

**IN THE COMPETITION**  
**APPEAL**  
**TRIBUNAL**

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

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

31<sup>st</sup> July 2025

Before:

Justin Turner KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**Claimants**

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

**V**

**Defendants**

**Microsoft Corporation and Others**

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**A P P E A R A N C E S**

MARK WILDEN (Instructed by Ghaffari Fussell LLP) on behalf of JJH Enterprises Limited.

GEOFFREY HOBBS KC & JAANI RIORDAN (Instructed by Sidley Austin LLP) on behalf of Microsoft Corporation and Others.

1 Thursday, 31 July 2025

2 (10.30 am)

3 Pre-trial review hearing

4 MR TURNER: I just need to read the notice. Some people are  
5 joining us via live stream. An official recording is  
6 being made and an authorised transcript will be  
7 produced. It is strictly prohibited for anyone else to  
8 make an unauthorised recording, whether audio or visual,  
9 of the proceedings and breach of that provision is  
10 punishable as a contempt of court.

11 Just give me a second.

12 (Pause)

13 I apologise, I've left your skeleton argument in  
14 a bag. Do you have a spare copy?

15 MR WILDEN: I do. I have the defendant's here. (Handed)

16 MR TURNER: Sorry about that. Thank you very much.

17 Right, thank you.

18 So I'm grateful for the skeletons which obviously  
19 I've read.

20 Mr Wilden, just to let you know, the tribunal's  
21 intention was that all material facts should be in the  
22 statement of facts and issues and having perused the  
23 documents I'm reluctant at this stage to rule that the  
24 facts being advanced by Microsoft shouldn't be there.

25 And that they should -- they are generally

1       admissible but we can go through the details and it may  
2       be that you want to submissions on some aspects of them.  
3       We can do that in a minute and I'm willing to hear  
4       submissions on that obviously.

5           Some facts no doubt will be agreed. Some facts  
6       being advanced in particular by Microsoft, it goes both  
7       ways, may not be admitted but nevertheless are not being  
8       actively challenged. Then some facts obviously may be  
9       challenged, in which case we need to know how we're  
10      going to deal with those factual disputes evidentially  
11      at the hearing.

12           As Microsoft point out, this is not being done as  
13      an abstract question of law. This is very much grounded  
14      in the particulars facts at least insofar as we're  
15      addressing specific examples.

16           The latest statements of facts is -- I have seen the  
17      one at the end of the bundle -- sorry I've been working  
18      off the electronic bundles, let's see if I can find it.

19   MR WILDEN: That's Microsoft's draft of 4.00 pm on 18 July.

20   MR TURNER: Let me find it --

21   MR WILDEN: It's at the end of bundle B. It's at tab 9.

22   MR TURNER: In a page number starting with 1000, I seem to  
23      recall.

24   MR WILDEN: I think it starts at 1191.

25   MR TURNER: 191.

1 MR WILDEN: 1191.

2 MR TURNER: Yes.

3 Right, I have been through this. We'll look at it  
4 in more detail. Mr Wilden, where do you say we go from  
5 here on this, having heard my initial observations in  
6 terms of the practicalities?

7 MR WILDEN: I'm grateful for your initial observation.

8 I think my starting point would be that on -- well,  
9 there are two points really. One is that a large number  
10 of the points were raised for the first time in the  
11 drafts that Microsoft served on the date of the filing  
12 deadline. Which is not very satisfactory. It's perhaps  
13 not a surprise that VL hasn't grappled with all of the  
14 detail of that as a result. We wanted to see the  
15 tribunal's view on the most appropriate way to proceed  
16 in those circumstances and we have that now and that's  
17 very helpful.

18 The second point would be that on a number of  
19 matters, particularly on the entirety of preliminary  
20 issue 2, ValueLicensing is still waiting for a response  
21 from Microsoft to its position in its earlier draft. As  
22 you'll have seen from my skeleton the way the drafts  
23 proceeded Microsoft proposed its wording, ValueLicensing  
24 amended the wording in the normal way and Microsoft's  
25 response a matter of days before the filing deadline was

1       simply to delete everything that VL had proposed and put  
2       its own initial wording back in.

3           Now, we asked Microsoft to respond to our position  
4       in proper detail the same day. Microsoft said that it  
5       would do so by email, I won't take you to the  
6       correspondence unless you want me to but the position  
7       we're in is that we're still waiting for Microsoft's  
8       response to that position.

9   MR TURNER: Right okay. So let's deal with preliminary  
10       issue 1 first.

11           Are there facts that you'll be actively disputing at  
12       the hearing?

13   MR WILDEN: The honest answer to that is I don't know  
14       because of the volume of new facts and new material that  
15       was added at the very last minute. We wouldn't object  
16       to conducting an exercise to respond to Microsoft's new  
17       position but our concern on that is to formulate  
18       a process where this isn't going to happen at the  
19       deadline again and we're not going to be dealing with  
20       an expanded draft of new material and coming back to  
21       this tribunal for more directions on the eve of trial --

22   MR TURNER: We're getting perilously close to the hearing,  
23       that's why I'd quite like to resolve things as much as  
24       we can today.

25           Perhaps could we just turn the pages so you can tell

1           me the difficulties that you're having? So tab 9 of  
2           bundle B, starts at 119 something and the first blue and  
3           red text was 1199.

4   MR WILDEN: Well, on many of the points in here I'm sure the  
5           wording can be finessed and it may not be helpful to go  
6           through --

7   MR TURNER: I would still like to know where we are. So  
8           you've heard my comments, this is something I would  
9           application need to stay in. Is this something you are  
10          going to be taking issue with?

11   MR WILDEN: Well, in so far as it sets out the parties'  
12          positions we stray into another area which is the extent  
13          to which this document should set out submissions of law  
14          as opposed to statements of fact. Again, I would be  
15          glad to be guided by the tribunal on this, it seems to  
16          us that it was becoming a sort of a hybrid statement of  
17          case with Microsoft's late additions. It seems to us  
18          that that would not greatly assist the tribunal. If the  
19          tribunal is of a view that that would assist, then we  
20          can approach the document afresh on that basis and  
21          I would emphasise that despite what my learned friend  
22          says in his skeleton that's not the basis on which any  
23          of the drafting of this document had been conducted up  
24          to this time.

25   MR TURNER: We're drifting off my question. So take

1 paragraph 19, is that something that you're disputing?

2 That's a fact. Not a legal argument.

3 MR WILDEN: Paragraph 19 -- this is a new point of fact that

4 didn't appear in previous drafts. I don't have

5 instructions on whether that --

6 MR TURNER: When did you receive paragraph 19?

7 MR WILDEN: As I understand it, it was in that draft of the

8 18th. It may have been earlier that week. I don't

9 recall --

10 MR TURNER: 18 July.

11 MR WILDEN: Which was the date of the filing deadline.

12 That's the date on which this draft --

13 MR TURNER: We're on 31 July.

14 MR WILDEN: We are.

15 MR TURNER: And this case is starting very soon, you are

16 going to have to grasp the nettle on these points.

17 MR WILDEN: We will and we're happy to do so if that's

18 an exercise which the tribunal would find of assistance.

19 MR TURNER: It's not a question of finding it of assistance

20 or not. It is a question of -- we're not going to have

21 an abstract legal discussion, we're about to have

22 a trial.

23 MR WILDEN: I appreciate that.

24 MR TURNER: One of the things the tribunal needs to consider

25 is whether we need to hear witnesses and have

1 cross-examination, on paragraph 19. Reading it I'd find  
2 that surprising.

3 MR WILDEN: I think both of the parties are agreed in taking  
4 the view that oral evidence wouldn't be required and  
5 neither party as I understand it requested it.

6 MR TURNER: Well, it's going to be required if you're  
7 challenging something. I mean I don't know what -- you  
8 know, if Microsoft put forward a proposition you  
9 disagree with --

10 MR WILDEN: What I would challenge --

11 MR TURNER: -- then you're going to have to challenge it.  
12 Otherwise it's unchallenged and --

13 MR WILDEN: Well, as I'd understood it from the way that the  
14 proposed draft directions are developed and the  
15 proposals that Microsoft has put forward, which we  
16 welcome, the cross-examination be conducted on the basis  
17 that it not be necessary to cross-examine in order to --

18 MR TURNER: It's not necessary but if Microsoft say -- just  
19 take this is an example -- if the proposition is that  
20 Microsoft provide a multiple activation key, which  
21 I don't for a moment doubt that they do, but if you were  
22 to challenge that as a fact, you would need to have  
23 a strategy for doing that. Just saying it's challenged  
24 would not assist you. So if there are any facts in here  
25 that you wish to challenge then you may need to



1 cross-examine on them. You may need to adduce your own  
2 evidence. It's no different to any other legal  
3 proceedings.

4 MR WILDEN: That's quite right but that comes to the  
5 difficulty of adding this much material into a document  
6 that's headed "Statement of agreed facts". There's  
7 nothing to stop Microsoft putting this material before  
8 the tribunal in another way and indeed it has done so in  
9 its evidence. The issue that is of great concern to my  
10 client is that this document will have a life beyond  
11 this trial of preliminary issues. It will be relied  
12 upon no doubt in the liability trial in this action and  
13 possibly in other actions concerning similar issues.  
14 And ValueLicensing doesn't see a need to be boxed into  
15 a factual position on points which aren't relevant and  
16 don't need to be determined for the --

17 MR TURNER: I am not asking you to formally admit it.  
18 I want to know if you are going to be in the preliminary  
19 issue challenging it.

20 MR WILDEN: On that particular --

21 MR TURNER: Whether estoppels arise by your failure to  
22 challenge it or not is a matter for another day. I have  
23 no idea, one would have to think through and have some  
24 sort of understanding of why the point is being  
25 re-argued in another forum.

1 MR WILDEN: ValueLicensing will challenge the relevance of  
2 it as not being relevant to the preliminary issues  
3 because the issues are whether the exhaustion regimes  
4 under the relevant directives allow licences to be  
5 transferred lawfully. The mechanism of that transfer,  
6 we say, isn't relevant.

7 MR TURNER: Okay. But I just want to be clear that this  
8 tribunal is not making an order that there shall be no  
9 cross-examination. You are at liberty to apply to  
10 cross-examine if you wish to challenge any facts.  
11 But whether that application will be successful is  
12 a matter for you to make good on. I don't want to be  
13 saying at the end of this preliminary issue that there  
14 was not proper fact-finding as the basis for this  
15 decision.

16 MR WILDEN: Well, we're concerned in that case that the  
17 scope for evidence and evidence that calls to be  
18 challenged will expand beyond points of relevance to the  
19 preliminary issues to the point where there isn't time  
20 in a three day trial for those issues properly to be  
21 determined. That's our concern.

22 MR TURNER: Right, but I need to know -- that may be a very  
23 legitimate concern but you need to give me a bone, tell  
24 me what it is that you want to challenge but you don't  
25 have time to challenge. At the moment you've told me

1           there's nothing you want to challenge. Now we've gone  
2           from that to a situation where you say there isn't time  
3           to challenge things.

4   MR WILDEN: My position standing before you is I don't know  
5           the exact detail because the exercise hasn't been  
6           completed of drilling into all of the details of the new  
7           points that Microsoft has raised.

8   MR TURNER: Right let's go through them.

9           We've dealt with the first one. Paragraph 27.

10   MR WILDEN: I'm sorry, on page 9, paragraph 20 we have no  
11           objection to. The pattern of this point, of the way  
12           that this section of the draft developed was that there  
13           was a paragraph that ValueLicensing wanted to include  
14           that Microsoft objected to and so that set of three  
15           paragraphs was essentially in tandem and Microsoft has  
16           opted to remove one but keep the other two. So I mean  
17           that's one example of how if --

18   MR TURNER: I don't want to --

19   MR WILDEN: ValueLicensing will want to add more facts as  
20           well, facts that Microsoft has removed from this draft.

21   MR TURNER: Well, let's just carry on as we are for the  
22           moment. We'll come back to that.

23           So paragraph 27. This is that you are provided  
24           25 per cent more max than provided by Microsoft to the  
25           customer. Is that an issue?

1 MR WILDEN: This is an entirely new factual allegation which  
2 was expanded by Microsoft between its draft of 1.00 am  
3 on the 18th and 4.00 pm on the 18th.

4 MR TURNER: Right, but we're two weeks later now and we've  
5 got a trial starting in a month, I'm just asking you  
6 whether this is an issue. I don't know when another day  
7 is going to be.

8 MR WILDEN: We're not going to accept this as an admitted  
9 fact as we haven't seen evidence for it. And it's not  
10 something that -- I mean we say it's not something that  
11 tribunal needs to resolve in order to resolve the  
12 preliminary issues.

13 MR TURNER: So you won't be actively challenging it?

14 MR WILDEN: I can't say that at this time.

15 MR TURNER: Right well, this is the pre-trial review. We're  
16 here to determine the shape of the hearing in September.  
17 We've got a month to go, it's August, you are going to  
18 have limited access to the tribunal and no doubt limited  
19 access to everyone concerned with the case. I assume  
20 people will be going on holiday and things.

21 What are we going to accomplish today if you're  
22 telling me you need to go away and think about all this?

23 MR WILDEN: This is the issue with Microsoft's application,  
24 that we had a statement of facts --

25 MR TURNER: I want to talk about going forward. I don't

1       really want to go backwards otherwise we'll never find  
2       the loose end. What are we going to do going forward?  
3       What's your proposal?

4   MR WILDEN: Well, my proposal was to prepare a statement  
5       which can be prepared in short order, which is limited  
6       to facts that are agreed so that tribunal has that --

7   MR TURNER: We've already dealt with that --

8   MR WILDEN: I appreciate --

9   MR TURNER: Yes --

10  MR WILDEN: In think in that case, if that is not  
11       an acceptable proposal then there will have to be some  
12       form of procedure by which drafts continue to be  
13       exchanged and wording is finalised.

14  MR TURNER: Not really. We're going to have to move on  
15       to -- and there may need to be a final round of sorting  
16       this all out but we're going to have to move on to what  
17       the evidence is. If you're challenging 27.1 saying this  
18       is just nonsense you are going to have to adduce some  
19       evidence and then Microsoft may want to come back,  
20       I don't know, they may have witnesses. We may have  
21       cross-examination of those witnesses. You say it's not  
22       relevant. I'm not in a position to say one way or the  
23       other today.

24  MR WILDEN: But this is precisely our issue with Microsoft's  
25       approach --

1 MR TURNER: What are you proposing would happen? If you  
2 want to challenge -- are you inviting me to strike 27(1)  
3 out?

4 MR WILDEN: I'm not inviting you to do that today because  
5 you have indicated that that's not an approach -- you're  
6 not minded to take the approach of limiting the document  
7 to those facts that are agreed.

8 MR TURNER: Yes.

9 MR WILDEN: If you were then yes, I suspect I would be --

10 MR TURNER: If it is not agreed. That would be easy. But  
11 absent that if it's not limited to -- if there is a fact  
12 that Microsoft is advancing, I don't know how Microsoft  
13 intend to prove it but they may have their own thoughts  
14 on that, are you going to be taking issue with it?  
15 Putting in evidence? Do we have to have witnesses  
16 called? Cross-examined? That's what we need to  
17 understand.

18 MR WILDEN: May I take instructions?

19 MR TURNER: Yes. Yes, but we have quite a lot of these.  
20 Why don't we take a look at a few more before you take  
21 instructions. So if you move on to 33. There's a lot  
22 of discussion of the PLTF and Mr Horley. The relevance  
23 of which I don't at the moment understand.

24 MR WILDEN: Well, nor do we.

25 MR TURNER: Again, are you going to be challenging these

1 facts? It seems to be just reciting what's in  
2 a document that's going to be annexed.

3 MR WILDEN: To the extent that the text recites what's in  
4 the document without characterising it, no, I don't  
5 imagine we will be challenging the fact of what is in  
6 the document. We do question the relevance of it.

7 MR TURNER: Yes, I understand that. What else is there in  
8 here?

9 MR WILDEN: While we're in that part of the document?

10 MR TURNER: Yes.

11 MR WILDEN: I note paragraph 37.

12 MR TURNER: Yes.

13 MR WILDEN: Where there is a placeholder with no content at  
14 all. And this is Microsoft's proposed draft.

15 MR TURNER: Yes okay. All right, I'm just trying to focus  
16 not on, as I say, the past but just how we're going to  
17 deal with this going forwards.

18 So are there any other areas of disagreement where  
19 at the moment you're anticipating having to have  
20 an active challenge to them as opposed to just saying  
21 well they're not relevant or you don't admit them.

22 MR WILDEN: Well, we have submissions from Microsoft at  
23 paragraph 58. And if the tribunal would be assisted we  
24 could place our position alongside that as well.

25 MR TURNER: Yes.

1 MR WILDEN: And if that's the position that would help then  
2 certainly we could do that.

3 My concern is that if we are to move forward in  
4 a productive way, Microsoft can't be permitted to add  
5 more material in future rounds of drafts and we must at  
6 the very least be limited to the four corners of what  
7 Microsoft has put in here albeit that ValueLicensing is  
8 not in the same position because Microsoft has removed  
9 material from ValueLicensing's earlier drafts which it  
10 may want to reinsert.

11 It may be that a way forward is to work on a draft,  
12 the substance of which albeit perhaps not the argument  
13 is limited to what has already been exchanged in the  
14 drafts that we have.

15 MR TURNER: Well, I'm not limiting anyone at this stage.  
16 Let's just go to 92. So this is the preliminary  
17 issue 2. Microsoft have set out what seems prima facie  
18 relevant matters to that issue.

19 MR WILDEN: Well what Microsoft has not done is attempt to  
20 reflect ValueLicensing's position. Which I can show  
21 you --

22 MR TURNER: Well just tell me. We'll get on to your  
23 position in a minute. Are you going to be actively  
24 challenging what's in all this blue text in 92 through  
25 113?



1 MR WILDEN: Well yes. I mean one example is that Microsoft  
2 is asserting as fact that a non-exhaustive list of  
3 unparticularised computer files, at paragraph 94, each  
4 one of the items on that list is protected as  
5 an original literary, artistic musical work and/or sound  
6 recording. That is paragraphs 94 to 97. The same  
7 applies for Windows in paragraphs 105 to 108.

8 MR TURNER: Right.

9 MR WILDEN: Now, if that is set to be an agreed fact, that  
10 would have --

11 MR TURNER: I am saying are you challenging it? Obviously  
12 you're not in a position to admit Microsoft's --

13 MR WILDEN: Well, that's --

14 MR TURNER: The extent of Microsoft's copyright works.

15 MR WILDEN: -- the crux of the problem. If it is in then it  
16 is in a document that is a statement of facts that  
17 ValueLicensing will have been taken to have agreed.

18 MR TURNER: We seem to be at cross-purposes. This is  
19 recording agreed facts. It's also including relevant  
20 facts which are not agreed. So this is in blue so it's  
21 not agreed. The question is are you going to be  
22 actively challenging it? That means to say developing  
23 a case at trial either by reference to documents or  
24 witnesses which challenges whether Microsoft -- well  
25 anyway we can read it, the matters in paragraph 94.

1 MR WILDEN: As I understand, we're not challenging the  
2 evidence that Microsoft has put forward as to the  
3 creation of its copyright works.

4 MR TURNER: Right.

5 MR WILDEN: But that falls far short of the extent of the  
6 facts that Microsoft are seeking to put here.

7 MR TURNER: Right. Okay. That's helpful. Thank you.

8 Fine. So that gives me just at least a feel for  
9 where we are.

10 So you say there are still gaps in this. You still  
11 need to -- you are not going to have opportunity to  
12 consider it further but as you say there are some gaps  
13 where Microsoft has either deleted your text or hasn't  
14 responded to it.

15 MR WILDEN: Yes.

16 MR TURNER: In terms of -- where are we on evidence? This  
17 document obviously needs some further development.

18 MR WILDEN: The parties have exchanged fairly extensive  
19 evidence which you'll see in bundle D.

20 MR TURNER: And then it is 8 August for evidence in reply or  
21 thereabouts.

22 MR WILDEN: Yes.

23 MR TURNER: Yes.

24 MR WILDEN: This is where our proposal was to get a document  
25 locked down at this stage so that the deadline for

1 evidence and reply doesn't need to be extended. I'm  
2 grateful for the indication as to the approach that the  
3 tribunal prefers and as to how we go forward from that.  
4 You have the essence of our objections. Our proposal on  
5 preliminary issue 2 was to the effect that rather than  
6 the parties go back and renegotiate wording on the basis  
7 of wording that Microsoft has not engaged with, the text  
8 of Microsoft's draft statement of facts on preliminary  
9 issue 2 could be put before the tribunal as a statement  
10 of Microsoft's position on preliminary issue 2.

11 The order of 29 May required the setting out of the  
12 non-computer program works on which Microsoft relies and  
13 that's not a point on which ValueLicensing should have  
14 any input because that's purely for Microsoft to set out  
15 its position anyway --

16 MR TURNER: Okay, but preliminary issue 2, Microsoft has set  
17 out its position. You either agree with that -- do you  
18 agree with it? Do you disagree with it? Are you going  
19 to be actively challenging it at the hearing in the  
20 beginning of September? These are the practical matters  
21 we need to grapple with. Do we have to schedule  
22 witnesses to deal with this? Are you going to be  
23 calling an author to say somebody else owns copyright in  
24 it? Highly unlikely, I think you've even admitted that.

25 MR WILDEN: Indeed.

1 MR TURNER: So my understanding at the moment is this is  
2 Microsoft's position and you're not admitting anything  
3 but you haven't got an active case to the contrary. You  
4 have submissions to make on relevance, submissions to  
5 make on the legal consequences and so forth but that's  
6 where we are on preliminary issue 2.

7 MR WILDEN: On preliminary issue 2.

8 MR TURNER: Is that a fair summary?

9 MR WILDEN: There are facts that we have set out in our  
10 witness evidence, which I'm sure will be for Microsoft  
11 to take issue with or not. As I understand it they have  
12 that evidence and aren't proposing to cross-examine on  
13 it. So I think we're in a position where on preliminary  
14 issue 2 there aren't likely to be substantial factual  
15 disputes.

16 MR TURNER: Right.

17 MR WILDEN: Which I mean we'd understood to be the position  
18 on preliminary issue 1 as well, that we were unlikely to  
19 have substantial factual disputes because so far as we  
20 can see Microsoft's contractual terms appear to be  
21 broadly agreed.

22 MR TURNER: Yes.

23 MR WILDEN: The pattern of what ValueLicensing did and how  
24 transactions operated appears to be agreed. There  
25 doesn't seem to be any challenge to ValueLicensing's

1 schedules and statements of fact as to the transactions  
2 themselves that are covered. Or that ValueLicensing  
3 sold on quantities of licenses in different amounts to  
4 those the original customer had bought from Microsoft.

5 MR TURNER: Another question for you. Why do we have to  
6 have so many transactions in? We have five at the  
7 moment which was our starting point. I did say we'd  
8 look at this again.

9 MR WILDEN: Well, that's a point that we had proposed to  
10 narrow down this week which Microsoft may do better to  
11 speak to because that's not -- we proposed narrowing  
12 down to one transaction in light of your comments at  
13 CMC 6.

14 MR TURNER: Right. Who chooses the transaction?

15 MR WILDEN: Well, we proposed -- I'll perhaps step back.  
16 We're not proposing that we narrow down to one  
17 transaction and that the parties tussle over which it  
18 should be. I'm proposing that we narrow down from five  
19 transactions to any number that the tribunal or that the  
20 parties can agree or the tribunal sees as appropriate  
21 and we don't have a strong position on which transaction  
22 that needs to be. We've proposed one transaction,  
23 transaction number 5, for reasons which include the  
24 contractual terms appear to be agreed between the  
25 parties, which they aren't for all of the transactions;

1       the numbers of licences appear to be agreed between the  
2       parties, which they aren't for all transactions, and it  
3       was a transaction that Microsoft nominated. So we would  
4       be content to narrow down to that one or to any other  
5       combination. But it's not our position that five  
6       transactions are needed to resolve the preliminary  
7       issues.

8               There are five because the CMC 6 order --

9   MR TURNER: Yes, I'm just seeing which one 5 is.

10  MR WILDEN: It's the ABN AMRO transaction.

11  MR TURNER: Yes, I see it.

12  MR WILDEN: If we were to narrow down to one transaction,  
13       then the process of finalising the statement of facts  
14       would be considerably simplified as well.

15  MR TURNER: Well, it might be but there is a lot of --

16       I only want to narrow down to the extent that it  
17       actually doesn't matter. If it matters --

18  MR WILDEN: Well quite. But there are a number of the  
19       points, the specific factual points about say the  
20       perpetual license transfer forms, which Microsoft has  
21       introduced on all five transactions. Now we can take  
22       instructions and take a position factually on all  
23       of those if the tribunal would take assistance from  
24       that.

25               But if that's not necessary and it can be narrowed

1           down to a smaller number of transactions, that will make  
2           that process more straightforward.

3   MR TURNER:   The PMLF -- have I got that right?

4   MR WILDEN:   Do you mean PLTF?

5   MR TURNER:   Yes.   Is that a pleaded issue?

6   MR WILDEN:   Not to my knowledge.   And this is an issue with  
7           the material that Microsoft have added.   As I mentioned  
8           in my skeleton it appears not really to go to the  
9           preliminary issues at all, but to an unpleaded potential  
10          future counterclaim for infringement of copyright.   We  
11          don't see that in the pleaded case.

12   MR TURNER:   Well, maybe.   Thank you.   Was there anything  
13          else -- sorry, I'm not making any rulings or orders at  
14          this stage.   I'm trying to get the lay of the land.   Is  
15          there anything else you wish to say at this stage on  
16          either what evidence is going to be adduced at trial or  
17          how we'll need to discuss the practicalities of how we  
18          take the statement forward?

19   MR WILDEN:   If I may have a moment to check my note as we've  
20          not gone in the order I'd expected.

21   MR TURNER:   Of course you can come back.   Check your note.  
22          Let me just hear from Mr Hobbs for a bit.   I won't shut  
23          you out from coming back.

24   MR HOBBS:   Having listened to my learned friend, can I ask  
25          if you've been provided with a mark-up copy of what

1           they're asking for against our order?

2   MR TURNER: I may well have been provided. I don't have it

3           in mind.

4   MR HOBBS: I'm pretty sure that from some of the

5           exchanges -- one moment -- which have been taking place

6           here that you haven't seen it.

7   MR TURNER: Right.

8   MR HOBBS: They're pushing back totally in relation to the

9           structure of the order that you made last time on the

10          samples and the statement of facts.

11   MR TURNER: Yes.

12   MR HOBBS: Totally. Not in my learned friend's submissions,

13          he's much more yielding and accommodating and sensibly

14          so.

15          Two sentences if I may.

16   MR TURNER: Yes.

17   MR HOBBS: In principle, in the modern law relating to civil

18          litigation, the agreed/disagreed document is the key

19          mechanism by which tribunals enforce the duty to operate

20          with the tribunal. It's the key thing. We've moved

21          away from years ago Scott schedules. We now have

22          experts' reports and as you know the experts then have

23          a meeting, points agreed, points disagreed. We have CGK

24          in patent cases, we have cited the examples. We have

25          draft orders like we're exchanging here. The whole



1           thing for the assistance of the tribunal and the  
2           enforcement of the duty to co-operate is that it be  
3           clear in a single document what is agreed and what is  
4           disagreed.

5   MR TURNER:   Yes.

6   MR HOBBS:    That's all we're asking for.

7   MR TURNER:   You're pushing at an open door.

8   MR HOBBS:    I'm pleased to hear that.  It's what -- now if --

9           I thought there was going to be some argument about what  
10          the order that you made last time at CMC 6 meant but no.  
11          So we have a situation in which it's clear what's  
12          required and clear enough to be obeyed.  All I'm asking  
13          for is that they do what the tribunal ordered last time.  
14          Now, you've seen the document.  You've seen bits of it  
15          and you've obviously read it in your private reading.  
16          All that's required now -- and there's no reason why  
17          this shouldn't be done by Monday because they've had it,  
18          it's been going backwards and forwards, it's live,  
19          they're on top of it for this hearing, it can be done by  
20          Monday, to finish the task of saying: what is agreed --  
21          no, what is challenged and why?  Which is what you  
22          ordered in your CMC 6 order.  That's all we want out of  
23          this.

24                Now, the evidence is this.  The parties have filed  
25          their evidence-in-chief if you can call it that, in

1       other words the first stage of the evidence was  
2       complete -- was it the 25th? The 25th. The next round  
3       of evidence is due, as you've rightly remembered, on --  
4       it's the 8th or thereabouts, 8 August. This exercise  
5       needs to be complete before we get to the reply stage on  
6       the evidence.

7               Now, we have anticipated in our draft form of order  
8       that there be a Glaverbel mechanism and I know that you,  
9       sir, will be vaguely familiar with that from times gone  
10      by.

11   MR TURNER: Very vaguely.

12   MR HOBBS: Yes. It seems like yesterday but it wasn't, it  
13      was 1990.

14   MR TURNER: I'm not sure whether that's necessary. I'll  
15      come back to that. I'm not sure whether that's  
16      necessary in this tribunal.

17   MR HOBBS: It's a way of accommodating things within the  
18      documents. The alternative is going to be a Civil  
19      Evidence Act notice over all the documents in the trial  
20      bundle. So either way there's just ways of dealing with  
21      it.

22   MR TURNER: I just have a couple of questions, Mr Hobbs.

23   MR HOBBS: Please do.

24   MR TURNER: First of all, the same question for you, how  
25      many contracts do we need to have in play. And it may

1           be you're not in a position to answer that immediately.  
2           This may be premature but I would like to reduce it.  
3   MR HOBBS: May I say with no disrespect you're spot on.  
4           Okay, so what you said at the last hearing was we can  
5           review at the PTR and it was clear what you were saying  
6           at that stage was when we have progressed to the point  
7           we haven't yet reached --  
8   MR TURNER: Hmm.  
9   MR HOBBS: -- and we review the situation to see.  
10           Now, what we're looking for is to see whether  
11           there's an established pattern. If there's a pattern  
12           which replicates, and we can all see that it does, then  
13           in those circumstances the tribunal would, I anticipate,  
14           when we come to the hearing in September, say this one  
15           stands or falls with that one and so on and so forth.  
16           But you may ask yourself and if you aren't I'll ask  
17           myself for you, what is all this fuss about? What is  
18           all this fuss about? Why hasn't this been done? Why  
19           are they kicking up?  
20           The answer is to be found if you can -- I don't know  
21           how -- whether you have it electronically, I hope you  
22           have, bundle E, a letter, page 214/215.  
23   MR TURNER: Right.  
24   MR HOBBS: If you're on page 214, that's a letter from my  
25           learned friend's instructing solicitors of 28 July.

1       Would you just look with me please at point 5. This is  
2       their assertion -- and you've seen it several times  
3       over:

4                >Your clients have adduced evidence on matters which  
5       in our view are irrelevant to the determination of the  
6       preliminary issues."

7                So they're setting themselves up as at judges of  
8       relevance:

9                "Where our client doesn't take a position on the  
10       factual accuracy of such facts and where the tribunal  
11       doesn't make findings with respect to such facts, our  
12       client will reserve its position to challenge such  
13       factual points as necessary at the proper time."

14               This won't do. As you've said, this is a trial that  
15       is coming up. We need to know what we're going to be  
16       deciding and not deciding at that trial, balance of  
17       probabilities and all the usual principles. What  
18       they're trying do, and cutting down at this stage before  
19       the tribunal is in a position to be fully seized of the  
20       arguments, what they're trying to do at this stage is to  
21       cut it down to one sample transaction -- by the way, the  
22       one that has been proposed by them doesn't even include  
23       one of the software products that is in issue -- they  
24       want to cut it down, and this is part of a process of  
25       not collaborating with us on the agreed/disagreed

1 statement. Why? Because they want to turn it into  
2 an exercise in futility. They want to be able to say,  
3 aha, thank you for the ruling on the preliminary issues.  
4 We have other transactions that don't fit that template.

5 Now we can't, with respect, I sound impertinent I'm  
6 not meaning to, we can't possibly accept that. So the  
7 way I would put it is to pick up on the P word. It's  
8 premature at the very least to say we would do this  
9 today. We should move to a position where we complete  
10 the procedural steps, complete the evidence, do the CEA  
11 notices if there are going to be any, which there may  
12 not need to be depending on what we do about the  
13 Glaverbel order and then we can reach a position going  
14 into the hearing when the tribunal will be fully  
15 appraised as to whether --

16 MR TURNER: It would obviously be nice to arrive at that  
17 position before skeletons are served otherwise --

18 MR HOBBS: We'll maximise on that. If we do this exercise  
19 on this document and complete it by Monday, no reason  
20 why it can't be done, then it's the 8th which is next  
21 Friday isn't it? The 8th is next Friday. We do the  
22 reply evidence. Then if there's any question as to  
23 whether we've got iterative duplicative things that we  
24 can all agree stand or fall together, that would be the  
25 time between then and skeletons.

1 MR TURNER: Now, another question for you, Mr Hobbs. On  
2 your copyright works.

3 MR HOBBS: Yes.

4 MR TURNER: Do I have enough information to know -- so  
5 an issue that may be relevant -- and please do not read  
6 anything into this -- is how incidental the non-computer  
7 program copyright works are and that involves  
8 an assessment or potentially involves an assessment of  
9 what they are.

10 MR HOBBS: Certainly.

11 MR TURNER: I'm not sure whether I have the material to do  
12 that at the moment.

13 MR HOBBS: We think you do. From our side. We've itemised  
14 the list of witness statements at the back end of our  
15 skeleton. We've itemised them. There's two issues  
16 wrapped up in that, as always in litigation a point has  
17 more than one cutting edge to it. The first is what is  
18 the law when you have what shall I call it, just for  
19 convenience, mixed or hybrid work, what is the law?

20 The second is when you know what the law is, which  
21 is a matter of legislative construction, the next  
22 question is how does this measure up to that? Does it  
23 meet or not?

24 We've prepared our evidence on the basis that we  
25 believe we can bring our non-program copyright works

1           within the scope of the case law that decides that you  
2           don't pretend that a non-program work is nothing more  
3           than a program. That's the case law as we read it.

4   MR TURNER: Sure sure sure. I mean yes there's not -- it  
5           seems a lot of assistance on the case law the last time  
6           I looked at it.

7   MR HOBBS: There is two. It's Nintendo and Tom Kabinet.

8   MR TURNER: Yes. But that was an e-book, wasn't it? Where  
9           obviously there is a huge copyright work and a little  
10          bit of program and here we are the other way around  
11          perhaps.

12   MR HOBBS: We're not in a vacuum. There's been a decision  
13          at the Court of Cassation in France, their top court.  
14          Also we'd need to look at a certified translation of  
15          UsedSoft II in the Bundesgerichtshof where they dealt  
16          with it on the way back from the court of justice --

17   MR TURNER: Lots to look at, yes.

18   MR HOBBS: There's lots of law. But my point is still the  
19          same, with respect. First we work out what the law is  
20          and the second is we see how it maps on to --

21   MR TURNER: Just in terms of the -- so if we take 105, the  
22          document we're looking at, 1224.

23   MR HOBBS: I've had to work -- could you give me the  
24          paragraph number again?

25   MR TURNER: 105.

1 MR HOBBS: Just one second. I'm nearly there.

2 MR TURNER: The current version.

3 MR HOBBS: That's the moving document. I'm with you. Thank

4 you.

5 MR TURNER: So you have talk about graphic works, graphical

6 user interface and I don't know if these are relatively

7 trivial or relatively substantial. I've no idea whether

8 that matters but --

9 MR HOBBS: It matters.

10 MR TURNER: So are we going --

11 MR HOBBS: We've proven it. We've proven it. It's in our

12 witness statement so it is already on file.

13 MR TURNER: If I want to know how substantial is the graphic

14 work where do I get that?

15 MR HOBBS: You'll see it in the witness statements.

16 MR TURNER: Okay.

17 MR HOBBS: They explain the creativity that went into it.

18 We also have the case law including from the

19 Court of Appeal --

20 MR TURNER: For example I don't know how -- I can't -- it's

21 a graphic work so I should be able to visualise it.

22 It's not exhibited -- or is it exhibited?

23 MR HOBBS: I am being told bundle D/134. Mr Riordan, on

24 whom I depend heavily, is asking me to --

25 MR TURNER: Bundle D --



1 MR HOBBS: D/134 and into 135.

2 MR TURNER: I see.

3 MR HOBBS: You have illustrations within the body of the  
4 witness statements and they all have exhibit --

5 MR TURNER: I understand. Thank you very much.

6 So I think it will be --

7 MR HOBBS: Sorry, my Lord --

8 MR TURNER: -- quite useful just to have in mind, obviously  
9 there are a lot of different things here, just as  
10 we're -- to focus on what you think your best case is  
11 for your non-program copyright works. Not asking you to  
12 do it today. But if we need to look at some in  
13 detail --

14 MR HOBBS: You will.

15 MR TURNER: -- there's going to be perhaps too much here to  
16 look at everything in detail.

17 MR HOBBS: Do you mean at the trial in --?

18 MR TURNER: At the trial, yes.

19 MR HOBBS: We'll have to be selective. I will say to you  
20 that I can't believe one day of pre-reading is  
21 sufficient. I can't believe it. It's all that is  
22 allocated at the moment. I just can't believe it.

23 MR TURNER: Yes, thank you for that reassuring --

24 MR HOBBS: It's like a Government health warning, every  
25 claim form.

1 MR TURNER: I'm grateful for the indication. But that's why  
2 it would be -- maybe you want to take your best three  
3 examples or something.

4 MR HOBBS: I can do that, I can do that. But all I can say  
5 is can you trust me when the time comes to actually take  
6 these points on board and refine my skeleton for the  
7 hearing?

8 MR TURNER: Yes.

9 MR HOBBS: But what we have to know, we have to know on the  
10 agreed/disagree basis are they controverting or  
11 challenging any of this? Are they? Because it will  
12 affect the pattern of evidence and presentation of the  
13 case at the hearing.

14 MR TURNER: They are free to. I'm not going to rule that  
15 they can't challenge things --

16 MR HOBBS: No, no.

17 MR TURNER: -- or make them admit things but the practical  
18 question is are they going to be running a case to the  
19 contrary.

20 MR HOBBS: Well, do they disagree --

21 MR TURNER: They may disagree with all sorts of things.

22 MR HOBBS: But they have to say why. In your order last  
23 time round --

24 MR TURNER: I'm not sure that -- it depends on what level of  
25 granularity one is looking at.

1 MR HOBBS: Granules are good when it comes to sorting out  
2 where we actually stand.

3 MR TURNER: Fine. So in terms of this document, I agree  
4 that it needs to be in better shape. So the complaint  
5 from VL is that you haven't dealt with some of their  
6 paragraphs, they haven't dealt with some of your  
7 paragraphs, so there needs to be a composite document.  
8 I'm not going to invite further explanation as to  
9 reasons why because I just think we'll never get it  
10 settled if we do that. So it needs to be sorted out as  
11 soon as possible. The suggestion is Monday. What do  
12 you say to that?

13 (Pause)

14 MR WILDEN: We would seek longer than that given that we are  
15 getting into the holiday period.

16 MR TURNER: Well Mr Hobbs, makes a point with some force  
17 when he says it needs to be done really before the  
18 evidence is done.

19 MR WILDEN: Indeed.

20 MR TURNER: The evidence is due on the 8th.

21 MR WILDEN: This is a change from Microsoft's position in  
22 its own draft order but we can make something work. Can  
23 we suggest the middle of next week?

24 MR TURNER: What is it that you have to do? Microsoft have  
25 put your paragraphs in. You may not agree with them.

1       They're in blue. That's fine. You need to put your  
2       position in. In red. You say some paragraphs already  
3       have been drafted, they've been taken out so those can  
4       go back in. You've had the blue paragraphs for two  
5       weeks. What else are you --?

6   MR WILDEN: It's a question of --

7   MR TURNER: -- waiting for?

8   MR WILDEN: -- the legal team who are not all, you know, the  
9       holiday season has started, I would just suggest that  
10      a little more time would be appreciated --

11   MR TURNER: I'll give you until close of business on  
12      Tuesday. If you need more time you'll have to come back  
13      and make an application.

14   MR HOBBS: Were sticking to the Friday deadline which is  
15      already there for evidence in reply.

16   MR TURNER: That's right.

17   MR WILDEN: Can we confirm that the points that we add won't  
18      be contested by Microsoft and Microsoft won't add more  
19      points in? As that's been the issue that has got us  
20      here in the first place.

21   MR TURNER: Well, if Microsoft -- if there are rejoinders to  
22      your points we'll have to see. That may be a reason for  
23      getting a further opportunity but I can't shut Microsoft  
24      out from saying things it sees fit to say just as  
25      I won't shut you out from saying things you see fit to

1 say.

2 Now, evidence in reply. That will obviously be

3 reply to evidence that has already been served but there

4 may be points which are not strictly in reply but points

5 that have come to light in the light of this document.

6 That at the moment is the 8th. Is there any problem

7 with that?

8 MR WILDEN: Not on our end.

9 MR TURNER: No. Good.

10 MR HOBBS: Not at our end.

11 MR TURNER: All right. At the moment in terms of -- if you

12 want to challenge witnesses -- we'll come back to what

13 is being referred as to the Glaverbel order in due

14 course --

15 MR WILDEN: May I pick up on a point that my learned friend

16 made?

17 MR TURNER: Yes, of course.

18 MR WILDEN: He's noted correctly that the transaction that

19 we nominated doesn't include --

20 MR TURNER: I'm not going to deal with transactions today.

21 I'm with Mr Hobbs that it's premature to do it today.

22 This document needs to be settled.

23 MR WILDEN: I can just suggest that there is more than one

24 transaction in which not both of the products are

25 involved and if that is an issue we can remove those

1 transactions and narrow down --

2 MR TURNER: Well, I'm not going to make a ruling on that

3 today. I'd be very disappointed if there are more than

4 two transactions involved when we get to -- ideally one,

5 no more than two. If there needs to be more than two

6 I need to know why.

7 MR HOBBS: I'm guessing there will be three. I don't want

8 to be difficult. That's my feeling for the contours of

9 the case.

10 MR TURNER: Very good. Okay. That needs to be agreed

11 between the two of you and just dealt with those ones in

12 the skeleton. I'll expect to be able to understand from

13 right skeletons why there's more than one. You know,

14 that there is an additional issue.

15 So as I understand from both of you, I'm not

16 shutting anyone out at the moment, but you're not

17 anticipating wanting to challenge anything in

18 cross-examination?

19 MR WILDEN: That's our position.

20 MR TURNER: Okay. That does not mean I'm ruling there is to

21 be no cross-examination. I don't want it to be said

22 there hasn't been a proper exploration of the facts.

23 That seems eminently sensible to me.

24 In terms, Mr Hobbs, of your Glaverbel order, I just

25 don't think it's necessary. We're not in the High

1 Court, we are in the CAT. We don't have these rules  
2 applying in the first place such that we need to then  
3 say they don't apply.

4 MR HOBBS: But we need to understand where we stand.

5 MR TURNER: That's the position. But if we make an order in  
6 this case and it's not made in the next one I don't know  
7 where that quite leaves us.

8 MR HOBBS: Sorry, well, do you mind if we have them? I've  
9 just finished a trial in front of Bacon J in which we  
10 operated on this basis in the High Court --

11 MR TURNER: In the High Court?

12 MR HOBBS: Yes.

13 MR TURNER: We're not in the High Court.

14 MR HOBBS: I know. I am always amazed -- you are  
15 omnipotent. When I look at the CAT rules 2015, there  
16 seems to be nothing this tribunal can't do if it wants  
17 to do it.

18 MR TURNER: Yes, yes.

19 MR HOBBS: But we need to know where we stand.

20 MR TURNER: Yes.

21 MR HOBBS: And the point about the Glaverbel format is that  
22 it tells you what you can do with the documents in the  
23 trial bundle. You can read them. It's agreed that you  
24 can read them. You can actually, having read them, you  
25 can make submissions on the basis of them. You don't

1           have to put them in cross-examination, et cetera,  
2           et cetera et cetera.

3           And in those circumstances it all goes to weight,  
4           not to admissibility.

5   MR TURNER: What you have in paragraph 5 is consistent with  
6           the CAT's normal practice. So you have that comfort.  
7           I'm not going to be making an express order to that  
8           effect because that's not the way we normally draft  
9           orders here.

10   MR HOBBS: Thank you. Well, a good horse runs at the shadow  
11           of the whip and I will see myself standing in the shadow  
12           of the whip.

13   MR TURNER: Right.

14   MR HOBBS: We've put in a notice to admit facts.

15   MR WILDEN: I'm sorry, before we move on, if I may, we have  
16           some additions that we were proposing to add to the  
17           directions and there is a more up-to-date draft order.  
18           If we are going through the directions might it assist  
19           to follow that?

20   MR TURNER: Sure, sure.

21           (Handed)

22   MR WILDEN: I think we have dealt with paragraphs 1 to 4  
23           there.

24   MR TURNER: Yes. What order do we actually need to make  
25           today? So you've heard the direction of this court.



1 I expect the statement of facts to be finalised by the  
2 close of business on --

3 MR WILDEN: Well I think you've ordered that --

4 MR TURNER: -- Tuesday.

5 MR WILDEN: -- we put our position in that document. Is  
6 that document then final at that stage? If the order is  
7 that ValueLicensing files a final version of that  
8 statement, then we're content with that.

9 MR HOBBS: No, we have to go through a process of midwifery  
10 to give birth to this document between now and close of  
11 business on Tuesday.

12 MR TURNER: When do you need? If you get a document back on  
13 Tuesday, Mr Hobbs, how long do you need to add anything  
14 to it?

15 MR HOBBS: I'm hoping if I've got to do it by close of  
16 business, to finalise it by close of business on Tuesday  
17 I'm going to get it back by Monday latest.

18 MR TURNER: No, you're getting it back on close of business  
19 on Tuesday. I think all the bits you want to say are in  
20 it. Of course there may be something that you need to  
21 say in rejoinder, wherever we are.

22 So what date is Tuesday?

23 MR HOBBS: Is that 7 August?

24 MR WILDEN: Tuesday is the 5th I think.

25 MR HOBBS: No, Monday is the 5th, isn't it? It's all just

1           a blur.

2   MR WILDEN:   Tuesday is the 5th.

3   MR TURNER:   Tuesday is the 5th.   Right.   Mr Hobbs, well, if

4           you have any additions, it won't be a question of

5           deletions.   If you have any -- of ValueLicensing text.

6           If you have any additions they are to be provided the

7           following day.   I can't imagine you are going to have

8           any because --

9   MR WILDEN:   May I suggest that they be additions of

10          submission or challenge and not of any new fact?

11          Otherwise --

12   MR HOBBS:   No.

13   MR TURNER:   Well, Mr Hobbs, if they have any additions they

14          will be by close of business on Wednesday.

15   MR HOBBS:   Thank you.

16   MR TURNER:   And I am going to leave the evidence in reply

17          where it is.

18   MR HOBBS:   Yes.

19   MR TURNER:   You pretty much know the lay of the land, both

20          of you.

21   MR HOBBS:   Thank you.

22   MR TURNER:   In terms of an order -- so that will be the

23          order, that you provide any final additions to the

24          document, to the statement of agreed facts, and

25          issues -- it's the title causing the problems.

1 MR HOBBS: I think it's wisest to call it "statement of  
2 facts", not agreed "statement of facts".

3 MR WILDEN: I would agree.

4 MR TURNER: Yes. So you will provide final comments by  
5 5 o'clock on Tuesday. Mr Hobbs will provide any further  
6 answers, I'm not going to give him a time, but on the  
7 following day.

8 MR HOBBS: Thank you.

9 MR TURNER: And we -- so then we won't need any more from  
10 that paragraph.

11 MR WILDEN: Well, we don't know that if more facts are added  
12 in that we respond to.

13 MR TURNER: Well, that's the basis on which we're going to  
14 be working, if anything more is added then you need to  
15 make an application to the tribunal. Of course, you are  
16 at liberty to do that, but hopefully after a further  
17 round each we should be there.

18 MR WILDEN: Thank you.

19 MR TURNER: Then, Mr Hobbs, the notice to admit facts.

20 MR HOBBS: Yes.

21 MR TURNER: I wasn't entirely persuaded how that is going to  
22 help or fit into things. It will probably create as  
23 many issues. I just wonder if it will just create  
24 issues rather than solve them. Do you want to press  
25 ahead with that? We can go through it.

1 MR HOBBS: No. Let's -- can I put it this way. I got some  
2 letter back from the other side saying there's no --  
3 nothing in the rules about this, and I just think that's  
4 ridiculous. We've served a notice to admit facts. If  
5 they're not going to answer, they're not going to  
6 answer, but I will rely on the fact that they didn't  
7 answer. And I can't compel them --

8 MR TURNER: Rely for what purpose?

9 MR HOBBS: Because I can see that there are lurking --  
10 I suspect that there are lurking issues that they won't  
11 clarify what their position is, and that the process  
12 we're going through on the statement of facts won't  
13 smoke them out.

14 MR TURNER: Let's just have a quick look at it. Remind me  
15 where it is in the bundles.

16 MR HOBBS: That's a good question. It was buried away,  
17 someone decided the best place for it was in the  
18 correspondence bundle and I've lost my copy.

19 MR WILDEN: I think it's at tab 72. Page 189.

20 MR TURNER: Which bundle?

21 MR WILDEN: Of E. I beg your pardon, that's the letter of  
22 service. The note is at page 191 of bundle E.

23 MR HOBBS: Right, so I'm told it's E/191, I hope that  
24 tallies?

25 MR TURNER: Yes. I mean, for example, Mr Hobbs, if we take

1           request 9.

2   MR HOBBS:   Yes.

3   MR WILDEN:   If it assists, I can confirm that we are

4           planning to respond to it.

5   MR HOBBS:   Great.

6   MR WILDEN:   I'm not sure that we need to go through the

7           substance of it today.

8   MR TURNER:   Right.

9   MR HOBBS:   Great.

10   MR WILDEN:   The issue is really whether it's necessary to

11           have an order that says so, and if there is what's not

12           explained is why the date that my learned friend is

13           seeking is different from the date that's on the surface

14           of the notice to admit itself.

15   MR TURNER:   Fine. I'm not going to make an order. You have

16           indicated you are going to respond to that, so that's

17           great. I will leave you to decide -- when do you

18           suggest proposing to respond to it?

19   MR WILDEN:   Well, the date that they've requested on the

20           notice itself is 14 August.

21   MR TURNER:   Right. But I'm not going to make an order as to

22           that.

23   MR HOBBS:   Thank you. There's been a sudden outbreak of

24           agreement here. This is excellent.

25   MR TURNER:   It's amazing what a grumpy tribunal can achieve!

1 MR HOBBS: If we ramp up the grumpiness we might get some  
2 more agreement.

3 MR WILDEN: If I may go back to the Glaverbel order point  
4 which is -- it's now at paragraph 7 of this draft. We  
5 propose to add --

6 MR TURNER: No, we're not making an order, we're not making  
7 an order, these obligations --

8 MR WILDEN: There is a point on which we were concerned  
9 which was whether any party would be deemed to have  
10 admitted any facts on the basis they hadn't challenged  
11 the evidence at the PI trial.

12 MR TURNER: We're not making paragraphs -- 7, but obviously  
13 if there's a substantive fact in Microsoft's evidence,  
14 and you wish to challenge that as a fact, and you don't  
15 cross examine on it, you are going to be in serious  
16 difficulty and vice versa.

17 MR HOBBS: And vice versa, that's right.

18 MR WILDEN: That will run the risk of bloating the trial  
19 with challenges on facts that aren't relevant to the  
20 preliminary issues. But that will be -- we'll deal with  
21 that at trial as best we can.

22 MR TURNER: Well, I mean it's no different to any other  
23 case. You have to, you know, pick and choose. So if  
24 it's a fact that matters and you challenge it, like you  
25 don't provide -- I don't know -- you didn't sign this

1 document or you don't provide those many keys, or you  
2 haven't made that representation, and you want to  
3 challenge that, you've got to challenge it. It's no  
4 different to any other proceeding in this tribunal.

5 MR HOBBS: What you've just said is the same as  
6 Lord Mansfield said in 1774 in a case called Blatch v  
7 Archer. It's obvious.

8 MR TURNER: All right, very good. So --

9 MR WILDEN: If we look at the proposed timetable, which is  
10 at --

11 MR TURNER: Yes, if there's no cross-examination this is  
12 going to be limited to two days. The third day was on  
13 the assumption there was cross-examination. So there  
14 will be a day on each issue.

15 MR WILDEN: A day on each issue.

16 MR TURNER: Well, I mean it's up to you how you divide it,  
17 but it works out roughly --

18 MR WILDEN: It's not clear that the issues will need the  
19 same amount of time.

20 MR TURNER: No, no, no, sorry, I misspoke, you have two  
21 days, you can divide them however you see fit. It will  
22 be approximately equal time for each party.

23 MR WILDEN: There won't be an order timetabled because we  
24 don't see --

25 MR TURNER: No, I'll leave you to agree that between

1           yourselves.

2           In terms of -- I have a few other things. Bundles,

3           I did want to talk about bundles. Right. I am alarmed

4           at the idea there might be a core bundle of up to

5           700 pages. What's going in the core bundle?

6   MR HOBBS: That comes from the practice direction.

7   MR TURNER: A maximum of 700. Good, you're not flexing your

8           muscles with a view to using that. So how much -- does

9           there need to be a core bundle? What would be in it?

10          We have an evidence bundle, we have the statement of

11          facts and issues, that's in a separate bundle. We have

12          the witness statements and exhibits.

13   MR HOBBS: Question back: would the tribunal be envisaging

14          that the core bundle is materials other than formal

15          pleadings and skeletons? In other words, we're looking

16          at a core bundle that's got stuff.

17   MR TURNER: I don't think we need a core bundle.

18   MR HOBBS: At all?

19   MR TURNER: It depends what you call -- we'll need

20          a pleadings bundle just in the background which we

21          probably won't need to turn up, I expect. That's the

22          pleadings in the case.

23   MR HOBBS: Yes.

24   MR TURNER: So just the principal pleadings, we don't need

25          every last request and everything. We're going to need



1           the statements of facts and issues, and feel free to  
2           push back on any of this. We'll need the evidence and  
3           the exhibits.

4   MR WILDEN: I would just ask whether the statement of facts  
5           not go in the core bundle if there was one.

6   MR TURNER: It just needs to be in a bundle. Then we  
7           need -- obviously the exhibits and any other documents  
8           being relied upon.

9   MR HOBBS: Yes. Now --

10   MR TURNER: What would the circumstances be?

11   MR HOBBS: Looking at the witness statements that I've so  
12           far seen, there are lists of documents in the usual way  
13           at the back end of them. They're quite extensive.

14   MR TURNER: Right.

15   MR HOBBS: And they will need to be managed properly. They  
16           couldn't go into a core bundle because they wouldn't  
17           fit, they would exceed the limit of 700 pages on that,  
18           I suspect. We will have to work hard to make sure the  
19           court is not over-burdened.

20   MR TURNER: So the key documents we're going to need to look  
21           at are what?

22   MR HOBBS: Right. So you saw, when I asked you to look at  
23           bundle D, the paragraphs in the witness statement, and  
24           you saw that there was some illustrations there.

25   MR TURNER: Mm-hm.

1 MR HOBBS: They have furnished their witness statements in  
2 each case with details of the creativity process,  
3 further illustrative materials of that kind, and  
4 attached exhibited materials. Now, one would not --  
5 given the way the law is in the CJEU, Tom Kabinet and so  
6 on, one would not wish to scrimp on that point, one  
7 would wish to see the substantiality of the visual --  
8 I'll call it the visual material -- as compared with the  
9 code. You'd want to see that.

10 MR TURNER: So were those -- sorry, those images you showed  
11 me just now, was that in the statement or in an exhibit?

12 MR HOBBS: It was in the body -- it was the witness  
13 statement. It says: this is the sort of thing, and I've  
14 got some more, here's an exhibit. And the exhibits are  
15 extensive. I haven't even been through them but they  
16 are extensive.

17 That's terrible. That's terrible.

18 MR TURNER: Right. But I mean if we limit it, if you say,  
19 "Right, I'm only going to give you extra detail on one  
20 or two graphic works." Or -- sorry, not necessarily  
21 graphic, one or two --

22 MR HOBBS: I've got to do better.

23 Look at those -- sorry, I don't want to sound  
24 impertinent -- that if one considers what the  
25 non-copyright works are. You saw a list of them.

1 MR TURNER: You mean the non-software, the non-program --

2 MR HOBBS: Non-code, non-codewords, let's call them that.

3 Yes. You saw what they were. It's easy to believe,  
4 when you don't know anything about it, that designing  
5 a font is just taking a letter of the alphabet and  
6 making a few twiddles on it, it's not like that. And  
7 they've shown, the graphic designers have shown how in  
8 fact they went through a process of evolving it.  
9 They've shown how many characters it involves, when  
10 you've gone italics, bold, et cetera, et cetera,  
11 et cetera.

12 Now, their evidence won't live -- their evidence  
13 won't live without the visuals that go with it. Now,  
14 obviously I don't want to put in every last step and  
15 stage on the way if it isn't necessary because we've  
16 reached a position where they are going to agree on  
17 subsistence of copyright. If they agree on subsistence  
18 of copyright all I need to do -- not all -- what I need  
19 to do is to satisfy of you of the substantiality of that  
20 copyright relevant to the code.

21 Basically, as Mr Justice Pumfrey called it in  
22 Easyjet v Navitaire -- or Navitaire v Easyjet, I forget  
23 which way round -- the code is the scaffolding on  
24 which -- that's how the argument will go -- is the  
25 scaffolding on which the other stuff that's protected by

1           the InfoSoc directive stands and sits. Now, I've got  
2           to show you that it's substantial, because if it's  
3           insubstantial there will be arguments about, well yes,  
4           maybe in principle, but not this case. I have to show  
5           you that it's substantial.

6           So I'm going to say yes, okay, let's -- let's  
7           dispense with the core bundle, let's not dictate --

8   MR TURNER: Sorry, I mean all that -- all that documentary  
9           material which is exhibited, I don't think we need that  
10          in -- that can just be electronic.

11   MR HOBBS: That sounds -- it can be, can't it?

12           (Pause)

13   MR TURNER: You can split it up, that's fine.

14   MR HOBBS: We'll need to split it up.

15   MR TURNER: If it's 2000 pages and --

16   MR HOBBS: That's the way to do it.

17   MR TURNER: So we won't put those in the hard copy bundles.

18   MR HOBBS: Absolutely perfect.

19   MR TURNER: So absent -- I can understand why that might be  
20          chunky, but other than that we shouldn't have a great  
21          deal of documents in the -- in the hard copy bundles.

22   MR HOBBS: From experience one knows that documents rise to  
23          the surface.

24   MR TURNER: Yes, there will be some.

25          And a plea which isn't in the practice direction but

1       which we're having problems with all the time is people  
2       overloading bundles, and when they get transported they  
3       end up in bits. So please -- no one is going to be  
4       criticised for dividing bundle A into A1, A2, A3, but  
5       please do not overload any of the bundles.

6   MR HOBBS: Yes.

7       Now, just a cri-de-coeur. We've given directions as  
8       to sequencing to arrive at the bundles that are coming  
9       to the tribunal. It's very important that we don't, on  
10      our side, experience again the situation we've had in  
11      which things get: here you are, that's the bundle, we've  
12      filed it. And we say, well, don't file it in that form,  
13      we've got to make sure that it has every document in  
14      in the right place that we can agree with you. And we  
15      don't want to avoid or miss out on the process of  
16      collaborative effort between the parties to get bundle  
17      in a form that the tribunal can work with properly.

18      That's why our draft order has what you might call  
19      fairly proscriptive directions in it.

20   MR TURNER: Yes. So most of this is agreed, as I understand  
21      it. I am just looking at the marked-up --

22   MR WILDEN: If I may, we don't disagree with the direction,  
23      but I have no idea what my learned friend is talking  
24      about with reference to filing bundles in the manner  
25      described.

1 MR TURNER: Right, okay, I'm not going to go back to that.

2 I think one thing that too many copies of bundles

3 were send, by the way, it was just me sitting today.

4 MR WILDEN: It wasn't clear to us whether the panel was one

5 or three today. That's the only reason.

6 MR TURNER: Anyway.

7 MR WILDEN: We did -- I'm told we did call and that we were

8 told.

9 MR TURNER: So there will be -- so we don't need -- let's go

10 through the order. Paragraph 10(a), so there won't be

11 a core bundle in this particular case. Or the core

12 bundle, alternatively you have a bundle for the

13 statement of facts, which is fine.

14 MR WILDEN: May I suggest it not -- that the marking and the

15 lettering doesn't need to be specified in an order.

16 MR TURNER: I agree with that, yes, yes.

17 And then the annexes, we will need a pleadings

18 bundle, only the principal pleadings in the case,

19 hopefully we won't need to look at it. In fact, that

20 can be electronic, the pleadings bundle can just be

21 electronic.

22 And then we'll have --

23 MR WILDEN: I'm sorry, does that mean that paragraph (c)

24 goes in the draft order?

25 MR TURNER: Paragraph (c). No (c) will be --

1 MR WILDEN: But without the lettering marking.

2 MR TURNER: Don't worry about lettering marking, you can  
3 choose -- you can have a lottery and decide what you  
4 number them in due course.

5 MR WILDEN: Paragraph (e), now --

6 MR TURNER: Sorry, just to be clear, there's going to be  
7 an evidence bundle. There's going to be  
8 an exhibits-bundle. But that can be electronic, if  
9 agreed.

10 MR HOBBS: Yes. I'd like the evidence statements to be in  
11 hard copy.

12 MR TURNER: Yes. I agree, Mr Hobbs.

13 MR HOBBS: Could we have the pleadings in hard copy as well?

14 MR TURNER: Yes, yes, pleadings can go hard copy. But just  
15 let's have the principal pleadings, we can get others  
16 out if we need them. Rather than every pleading.

17 MR HOBBS: We agree with that.

18 MR TURNER: Anything else need to go in the bundles?

19 MR HOBBS: So that's content. But the sequencing.

20 MR TURNER: Sequencing, yes.

21 MR WILDEN: Before we get there, we have the paragraph (e).  
22 Now, I've understood on instructions that -- I think the  
23 registry has suggested that the practice direction not  
24 be followed, as I understand it's not thought to be  
25 operating as well as one might hope. That's the

1 suggestion that's been put to me.

2 MR TURNER: Which bit is not operating? Well, you have to

3 put -- the bit that I care about is that it has clear

4 labels and directions and on the spine and inside.

5 MR WILDEN: Indeed.

6 MR TURNER: Well, somebody complied with that today, thank

7 you very much.

8 MR WILDEN: I can't say more than that, but I think that

9 a direction to comply with the practice direction

10 shouldn't be needed anyway.

11 MR HOBBS: There's no conflict with the practice direction,

12 and insofar as the practice direction says more it

13 ought, in our submission, to be complied with. That's

14 what it's for.

15 MR WILDEN: But it's not clear why an order is needed to

16 achieve --

17 MR HOBBS: Well, for goodness' sake, you're striking it out.

18 MR WILDEN: It's not binding anyway.

19 MR HOBBS: What do you mean it's not binding?

20 MR WILDEN: No, is it not binding anyway? If it is then why

21 is an order required?

22 MR HOBBS: Just do it.

23 MR TURNER: What are we arguing about here? I'm just trying

24 to look in this.

25 MR WILDEN: Paragraph 10(e).



1 MR TURNER: No, no, in no the practice direction, what is it  
2 that's --? In any way --

3 MR HOBBS: Nothing, nothing at all. This is all due to the  
4 fact that somebody made an enquiry, or someone in the  
5 registry, and someone in the registry says, "Yeah, well  
6 don't worry too much about that." In fact, the  
7 tribunal, I think, cares that so far as possible that  
8 practice direction should be complied with.

9 MR TURNER: Okay, well save insofar as varied by this order.

10 MR HOBBS: Yes, perfect.

11 MR TURNER: So draft indices by 18 August. That seems  
12 sensible. And then ... core joint authorities by  
13 3 September. That seems sensible. Any problems with  
14 any of this?

15 MR WILDEN: There is just the text that we would add at  
16 paragraph (i), just to confirm that the relevant section  
17 of the CMC 6 order be varied so that we don't have  
18 conflicting orders.

19 MR TURNER: Right. Okay. When are we getting the hard copy  
20 bundles?

21 MR WILDEN: That's in the CMC 6 order already. That is  
22 at -- it's in bundle C at tab 27. But I can read  
23 paragraph 8 which says: the hearing of the preliminary  
24 issues shall be listed to commence on 9 September with  
25 a time estimate of three days.

1 MR TURNER: Hold on, give me a second.

2 MR WILDEN: And --

3 MR TURNER: Hold on, you're going too fast.

4 MR HOBBS: Just go to the day.

5 MR WILDEN: It's page 380 in bundle C.

6 MR TURNER: Which paragraph of the --?

7 MR WILDEN: Paragraph 8.

8 MR TURNER: Eight: the hearing of preliminary issues should

9 be --

10 MR HOBBS: It's the third line.

11 MR TURNER: (sotto voce reads).

12 MR HOBBS: Then the tailpiece, five hard copies at the same

13 time.

14 MR TURNER: Do we need five?

15 MR HOBBS: That was -- that was --

16 MR WILDEN: It's in the order.

17 MR HOBBS: -- you settled into this order when you wrote it.

18 MR TURNER: I'm just reflecting on it, whether -- we're

19 sitting as a three, are we?

20 MR HOBBS: You are.

21 MR TURNER: Okay.

22 MR WILDEN: Vary that to three?

23 MR TURNER: No, no, no, that's fine.

24 MR HOBBS: Does the tribunal have an assistant, and is that

25 one of the five?

1 MR TURNER: Nine September, so the week in advance.

2 Right, I'm going to make a further order,

3 supplemental to this. I'd like electronic companies of

4 the key authorities, on the principal issue we're

5 discussing. Mr Hobbs you just reeled off a lot of cases

6 which you said were going to be relied upon --

7 MR HOBBS: There's a lot.

8 MR TURNER: -- on the substantive issue. I'd like those

9 much earlier. That doesn't in any way preclude you from

10 adding further ones in due course. But any authorities

11 that you have identified, that you're likely to rely on,

12 I'd just like them earlier so that I have time to read

13 them. So I'd like those by 25 August, electronically.

14 MR HOBBS: I'm slightly lost. Is it the joint authorities

15 bundle? Because it's not just my authorities bundle.

16 MR TURNER: I'd like any authorities --

17 MR HOBBS: From either side.

18 MR TURNER: -- from either side --

19 MR HOBBS: Thank you.

20 MR TURNER: -- relating to the substantive issue, issues,

21 the two substantive issues, the law of the two

22 substantive issues.

23 MR HOBBS: The PIs.

24 MR TURNER: The PIs. To be provided on 25 August.

25 MR HOBBS: Right. And now, the order requires sidelining,

1           do you want sidelining?

2   MR TURNER:  Erm --

3   MR HOBBS:  Because that increases our workload.

4   MR TURNER:  Sidelining can come later.

5   MR HOBBS:  That means you'd get it twice.

6   MR TURNER:  It doesn't matter.  Obviously it will be helpful

7           to know the bits -- that they're helpful -- some of

8           these authorities may be very long and it may be buried

9           in paragraph 83 and when I've got to paragraph 56

10          I wonder why am I reading this.

11  MR HOBBS:  I know that feeling, yes!

12  MR TURNER:  So I mean I am going to say some sidelining, but

13          I'm not going to hold you --

14  MR HOBBS:  I would really rather do the sidelining job and

15          get it done rather, than just do it -- I don't want to

16          do it again.

17  MR TURNER:  Right.  Sidelining the authorities, yes, by the

18          25th.

19  MR HOBBS:  Can we do it by the 25th?  What day of the week

20          is that?  If it's a Monday it's better than a Friday

21          because I can then work all weekend.

22  MR TURNER:  You are providing other -- it's when I get back

23          from holiday and you are also providing other trial

24          bundles on that date.

25  MR HOBBS:  It's perfect, it's a Monday, which means that we

1           can work all weekend day and night in order to achieve  
2           this.

3   MR TURNER: I can't believe it's going to be that big a job.

4   MR HOBBS: No, no, it's got to be done.

5   MR TURNER: But I'm not going to hold you to the sidelining  
6           to an extreme extent, put it that way.

7   MR HOBBS: No, no, but we will do it to an extreme extent.

8   MR TURNER: But it would be helpful to have -- to at least  
9           be able to have read at the authorities before one gets  
10          on to read the -- you warned me about all the reading,  
11          Mr Hobbs, you've only have yourself to blame I'm afraid!

12   MR HOBBS: I did. No, no, myself to congratulate, because  
13          you've taken it on board and it's fine. We'll do it,  
14          we'll do it, we're here to please.

15   MR TURNER: Thank you. Let me just check my notes. There  
16          are a few other things. Right, I've covered everything  
17          that was in my notes.

18   MR WILDEN: If I may, before we move on to sidelining, there  
19          is also a suggested provision for a supplemental  
20          authorities bundle to which authorities may be added on  
21          a rolling basis during the trial. And we propose that  
22          those authorities be marked up with the relevant  
23          passages as well. I understand this word -- this  
24          provision is opposed or at least not agreed.

25   MR TURNER: Well, it depends, if it's a rolling bundle it

1 depends whether that interferes with them --

2 MR WILDEN: I think the point is --

3 MR TURNER: -- the timing.

4 MR WILDEN: -- nobody wants to be deluged with authorities

5 whose principles relied upon aren't clear, and if

6 authorities are being added as trial progresses then the

7 passages should be marked.

8 MR TURNER: Presumably the principles are going to be set

9 out in the skeleton argument, are they not?

10 MR WILDEN: One would hope. But with the -- if authorities

11 are added on a rolling basis during the trial as

12 appropriate, as Microsoft is -- is asking for, then --

13 then we say those authorities should at least be marked

14 with the principles that are relied upon.

15 MR TURNER: I agree with that.

16 Mr Hobbs, the only thing that's troubling me at the

17 moment is how we're going to deal with your graphic --

18 well, not graphic -- your non-program copyright works as

19 a topic and how manageable that's going to be. And

20 we've discussed possibly focusing on some -- that

21 doesn't mean you're not relying on others -- but

22 focusing on your sort of best cases, as it were, the

23 most labour-intensive, or the most creative, or the most

24 substantial, however you -- you want to put it, works.

25 But that is going to be an important aspect of your

1 presentation, doing that in a manageable form. I'm not  
2 going to make an order in relation to it.

3 MR HOBBS: No, I'm sensitive to this point. As I've tried  
4 to indicate. But on the other hand, I don't mean this  
5 disparagingly, this is ultra-important for Microsoft and  
6 I'm not going to scrimp on their case for them.

7 MR TURNER: Of course. No, I understand, I understand.  
8 It's a question of how we manage it practically, I  
9 think.

10 MR HOBBS: I agree. But we've gone along way by having it  
11 in electronic form because, as you know, you can go  
12 through it as quick as you can and fasten on the  
13 graphics.

14 MR TURNER: Is there anything else we need to deal with  
15 today?

16 MR WILDEN: Microsoft are seeking their costs of the  
17 application and we resist that.

18 MR TURNER: I'm not making any order for costs today. So  
19 costs in the issue.

20 MR HOBBS: Just one thing. I've assumed -- and this hearing  
21 has also assumed -- that insofar as you need to have it,  
22 the other side is the claimant in the issue in the same  
23 way as they are the claimant in the proceedings. It  
24 does sometimes matter.

25 MR TURNER: Yes. So I assume that you would be opening the

1           case?

2   MR WILDEN:   Unlikely to be me personally, but yes.

3   MR TURNER:   Yes.   Then the time divided equally.

4   MR HOBBS:    Equally.

5   MR TURNER:   Two days.

6   MR HOBBS:    Just like the Supreme Court.   All right.   Just --

7           I think we've wrapped that up.   Just to thank you for

8           your patience and for your midwifery in producing

9           the result that we've achieved.

10  MR TURNER:   Thank you very much.

11  (11.50 am)

12                               (The hearing concluded)

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