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4 record.
5

6 **IN THE COMPETITION**
7 **APPEAL TRIBUNAL**
8

Case No: 1696/7/7/24

9
10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP
13

20th May 2026

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16 Before:

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18 The Honourable Mr Justice Johnson
19 John Davies
20 Lesley Farrell
21 (Sitting as a Tribunal in England and Wales)
22

23
24 BETWEEN:
25

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27 **DR MARIA LUISA STASI**

Class Representative

28
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30 v

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32 **MICROSOFT CORPORTATION AND OTHERS**

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

39
40 Sarah Ford KC and Ben Lewy (instructed by Scott+Scott UK LLP)
41 on behalf of Dr Maria Luisa Stasi
42

43 Brian Kennelly KC and Aislinn Kelly-Lyth (instructed by Linklaters LLP) on behalf of the
44 Microsoft Corporation and Others
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(2.00 pm)

Housekeeping

THE HONOURABLE MR JUSTICE JOHNSON: Can I start with the usual warning. Some of you are joining us on the live stream on the website. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of these proceedings, and breach of that provision is punishable as a contempt of court. Thank you.

Ms Ford.

Submissions by MS FORD

MS FORD: Sir, members of the Tribunal, I appear with Mr Lewy for the Class Representative. Mr Kennelly KC appears with Ms Kelly-Lyth for Microsoft. This is the consequential hearing following the judgment on certification. If the Tribunal is content, I was proposing to start with the question of costs.

THE HONOURABLE MR JUSTICE JOHNSON: Yes. Thank you.

MS FORD: There is a certain amount of common ground between the parties. Microsoft accepts that it is liable for the Class Representative's costs of its unsuccessful opposition to the certification and accepts that it is appropriate to order an interim payment. The dispute between us is the percentage deduction that is appropriate to reflect the cost that would have been occurred in any event. The Class Representative proposes a 15 per cent reduction, Microsoft says 30 per cent. The amount of the interim payment and whether it should be suspended pending appeal. The Tribunal will have seen we have produced a costs schedule, which is in the

1 supplemental bundle for this hearing behind tab 2, starting at page 8.

2 As the Tribunal will have seen, it concerns the period from 25 July 2025, which is the
3 date that we received Microsoft's response, to 23 January 2026 which was the date
4 for the parties' written submissions on the Supreme Court's judgment in *Evans*. If the
5 Tribunal turns to page 12, the total costs incurred over that period are £527,396.14.
6 We seek an order that Microsoft pays 85 per cent of those costs to be assessed if not
7 agreed, and that would amount to roughly £448,000.

8 15 per cent is the amount of the deduction that the Tribunal has applied in other cases
9 in which the class representative was substantially successful, and we have cited five
10 examples in our skeleton as the Tribunal may have seen. We do of course accept
11 that it is necessary for the Tribunal to exercise discretion and assess each case on its
12 own merits but we say that there is nothing in the circumstances of this case to merit
13 a greater deduction from the costs incurred than the 15 per cent figure.

14 We say that Microsoft mounted a no holds barred opposition to the certification. It
15 necessitated a heavy two-day hearing, including written expert evidence. It was
16 unsuccessful across the board and so we say, at most, a 15 per cent deduction is
17 appropriate.

18 Addressing the particular points that Microsoft has raised on our costs, and this is
19 starting with Microsoft's submissions at paragraph 8, they have first of all made some
20 points about Professor Wickelgren's methodology. The Tribunal in its judgment has
21 already concluded that the methodology passes the relevant process test and
22 Microsoft was unsuccessful on this issue, so we say that does not justify any deduction
23 at all.

24 It has also made some points on opt-in versus opt-out and, again, Microsoft's position
25 on that was rejected so we say that does not justify any reduction.

26 Thirdly, it has made some points on funding. The only issue in our submission on

1 which the Tribunal independently required further clarification from the Class
2 Representative was in respect of clause 17.1 of the LFA and the appointment of
3 a costs assessor. We have indicated in our skeleton that we would update the Tribunal
4 as to where we are on that.

5 The revised LFA has now been signed, and we will provide copies of that to the
6 Tribunal and the Defendants. Kain Knight have been appointed as cost assessors.
7 So, we have acted as was agreed with the Tribunal in proposals in correspondence.
8 We say those issues incurred minimal costs in addressing them and certainly would
9 not justify any deduction in the amount of our costs going beyond the 15 per cent that
10 we had proposed.

11 Microsoft have challenged the Class Representative's decision to instruct specialist
12 costs counsel. In relation to that, we say that that was a justified decision given the
13 significant challenges that were raised in respect of the Class Representative's funding
14 arrangements. Microsoft has raised the point that it did not itself decide to instruct
15 specialist cost counsel, that is of course a matter for Microsoft, but it does not mean
16 that our decision to do so in response to a concerted challenge was an unreasonable
17 one. Nor in our submission does it necessarily mean that Microsoft's position is more
18 cost effective. Microsoft has not put forward its own costs of the CPO hearing, so we
19 are not in a position to make a comparison as to whether it is or is not a more effective
20 approach.

21 Those are the points that have been raised on the percentage of discount from costs.
22 The second dispute concerns the amount of the interim payment. We proposed
23 70 per cent, which amounts to £313,600. Microsoft have proposed £163,270-odd.
24 That is a 65 per cent figure of the lesser amount of the costs that they are proposing.
25 It also entails deducting the amount of the costs incurred for leading counsel in respect
26 of funding.

1 Again, we say our proposal of a 70 per cent figure finds support in the Tribunal's
2 practice and we have cited two examples of that in our skeleton. In general, we say
3 that the amount of the costs that we have claimed are not unreasonable and, again, it
4 is notable that Microsoft have not chosen to put their own costs forward by way of any
5 comparison.

6 Microsoft have sought to suggest that any interim payment should be suspended
7 pending its appeal. That is not the general practice of this Tribunal. Again, we have
8 cited an authority to that effect. I can take the Tribunal to it if it is of assistance. It is
9 the authorities bundle, for this hearing, so the supplemental authorities bundle, tab 5.

10 Within that, page 43.

11 It is paragraph 9, starting towards the bottom of the page, where the unsuccessful
12 party in that case requested that costs orders being made against it should be stayed,
13 pending the outcome of any appeal. The Tribunal refused that application. They say:
14 "We don't consider that a stay of that order would be appropriate. Where a party has
15 lost litigation at first instance the usual position is that there should be no stay of any
16 part of the order made, including in relation to costs, pending the amount of appeal,
17 unless solid grounds are put forward to justify a stay."

18 The cross-reference is to the relevant provisions of the CPR.

19 In our submission there has been no concrete reasons advanced in the circumstances
20 of this case to depart from the usual position. The most that has been said is that if
21 a payment were made and Microsoft were successful on appeal then it would have to
22 be clawed back again. But of course that would apply in any litigation. It is not
23 particular to the circumstances of this case. So, in our submission we would
24 respectfully ask the Tribunal to make the order in respect of the costs that we have
25 asked for.

26 THE HONOURABLE MR JUSTICE JOHNSON: Thank you. So the second stage of

1 | your analysis involves identifying the amount of an interim payment on account.

2 | MS FORD: Yes.

3 | THE HONOURABLE MR JUSTICE JOHNSON: So your proposal is 70 per cent --

4 | MS FORD: 70 per cent.

5 | THE HONOURABLE MR JUSTICE JOHNSON: -- of the reduced figure?

6 | MS FORD: Of the 85 per cent.

7 | THE HONOURABLE MR JUSTICE JOHNSON: Of the 85 per cent. I just wanted to
8 | be clear about that. Thank you very much.

9 | Yes, Mr Kennelly.

10 |

11 | Submissions by MR KENNELLY

12 | MR KENNELLY: Members of the Tribunal, three short points in response.

13 | THE HONOURABLE MR JUSTICE JOHNSON: Thank you.

14 | MR KENNELLY: First, and I should say my learned friend fairly summarised the
15 | points, I will take that as read. We say a 15 per cent only reduction on the Class
16 | Representative's costs does not reflect the work that had to be done, in any event, for
17 | and at the hearing. It seems to be common ground that most of the submissions and
18 | the hearing related to concerns with Professor Wickelgren's methodology. Those
19 | issues had to be addressed at some point in the proceedings, ideally as early as
20 | possible, and they weren't purely certification specific points. I'm not going to go back
21 | to the document. The Tribunal will recall that our case was that Professor Wickelgren
22 | in his first report had provided no explanation at all as to how he proposed to
23 | demonstrate that the pricing practices were abusive.

24 | That wasn't nitpicking. That was a fundamental gap. It had to be pointed out by
25 | Microsoft and it prompted, we say, Professor Wickelgren to produce a second report.
26 | It was only at that stage he acknowledged the need to adopt some method for

1 assessing whether Microsoft's conduct had departed from competition on the merits,
2 which is the legal question. Then he had his 11 factors which he said would indicate
3 abusive.

4 Of course, even then the Tribunal expressed concerns with his approach. In your
5 judgment at paragraph 84 you referred to shortcomings in his methodology. You
6 referred to a lack of clarity by the extent to which he relied on two of the three
7 mechanisms of harm. Even he, Professor Wickelgren, described his third mechanism
8 of harm, the segmentation of the cloud market point, as novel.

9 So true it is that the process stage was passed, but it was passed, we say, only after
10 the second Wickelgren report was produced. Until then it was genuinely hard to
11 understand how the theory mapped on to the established concepts of abuse of
12 dominance. So we say they should not recover 85 per cent of their costs of that
13 exercise. Professor Wickelgren should have produced the proper report with the
14 blueprint to trial in his first report.

15 The second point on costs is whether the Class Representative should be entitled to
16 recover the costs for specialist costs counsel. The costs issues were important but
17 they weren't particularly complex. Even though we pointed these problems out, we
18 didn't see the need to instruct a specialist costs counsel. Ultimately, it is a very short
19 point, we say they didn't need two silks at the hearing for that issue. They had a larger
20 team than we had. A specialist costs counsel was not required to deal with those fairly
21 straightforward but important points.

22 Finally, on the question of whether the payment of costs the payment on account
23 should be stayed pending appeal, this is a matter ultimately for your discretion. If you
24 think that we have a decent prospect on appeal, which is a big if, that is a fact that
25 goes to whether you suspend the interim award or not, particularly where it is likely
26 that an appeal will be resolved well before the underlying litigation in this case is

1 resolved.

2 The case to which my learned friend referred, *FIPO v CMA*, was a final judgment at
3 first instance. This is a different case. Here we are concerned with an interim payment
4 in ongoing litigation and the point is open to you. I will say no more about it.

5 The final point then is on the percentage for interim payment, if you are minded to
6 make one today. For this, could I ask to you turn up the Class Representative's
7 skeleton?

8 THE HONOURABLE MR JUSTICE JOHNSON: Yes.

9 MR KENNELLY: At paragraph 20, they set out a list of cases which again all have to
10 be viewed in their particular facts, but the Class Representative saw fit to cite them as
11 evidence of the approach the Tribunal takes. Here, cited as evidence to support
12 an interim payment of 70 per cent of the claimed costs. So, seven precedents are
13 cited here, but in five of them -- five of the seven -- the Tribunal ordered 65 per cent.
14 So, what the Class Representative's own research demonstrates is that the normal
15 approach is 65 per cent and not 70 per cent and that is why we propose, respectfully,
16 a 65 per cent interim payment and not 70. 70 is out of the norm and this case is not
17 out of the norm to call for a higher percentage like that. That obviously is to be applied
18 to whatever this Tribunal settles on as the proper cost figure. That will depend on your
19 view on my other submissions, in relation to the reduction and the specialist costs
20 counsel costs.

21 Those are my submissions on costs. Unless I can be of any further assistance to you?

22 THE HONOURABLE MR JUSTICE JOHNSON: On the question of deferring payment
23 or stay. I mean, do you say that the discretion there is simply at large? We can just
24 do what -- what principle should we apply in deciding whether a stay was appropriate?
25 I mean, for example, in cases where permission to appeal has been given -- we are
26 not yet at that stage, we need to address it separately -- there is, of course, a discretion

1 to grant a stay of execution pending the outcome of the appeal. Exercising that
2 discretion involves conducting a balancing exercise between the competing interests
3 of the parties, bearing in mind the uncertainty of the outcome regarding the appeal,
4 which necessarily is pending at the stage the decision is made.

5 Is that the sort of evaluation you are inviting us to conduct or something else?

6 MR KENNELLY: Something like that.

7 THE HONOURABLE MR JUSTICE JOHNSON: Something like that?

8 MR KENNELLY: Very like that. In fact, if I can take you to *Excalibur*. It is an authority
9 very familiar to you. It is at tab 4 of the supplemental authorities bundle for this
10 hearing.

11 THE HONOURABLE MR JUSTICE JOHNSON: Yes.

12 MR KENNELLY: At page 30. It is paragraph 24.

13 THE HONOURABLE MR JUSTICE JOHNSON: Did you say --

14 MR KENNELLY: It is tab 4 of the authorities bundle for this -- I think it is the
15 supplemental authorities bundle for this hearing. It is on tab 4, it begins at page 25
16 and I would ask to you go to page 30: *Excalibur Ventures LLC*.

17 THE HONOURABLE MR JUSTICE JOHNSON: So I have the supplemental
18 authorities bundle for this hearing. Tab -- ah yes, tab 4. Yes. I am with you. Thank
19 you. Sorry. Which page?

20 MR KENNELLY: Page 30.

21 THE HONOURABLE MR JUSTICE JOHNSON: Yes.

22 MR KENNELLY: So paragraph 24, and this is the very broad discretion which you
23 have described in determining whether to order any payment and its amount. Of
24 course, we say that even if you are prepared to suspend the payment, the fact that
25 these factors are also relevant to the amount that you settle on, account needs to be
26 taken of all the relevant factors. I rely in particular on the likelihood of a successful

1 appeal.

2 If you think that we have a chance of winning on appeal, since this is an interlocutory
3 decision, that's a factor that we say pointing towards suspending payment. But the
4 discretion is a broad one. Those are the factors which the court in *Excalibur*,
5 Lord Justice Christopher Clarke, cited as the relevant ones.

6 THE HONOURABLE MR JUSTICE JOHNSON: All right. Thank you.

7 MR KENNELLY: If you were to ask me, sir, how often is this done in the Tribunal, it
8 would be a rare order for this Tribunal to make. So when my learned friend said it was
9 out of the ordinary, that was a fair summary. It is not a normal order that is made.

10 THE HONOURABLE MR JUSTICE JOHNSON: Okay. Back to you.

11 MS FORD: Sir, the only point I would point out is that the authority the Tribunal has
12 just been shown is concerned with the discretion as to whether to order an interim
13 payment at all. It is not specifically concerned with a question of a stay and permission
14 to appeal.

15 THE HONOURABLE MR JUSTICE JOHNSON: What I propose we do is we break for
16 five minutes and confer amongst ourselves, then return.

17 (2.17 pm)

18 (A short break)

19 (2.27 pm)

20 THE HONOURABLE MR JUSTICE JOHNSON: Yes, thank you all. We will give you
21 our ruling on the costs issues.

22

23 Ruling

24 We have to deal with certain matters arising from an application made by the Class
25 Representative to recover the costs associated with Microsoft's objection to her
26 application for a collective proceedings order. The first point relates to identification

1 of the costs referable to Microsoft's objection. The Class Representative has served
2 a costs schedule showing that between 25 July 2025, when the objection was first
3 received, and 23 January 2026, when the matter effectively concluded, the Class
4 Representative had incurred costs of £527,396.14.

5 The Class Representative accepts that she cannot recover all of those costs. She
6 accepts that some of them would have had to have been incurred in any event.

7 Microsoft takes the same view.

8 There is a difference between them, however, as to the percentage by which the top
9 line figure should be reduced to allow for costs which would have had to be incurred,
10 even if Microsoft had not raised any objection.

11 The Class Representative proposes a reduction of 15 per cent. Microsoft proposes
12 30 per cent. Microsoft relies on four matters in particular. One, the difficulties
13 associated with identifying from Professor Wickelgren's evidence a reliable blueprint
14 to trial, discussed in the CPO judgment, for example, at paragraphs 84 to 97, which
15 Microsoft says would have required attention from the Tribunal, in any event.

16 Two, Microsoft makes the basic point that the Tribunal would always have been
17 required to consider the question of opt-out versus opt-in.

18 Three, Microsoft points to the fact that some costs were attributable to funding issues
19 which were matters of concern for both Microsoft and for the Tribunal.

20 Four, a final point is made about the Class Representative having chosen to instruct
21 separate leading counsel to deal with funding issues at the hearing.

22 We have to do the best we can on the available materials, recognising that this is
23 an imprecise science. We think there is limited assistance to be gained from
24 considering percentage reductions allowed in other cases because what is called for
25 is an assessment of the appropriate reduction in this case.

26 We have to acknowledge, as the Class Representative points out, that this case

1 ultimately involved a heavily contested hearing over two days which included
2 challenges by Microsoft at all material points of the certification analysis, on the
3 blueprint to trial, on the question of opt-out versus opt-in and on the question of
4 funding.

5 Looking at the matters raised by Microsoft, we find only point one, relating to
6 Professor Wickelgren's evidence, of any real weight. Point two is simply a restatement
7 of the basic problem and although point three is accurate, the funding issues raised
8 were only a limited part of the overall picture.

9 Further, as to point four, we do not consider it was unreasonable for the Class
10 Representative to have engaged specialist costs counsel to deal with funding issues.
11 Although ultimately limited in scope, these were critical matters for the Class
12 Representative and had come under careful scrutiny by Microsoft and were matters of
13 concern for the Tribunal. It was appropriate to have a specialist available at the
14 hearing to deal with any issues arising.

15 Point one though is more material. Even absent a challenge by Microsoft, it would
16 have been necessary for the Tribunal to engage with Professor Wickelgren's
17 evidence. We found much comfort in Professor Wickelgren's second report which
18 addressed certain shortcomings in his first report and ultimately enabled us to
19 conclude that the Class Representative could show an appropriate blueprint to trial.
20 We think it appropriate that some further allowance should be made for the fact that
21 these clarifications would likely have been required anyway, even absent an objection
22 from Microsoft. We do not think this is adequately catered for in the Class
23 Representative's 15 per cent figure. We would, therefore, propose a reduction from
24 the Class Representative's top line figure of 20 per cent, giving a figure of
25 £421,916.92.

26 The next question to address is that of interim payment on account. The Class

1 Representative seeks an interim payment of 70 per cent of her relevant costs. That is
2 to say 70 per cent of the £421,916.92 I have mentioned already.

3 She points to other recent cases in which similar figures have been awarded by way
4 of interim payment, for example, *London Array Limited v Nexans* [2026] CAT 16, in
5 which the interim payment was 65 per cent, and *Le Patourel v BT* [2021] CAT 32, in
6 which the interim award was 70 per cent. Microsoft on the other hand has referred to
7 an earlier decision in 2009, *Consumers' Association v JJB Sports PLC* [2009] CAT 3,
8 as supporting
9 "a general conventional starting point for interim awards"
10 of 50 per cent. It therefore proposes an interim payment of 65 per cent rather than 70
11 per cent.

12 Again we find the references to other cases of limited assistance. A better starting
13 point is the guidance given by Christopher Clarke LJ in *Excalibur Ventures LLC v*
14 *Texas Keystone Inc* [2015] EWHC 566 (Comm), namely that what is a reasonable sum
15 on account of costs will have to be an estimate dependent on the circumstances, the
16 chief of which is that by definition there has been no detailed assessment. Thus, in
17 many cases, what is a reasonable sum will be one that is an estimate of the likely level
18 of recovery on assessment, subject to an appropriate margin to allow for error in the
19 estimation. This can be done by a number of methods, for example, by taking the
20 lowest figure in a likely range.

21 In the present case, despite the disagreement between the parties, the scale of the
22 disagreement is, in fact, quite narrow. It is the difference between 65 per cent and
23 70 per cent. We too feel confident that the eventual recovery will be within that range.
24 However, we feel we should be cautious. Our principal concern arises from the expert
25 evidence. We think there is potential for a reduction in the costs referable to the work
26 carried out by Professor Wickelgren for the reasons already given above.

1 We would therefore propose an interim payment on account representing 65 per cent
2 of the relevant costs, taking the lowest figure in the available range, which gives a final
3 sum of £274,246.

4 A final matter to address is Microsoft's proposal that payment of that sum be deferred,
5 pending the outcome of any appeal. Having considered the matter, we decline to
6 make such an order, which would operate as a de facto stay on the interim costs order.

7 Mr Kennelly KC has relied on the potential for an appeal. We have yet to determine
8 his application for permission to appeal. But even in cases where permission is
9 granted, a stay is not automatic. Rather, it is necessary to balance, (1) the risk of
10 injustice to the proposed appellant arising from it being required to comply immediately
11 with an order the court or Tribunal has made but which may eventually be overturned
12 on appeal, against (2), the risk of injustice to the respondent if deprived of the benefit
13 of the order it has already obtained and which it may hold on to if the appeal is
14 unsuccessful.

15 Microsoft's written request here refers in general terms to the risk of an overpayment
16 being made which subsequently has to be clawed back. If that means overpayment
17 arising from an interim payment which turns out to be too generous on assessment,
18 that risk is inherent in every exercise of ordering a payment on account and, in our
19 view, is already adequately accommodated by the margin of error built into our
20 estimation and the fact we have chosen a figure at the bottom of what we consider to
21 be the relevant range.

22 On the other hand, if the point being made is that Microsoft might have to claw back
23 the whole of its costs, if it wins on its appeal, there is nothing special about that. Stating
24 the issue in that way does not engage with the balancing exercise we have described
25 and does not provide an adequate basis for a stay at this stage. Or, to put it differently,
26 but to the same practical effect, we see no good reason to decline to make a payment

1 on account on terms which require it to be paid in the usual way.

2 Thank you. That concludes this ruling.

3 (End of ruling)

4 Thank you, Ms Ford.

5 MS FORD: Sir, on the matter of permission to appeal, Microsoft has indicated that its
6 application can be dealt with on the papers. We have set out our position on that in
7 our skeleton for this hearing.

8 THE HONOURABLE MR JUSTICE JOHNSON: Yes.

9 MS FORD: In those circumstances we are in the Tribunal's hands as to whether it
10 would be assisted in hearing oral submissions on that matter or not. (Pause)

11 THE HONOURABLE MR JUSTICE JOHNSON: I think we are content to deal with the
12 matters on the papers, unless there is anything you particularly would like to draw out.
13 Mr Kennelly, it is your application, say what you need to.

14

15 Submissions by MR KENNELLY

16 MR KENNELLY: I wanted to address the Tribunal on the question of whether I was
17 entitled to make the application at all because I had not taken the point properly before
18 the CPO judgment.

19 THE HONOURABLE MR JUSTICE JOHNSON: Yes.

20 MR KENNELLY: Again, I'm happy for the Tribunal to address that on the papers. We
21 have set out our position. May I address you on that point alone because obviously it
22 goes to the --

23 THE HONOURABLE MR JUSTICE JOHNSON: Of course you may. Thank you.

24 MR KENNELLY: -- degree of assistance that I provide to the Tribunal and I am
25 anxious obviously to do so.

26 THE HONOURABLE MR JUSTICE JOHNSON: Yes.

1 MR KENNELLY: This is raised in the Class Representative's skeleton argument and
2 we will turn to that, if that is possible.

3 THE HONOURABLE MR JUSTICE JOHNSON: Yes.

4 MR KENNELLY: I'm looking at pages 6 and 7. They make two points. They say that
5 you have a discretion as to whether Microsoft can advance this legal argument at all,
6 because they say it wasn't raised before and they cite first the submissions I made at
7 the CPO hearing, that is the passage from the transcript that you see that goes from
8 page 6 to page 7, the exchange between Ms Farrell and myself.

9 THE HONOURABLE MR JUSTICE JOHNSON: Yes.

10 MR KENNELLY: Of course, there I accepted that the CMA's opinions were admissible
11 at the certification stage because that is what the Court of Appeal had said expressly
12 in *Evans*. That was the position at the time. The Court of Appeal judgment was
13 overturned in *Evans* so you get no assistance from that passage.

14 You invited us in fact to make submissions about *Evans* after the judgment was
15 handed down, after the hearing. The Class Representative quotes from our
16 submissions at paragraph 25 on the previous page at page 6. There, we said in the
17 second sentence, this is following *Evans*:

18 "Whether weight can fairly be placed on such investigations is doubtful."

19 Of course, I meant whether any weight can fairly be placed is doubtful. I cite *Evans*,
20 noting the general common law rule.

21 So it is important to see why we said the position had changed, because we cite the
22 general common law rule upheld in *Evans* in the passages referred to. But findings
23 made by another decision-maker are not admissible as evidence of the facts found.

24 So we cite the very passages in *Evans* that we rely on in our application for permission
25 to appeal. We cite the rule in *Hollington v Hewthorn*. There is no ambiguity about the
26 text as cited. Evidence of the facts as found means findings on the facts. We went

1 on then to quote that:

2 "The rule is an incident of fairness and, accordingly, it does apply before the Tribunal."

3 So, again, I say no ambiguity about that. Then we went on to say:

4 "In any event, the regulatory investigations do not improve her claim."

5 "In any event" meaning if it is admissible, then we go on to address the weight that
6 you should place on it.

7 So, the legal conclusion that I cited, in my submission, explained that the findings of
8 fact by another decision-maker are not admissible in the Tribunal. In the
9 circumstances, of course, the word "doubtful" could have been stronger. I see that.
10 But there is no basis for saying that the admissibility point was not taken at all. The
11 authority cited by my learned friend at footnote 12 on page 7 made plain that the
12 discretion not to entertain an application for permission to appeal arises when the point
13 is not taken at all. That is when that discretion arises.

14 May I just show you -- this is my last point -- this authority. It is the *FII* judgment in the
15 Supreme Court behind tab 7.

16 THE HONOURABLE MR JUSTICE JOHNSON: Yes.

17 MR KENNELLY: Behind tab 7. It begins at page 53. If you go, please, to page 88.

18 Page 88, I am looking at the penultimate paragraph that begins, "The court then spoke
19 with a spectrum of cases." The Supreme Court had surveyed all the authorities on
20 when new, completely new points, could be taken on appeal. The Supreme Court
21 said at one end --

22 THE HONOURABLE MR JUSTICE JOHNSON: Sorry, where are you?

23 MR KENNELLY: So sorry. It is the second to last paragraph on page 88. It is above
24 paragraph 91.

25 THE HONOURABLE MR JUSTICE JOHNSON: Yes. Thank you.

26 MR KENNELLY: At one end, where there has been a full trial involving live evidence

1 and a new point might have changed the course of the evidence or required further
2 factual inquiry, there was likely to be significant prejudice to the other party. The policy
3 arguments in favour of finality would be likely to carry greater weight: that would be to
4 say no to the new point.

5 The other end, for the point to be taken was a pure point of law which could be argued
6 on the facts as found by the judge. The appeal court is far more likely to permit the
7 point to be taken, provided the other party had time to meet the new argument and
8 had not suffered any irremediable prejudice in the meantime.

9 So, what the Tribunal must decide, therefore, is whether the Class Representative will
10 suffer some irremediable prejudice if we say our legal errors in certification judgments
11 are remedied now. Obviously, the Class Representative will suffer no such prejudice.

12 There has been no trial. There has only been a two-day hearing at which it would
13 have been impossible for Microsoft to raise the point because it came after the hearing
14 itself. It is a pure point of law.

15 Of course, Microsoft was willing to agree a stay of the proceedings pending resolution
16 of the point of law, in order to avoid costs being accrued in the meantime, but the Class
17 Representative rejected that proposal.

18 In fact, it is really Microsoft that would suffer serious prejudice if the Tribunal's
19 approach -- which we say was wrong -- was not remedied in the Court of Appeal,
20 because the proceedings being certified on an opt-out basis gives the Class
21 Representative that powerful leverage which the Supreme Court referred to in the
22 *Evans* judgment.

23 So if there is a balance of prejudice to be considered at all -- we say it does not
24 arise -- it favours granting permission to appeal or allowing us the opportunity to ask
25 for permission to appeal.

26 The rest I think you can get from the written application, but I wanted to make that

1 point clear.

2 THE HONOURABLE MR JUSTICE JOHNSON: I will just turn to Ms Ford and check --

3

4 Submissions by MS FORD

5 MS FORD: Sir, we make what is really a very brief point. The wording of Microsoft's
6 application for permission to appeal claims that the CMA's findings are "plainly
7 inadmissible." That is the ground of appeal that is sought to run. The simple point we
8 make is that at the hearing that submission was not made, understandably so because
9 of the legal position at the time. But when Microsoft had the opportunity to make
10 submissions as to the position in the light of the Supreme Court's judgment in *Evans*,
11 it didn't make the submission that the CMA's findings were "plainly inadmissible." At
12 most, it says that they were "doubtful." So, we do say this is a scenario where the
13 Tribunal has a discretion whether or not to take a point on appeal which was not run
14 below. However, we do say in the event that the Tribunal is minded to allow the point
15 to be considered, in any event, it is misconceived for the reasons that we have set out
16 in some detail in our written submissions.

17 THE HONOURABLE MR JUSTICE JOHNSON: Thank you. I wonder whether we
18 should just break for a moment or two, then tell you where we are on permission to
19 appeal.

20 (2.46 pm)

21 (A short break)

22 (2.53 pm)

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24 Decision on Permission to Appeal

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That is the second main item of business. Ms Ford, the next one is timetable I think?

Discussion on Timetable

MS FORD: Sir, yes. On that the parties have been liaising and reached agreement, subject to the Tribunal's approval.

THE HONOURABLE MR JUSTICE JOHNSON: Yes.

MS FORD: Microsoft to file and serve its defence by 4pm on 11 September 2026.

THE HONOURABLE MR JUSTICE JOHNSON: Yes.

MS FORD: The Class Representative to file and serve her reply, if so advised, by 4pm on 20th November 2026. Then there be a CMC for the purposes of listing directions for trial in December 2026. Subject to the Tribunal's approval.

THE HONOURABLE MR JUSTICE JOHNSON: Yes. We are happy with those directions so we will happily affirm them.

MS FORD: I am grateful.

THE HONOURABLE MR JUSTICE JOHNSON: Thank you very much. Any other business for today?

Good. Thank you all very much for your assistance. The hearing is now concluded.

(2.54 pm)

(The hearing adjourned)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?