

IN THE HIGH COURT OF JUSTICE **Claim No. CL-2021-000208**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

BETWEEN:

JJH ENTERPRISES LIMITED

(trading as ValueLicensing)

Claimant

— *and* —

(1) MICROSOFT CORPORATION

(2) MICROSOFT LIMITED

(3) MICROSOFT IRELAND OPERATIONS LIMITED

Defendants

PARTICULARS OF CLAIM

A. Introduction

1. The Claimant (“VL”) claims damages and other relief arising from breaches by the Defendants (“**Microsoft**”) of:

- (1) s.18 of the Competition Act 1998 (“**CA98**”), Article 102 of the Treaty on the Functioning of the European Union (“**TFEU**”), and/or Article 54 of the Agreement on the European Economic Area (the “**EEA Agreement**”) (together, the “**prohibitions against abuse**”); and/or
- (2) s.2 CA98, Article 101 TFEU, and/or Article 53 of the EEA Agreement (together, the “**prohibitions against anti-competitive agreements**”).

The prohibitions against abuse and the prohibitions against anti-competitive agreements are referred to collectively below as the “**competition rules**”.

2. Microsoft’s breaches of the competition rules arise from its sustained – and ongoing – **Campaign** to stifle the sale of pre-owned licences for Microsoft software in the UK and EEA (together, the “**Relevant Territories**”). As further explained below, in the markets for such software, resellers of pre-owned perpetual software licences, including VL, compete with Microsoft, which (directly and through partners) sells new perpetual licences and, increasingly, subscription licences and services. For many users, pre-owned licences are a viable, and often much more affordable, alternative to Microsoft’s own offerings.
3. The Campaign has taken (and continues to take) various forms, including paying customers to restrict the supply of pre-owned licences to VL and other competitors. In so doing, Microsoft has abused its dominant positions in the relevant markets, and entered into agreements with the object and/or effect of distorting competition. As a result, VL has suffered loss and damage in the order of £270 million to date. Such loss and damage is continuing to accrue, presently at the rate of approximately £87,000 per day.
4. VL has sought meaningful engagement and information from Microsoft in pre-action correspondence, but none has been forthcoming. These particulars of claim reflect the best of VL’s present knowledge and belief. Most of the relevant facts are in Microsoft’s knowledge, and not VL’s. VL reserves the right to amend and/or plead further – including so as to expand the claim to include additional Microsoft software products – following disclosure and/or the provision of further information in these proceedings.

Relevant periods

5. In these Particulars of Claim, the “**Pre-Brexit Period**” refers to all material times up to 11pm on 31 December 2020, and the “**Post-Brexit Period**” refers to all material times thereafter.

The parties

6. VL is a private limited company incorporated under the laws of England and Wales with company number 06647308. It purchases, resells, and brokers the purchase and resale of pre-owned software licences in the Relevant Territories, in particular for Microsoft software products.
7. The First Defendant (“**Microsoft Corp**”) is the world’s leading software company. The Second Defendant (“**Microsoft UK**”) and Third Defendant (“**Microsoft Ireland**”) are indirect subsidiaries of Microsoft Corp. Microsoft is a single economic entity for the purposes of the competition rules.

B. Factual background

Microsoft software

8. Microsoft makes software – both operating systems and applications – designed to run on personal computers (“**PCs**”) and servers. More recently, it has also started offering software as a service: i.e., running applications on its own servers and making them available to customers over the internet.
9. This claim primarily concerns two of Microsoft’s best-known and most successful software products, namely:
 - (1) Microsoft Windows (“**Windows**”), an operating system for PCs; and
 - (2) Microsoft Office (“**Office**”), an office productivity suite. (Such suites are bundles of personal productivity software that generally include word processing, spreadsheet and presentation applications. Office includes, amongst other applications, Word, Excel, PowerPoint and Outlook. Depending on the particular edition of Office, other programs – such as Access, a database application – may also be included).

10. Windows and Office are designed to work with other Microsoft software, most materially the following server products: (1) **Windows Server**, a server operating system; (2) **Exchange Server**, an email and calendar hosting application; and **SharePoint Server**, an intranet server application.

Licensing

11. Microsoft's software licensing terms are set on a global basis by Microsoft Corp, which owns the copyright in the relevant software. Microsoft grants licences via local entities. In the Relevant Territories, the licensing entity is Microsoft Ireland. Microsoft UK acts as a distributor, negotiating and entering into agreements for the sale of such licences.
12. Microsoft's software licensing terms are complex. Until February 2021, they were regularly published as a single document; the last English version ran to over 75,000 words. They are now published as interactive pages on Microsoft's website. The following section seeks to describe the material aspects of Microsoft's licensing terms, while avoiding unnecessary detail.
13. Traditionally Microsoft sold perpetual licences for its software products. A perpetual licence entitles the purchaser to use the version of the software to which it applies for an unlimited period. For many products, Microsoft has sold perpetual licences both to consumers through retail channels, and to business and enterprise customers through volume licensing agreements. This claim is concerned with Microsoft's volume licensing business.
14. From time to time, Microsoft releases a new **major version** of one of its software products. Major versions of Office for Windows, for example, have included Office XP for Windows (released in 2001), Office 2003 for Windows (released in 2003) and Office 2007 for Windows (released in 2006).

15. A perpetual licence for one major version of a Microsoft product does not entitle its owner to use subsequent major versions. However, volume-licensing customers have been able to enter into maintenance contracts with Microsoft, which it calls “**Software Assurance**”. Software Assurance entitles customers to upgrade to the latest version of the relevant product throughout the contract term. This means that, by the end of a Software Assurance term for a given product, the perpetual licence originally purchased by the customer has become a perpetual licence for the then-current major version.
16. When Microsoft releases a new major version of a product, that does not render the previous version obsolete. For volume-licensed products, Microsoft’s policy was historically to offer ten years of support for each major version. This included the provision of bug fixes and security updates, and the availability of technical support. For example, Office 2010, released in June 2010, was supported until October 2020. As part of its efforts to convert enterprise customers from perpetual licences to subscriptions, described below, Microsoft has recently shortened the support period for its perpetually licenced products. Office 2019 has only seven years of support in total, and Office 2021 will have five years.
17. Depending on its requirements, an organisation may be satisfied with an older, but still supported, major version of a product, at a reduced cost, rather than incurring a higher cost by purchasing a new perpetual licence, or taking out a subscription licence, in order to use a newer version.
18. Traditionally, companies and organisations have run Microsoft’s server software products on their own servers, or servers managed for them (known, slightly inaccurately in the latter case, as “**on-premise**” hosting). Customers generally require two kinds of licence in order to do so:

- (1) First, a **server licence** to run the software on the server. Server licences are currently sold on either a per-core or per-server basis. (A core is the operative part of a computer processor, or “**CPU**”; one CPU may have multiple cores, and one server may have multiple CPUs. Server licences have in the past been sold on other bases, such as per-CPU.)
 - (2) Second, so-called client access licences (“**CALs**”) for end users. These are generally sold per user or per device. As well as CALs for individual software products, such as SQL, Microsoft sells “**CAL Suites**” that permit the use of multiple server products and features.
19. As well as Windows and Office, this claim is concerned in particular with Microsoft’s **Core CAL Suite** and **Enterprise CAL Suite**. Both license the use of certain features of server software products including Windows Server, Exchange Server and SharePoint Server. Enterprise CAL Suite licences have a wider range of features than Core.

The market for pre-owned software licences

20. Purchasers of perpetual software licences in the Relevant Territories have at all material times been entitled to resell those licences, regardless of any purported restrictions on resale in the original licence agreement. This is the effect of art.4(2) of Directive 2009/24/EC (the “**Software Directive**”, which also applies to non-EU EEA countries by virtue of the EEA Agreement) and s.18 of the Copyright, Designs and Patents Act 1988, as amended from time to time. Pursuant to those provisions:
 - (1) During the Pre-Brexit Period, the first sale in the Relevant Territories of a copy of a program by the rightholder, or with the rightholder’s consent, exhausted the distribution right within the Relevant Territories

of that copy, with the exception of the right to control further rental of the program or a copy thereof.

(2) In the Post-Brexit Period, the same applies, save that a first sale in the UK will not exhaust the relevant distribution right in the EEA.

21. As a result, and subject to paragraph 20(2), at all material times, perpetual licences purchased in the Relevant Territories could be lawfully resold notwithstanding any purported restriction in the licence agreement.

Pre-owned licences for Microsoft software sold by VL

22. VL is one of a number of companies that specialise in acquiring and reselling pre-owned Microsoft software licences in bulk, from and to companies and organisations in the private and public sectors. It conducts the vast majority of its business in the Relevant Territories.

23. Materially (though not exhaustively), VL acquires and resells pre-owned perpetual volume licences for the following categories of Microsoft software (the “**Relevant Perpetual Licences**”): (1) Windows; (2) Office; and (3) Core and Enterprise CAL Suites.

Microsoft’s push to a subscription/service model

24. During the relevant period, Microsoft has sought – with considerable success – to shift its business model from selling perpetual licences to selling periodic subscriptions. Rather than paying once for perpetual licences, with occasional paid upgrades or Software Assurance contracts, customers pay for subscriptions on a recurring basis, in exchange for the use of certain Microsoft software and services during the subscription term.

25. Microsoft’s main subscription offering is Microsoft 365 (“**M365**”), introduced in 2011, and until April 2020 known as Office 365. Materially, Microsoft sells

M365 subscriptions on a per-user basis (“user subscription licences”, in Microsoft shorthand “**User SLs**”).

26. M365 is sold in various editions. The M365 editions with which this claim is concerned are sold to enterprise customers and known as M365 E3 and E5. They include the use of both Windows and Office. An M365 subscription thus obviates the need for perpetual licences for those products.
27. Enterprise editions of M365 also include CALs for Exchange Server and SharePoint Server, together with some Window Server features. For some customers, the CALs included in M365, and/or Microsoft’s hosted services such as Exchange and SharePoint, will completely replace perpetual CAL Suites. The Core and Enterprise CAL Suites do include CALs for certain features of on-premise server software that are not included in the corresponding edition of M365. Those CALs are available via so-called **CAL Suite Bridges**. A CAL Suite Bridge is a User SL version of the equivalent perpetual CAL Suite.
28. It is substantially advantageous to Microsoft for customers to pay for its software via subscription and/or as a service, rather than by purchasing perpetual licences, in that:
 - (1) Even pound for pound, recurring income streams are generally valued more highly by investors than income streams from one-off purchases, being seen as more stable and predictable.
 - (2) However, VL understands that an M365 subscription is in fact more profitable than the equivalent combination of perpetual licence sale and SA, over the term of the latter. For example, an analyst note published by BMO Capital Markets on 7 January 2016 records that at Microsoft’s Financial Analyst Briefing in April 2015, Microsoft indicated that it

would earn 20% more gross profit on an M365 E3 subscription than on the sale of the equivalent perpetual licences together with Software Assurance.

- (3) As M365 subscribers take Microsoft services (such as email and file hosting) as well as using Office applications, they provide Microsoft with greater opportunities further to increase its average revenue per user by up-selling those users to higher subscription tiers, additional functionality, additional services, and more storage.
 - (4) Offering cloud-based services to subscription customers also allows Microsoft to gather valuable data through its customers' use of those services.
29. As well as perpetual and subscription licences, Microsoft offers generalised computing services in the cloud under the trade name **Azure**. Customers can use Azure for a wide range of computing needs. They pay according to workload used (for example, a certain sum per hour for a given amount of processing power, or per million executions), rather than purchasing or renting servers. Just as it has sought to shift customers from perpetual to subscription User SLs, Microsoft has sought to persuade customers to move from operating server software on premise to taking Azure services. This latter transition is not the subject of the instant claim but, as noted above, VL reserves the right to plead further, including in respect of additional software products, in light of disclosure.

From SA discounts

30. Microsoft thus has strong incentives to seek to convert enterprise users from perpetual licences to subscriptions. However, users that have paid for perpetual licences, particularly in combination with Software Assurance, may

not have strong incentives so to convert, since they will already be entitled to use the licensed software.

31. Microsoft has therefore offered such users discounted subscription prices, as incentives to convert from perpetual licences to subscriptions. In August 2014, Microsoft introduced so-called “**From SA**” subscription terms for M365. From SA subscriptions are available to customers with the relevant fully paid, perpetual licenses (known as “**Qualifying Licences**”), and active Software Assurance contracts. Thus:
 - (1) to qualify for From SA discounted subscriptions for M365 E3, customers need Qualifying Licences with SA for Windows, Office Professional Plus and the Core CAL Suite; and
 - (2) to qualify for From SA discounted subscriptions for M365 E5, customers need Qualifying Licences with SA for Windows, Office Professional Plus and the Enterprise CAL Suite.
32. User SLs are also available on From SA terms for CAL Suite Bridges, the Qualifying Licence being a fully paid, perpetual licence for the corresponding CAL Suite.
33. As well as owners of perpetual Qualifying Licences, Microsoft offers User SLs on From SA terms to Enterprise Agreement Subscription (“**EAS**”) customers. EAS is a licensing arrangement under which customers pay for the right to use the latest version of the relevant products in three-year periods, but do not retain a perpetual licence at the end of the term. From SA terms are available to EAS customers with continuous subscription coverage on the relevant Qualifying Licences for no less than three years.
34. Microsoft’s efforts to transition enterprise users from perpetual licences to User SLs, including by offering From SA discounts, have been very

successful. For example, according to its annual reports, Microsoft's Office 365 Commercial revenue grew 46% during its 2017 fiscal year, 41% during its 2018 fiscal year, 33% during its 2019 fiscal year, and 24% during its 2020 fiscal year. This revenue growth reflected increasing numbers of subscribers, as well as, in the latter years, higher average revenue per user.

Effect of corporate migration to M365 on availability of pre-owned licences

35. Under conditions of normal competition, this widespread migration by enterprise customers from perpetual licences to subscription, and those customers, as a consequence, no longer for their perpetual licences, would have led to a substantial supply of pre-owned licences to the market, including in the Relevant Territories.
36. Further, as explained above, Software Assurance contracts – which perpetual licence holders must have to obtain User SLs on From SA terms – have the effect that, at the point of migration, those perpetual licences apply to the current major releases of the software in issue. Microsoft's very successful efforts to persuade corporate clients to switch to M365 through the use of From SA discounts ought therefore to have released a very large number of perpetual licences for the latest major versions of Windows and Office, and associated CAL Suites, onto the pre-owned market in the Relevant Territories.
37. However, that would not have been in Microsoft's interest. As set out above, pre-owned licences can, for many organisations, be a more affordable and satisfactory alternative to new licences or subscriptions. A sale of a pre-owned licence is thus likely to mean lost revenue to Microsoft.
38. Accordingly, Microsoft has adopted, and continues to adopt, a course of conduct whose purpose and effect was to keep large numbers of such pre-owned licences off the market (the "**Campaign**", described in section D

below). VL's case is that the Campaign has contravened, and continues to contravene, the competition rules is set out in section E below.

C. The relevant markets and Microsoft's dominance

39. The definition of the relevant markets will be a matter for expert evidence in due course. Pending such evidence, VL's case is as follows.
40. The relevant product markets are those for (1) desktop operating systems; and (2) office productivity suites.
41. The relevant geographic market comprises the Relevant Territories.
42. Microsoft has a dominant position in the relevant markets:
 - (1) Windows' share of the desktop operating system market is at least 75%.
 - (2) Office's share of the office productivity suite market is at least 75%.
 - (3) Of those market shares, the part resulting from the sales of pre-owned licences is extremely small. Microsoft monopolises the remainder, being the exclusive supplier of new perpetual licences for, and grantor of subscription licences for, Windows and Office.
 - (4) Windows and Office benefit from very strong brand loyalty, particularly among business and enterprise customers.
 - (5) Windows and Office benefit from very strong network effects, and users choosing competing software face considerable switching costs. In particular, and without limitation:
 - (a) Corporate users are overwhelmingly familiar with using and, corporate IT professionals are overwhelmingly familiar with supporting, both products. Switching to alternative software

would require costly retraining of existing staff, and significantly reduce the available pool of skilled job applicants.

(b) Word processing, spreadsheet and presentation documents are nearly ubiquitously shared, in electronic form, in Word, Excel and PowerPoint's native file formats respectively, a situation that has persisted since many years before the start of the relevant period. While competing office software suites may be able to read and write files in Office's native file formats, none of them reliably and consistently achieve full file compatibility or feature parity.

(6) Windows and Office also benefit from very strong barriers to entry:

(a) Very significant time and costs are required to develop new desktop operating systems and office software suites.

(b) In light of the dominance of Windows and Office, and the network effects and switching costs from which they benefit, any investment in the time and costs required to develop competing software would also be very risky.

(c) Microsoft has very large economies of scale, the incremental cost of a new perpetual software licence being close to zero.

(7) Microsoft's market power is further demonstrated by its success in increasing average revenue per user over time.

43. Although the two product markets identified at §40 above are distinct, Microsoft is able to leverage and reinforce its dominance in each through its practice of bundling, which happens at several levels:

(I) First, Office is itself a bundle of applications that could in principle be sold separately, but in practice almost never are.

- (2) Second, Microsoft's volume agreements for perpetual licences offer significantly better prices when customers take a bundle of licences together – most commonly, Windows, Office and the Core or Enterprise CAL Suite.
- (3) Third, Microsoft's subscription licences for enterprise customers positively require those customers to take bundles including all three of Windows, Office, and one or other CAL Suite, as explained above.

D. Microsoft's campaign to keep pre-owned licenses off the market

44. VL sets out below the elements of the Campaign of which it is currently aware. However, particularly as some of those elements have by their very nature been concealed from VL, the account below may be incomplete. VL reserves the right to plead further in light of disclosure, including in respect of any aspects of the Campaign relating to customers' transitions from operating server software on premise to Azure services.
45. The Campaign, insofar as known to VL, has involved two major stages.

Stage one of the Campaign: custom contractual terms

46. The first known stage of the Campaign began at a point in time unknown to VL, but no later than 2016. It involved contractual negotiations between Microsoft and certain large customers in the Relevant Territories that switched from perpetual to subscription licences. Microsoft offered such customers discounted subscription prices, but required them in exchange to agree to terms expressly, and/or with the effect of, preventing or impeding those customers from offering for sale the perpetual licences they would no longer need as a result of the migration – i.e., in the case of M365, Windows and Office licences and CALs.

47. VL believes that these **Custom Anti-Resale Terms** have included:
- (1) terms under which the customer agreed to relinquish its perpetual licences, and/or that those licences would expire, and/or that it would not transfer them to a third party; and/or
 - (2) terms preventing the customer from informing potential purchasers such as VL of the existence of any surplus perpetual licences (whether or not purportedly subject to terms of the kind identified at (1) above).
48. VL believes that the Campaign has also included:
- (1) where customers have agreed to relinquish licences, or their expiration, Microsoft expunging all reference to such licences from the Microsoft Licensing Statements (“**MLSs**”) for those customers (MLSs are reports provided by Microsoft, which purport to list “all historical and current volume license agreements” for the relevant organisation(s). Expunging reference to licences that have purportedly relinquished or expired, rather than listing them as such in the MLS, (a) is contrary to the stated nature of MLSs, and (b) has prevented potential buyers that might otherwise challenge such purported relinquishment/expiry, including VL, from discovering the true position); and/or
 - (2) as well as, or instead of, using Custom Anti-Resale Terms, Microsoft simply advising such customers that such licences could not be resold, either at all or during the subscription term.

Stage two of the Campaign: the May 2020 “from SA” condition

49. In May 2020, Microsoft added a new eligibility condition for From SA subscription terms, as set out in its published, worldwide Volume Licensing Product List. Before that date, the requirements were as follows:

“i. Customer has active SA [i.e., Software Assurance] or is renewing coverage for the corresponding Qualifying Licences

ii. Customer acquires no more than one From SA SL [i.e., Subscription Licence] for each Qualifying Licence, unless provided otherwise in this Appendix

iii. Customer acquires From SA SLs at Enrollment anniversary or renewal”

50. On 1 May 2020, Microsoft added a fourth condition, namely that:

“iii. Customer retains the corresponding Qualifying Licences throughout its From SA licence subscription period”

This “**New From SA Condition**” applies to all Qualifying Licences required to be eligible for From SA terms for a given User SL, as materially summarised at §31 above.

51. The New From SA Condition purports to prevent customers from selling their perpetual licences into the pre-owned market, at least during the term of their From SA subscriptions.

52. VL refers to the Custom Anti-Resale Terms, the New From SA Condition, and any terms having the effect claimed by Microsoft in its communications referred to in paragraph 52 above as, collectively, the “**Impugned Terms**”.

The effects of the Campaign

53. By requiring customers to accept one or more of the Impugned Terms in exchange for discounted subscriptions, Microsoft has effectively been paying those customers (via those discounts) to protect Microsoft from competition, by restricting the supply of pre-owned licences to Microsoft’s competitors such as VL. (Indeed, if they did supply such competitors, those customers would, indirectly, themselves compete with Microsoft. Microsoft is thus paying potential competitors not to compete with it.)

54. Insofar as Microsoft has advised customers transitioning to subscription licences that they were not free to resell their old perpetual licences, such assertions either reflected applicable Impugned Terms or were misleading.
55. By the Campaign, including offering and/or insisting on the Impugned Terms, Microsoft has taken advantage of its dominance in the relevant markets for desktop operating systems and/or office productivity suites to create still more preferential conditions for itself by restricting and/or distorting competition in those markets. In particular:
 - (1) The Campaign has impeded competition on the relevant markets:
 - (a) It has prevented the great majority of pre-owned licences that would otherwise have come on to those markets from doing so.
 - (b) It has increased barriers to entry for resellers such as VL, which need to acquire pre-owned licenses to compete.
 - (c) It has thereby deprived resellers such as VL of an equal opportunity to compete on those markets.
 - (d) It has thus impeded the development of the secondary segments of those markets.
 - (2) As a result, the Campaign has:
 - (a) further strengthened Microsoft's already dominant position in the relevant markets; and
 - (b) reduced Microsoft's own incentive to innovate,

in turn further impeding competition.
 - (3) The Campaign has harmed consumers on the relevant markets:

- (a) It has reduced the scope for owners of surplus perpetual licences to sell them, and thereby realise value.
- (b) It has eliminated or reduced the availability of what would otherwise have been a potentially valuable option for many consumers, i.e., the purchase of pre-owned licences.
- (c) It has increased prices for consumers:
 - (i) Reducing the supply of pre-owned licences is likely to increase their price.
 - (ii) Because pre-owned licences are generally cheaper than comparable new perpetual licences or User SLs, the costs of using the software products covered by the Relevant Perpetual Licences have increased on average.
 - (iii) It has eliminated or reduced a competitive constraint on Microsoft's own pricing of perpetual licences and User SLs.
- (4) Further or alternatively, insofar as corporate users have passed on their increased costs to their own customers, the Campaign has increased costs for consumers generally.
- (5) The detriment to end users has been particularly severe in the case of organisations with limited resources, such as local government entities and healthcare providers. Where those organisations are publicly funded, Microsoft's conduct has increased public costs and/or reduced public services.
- (6) The damage to the secondary market segments is particularly egregious given (a) that those segments exist as the result of deliberate choices by the legislators of the Relevant Territories; (b) that competition law aims

to protect market segments of such kinds; and (c) Microsoft's special responsibility as a dominant firm vis-à-vis those segments.

56. Restricting and/or distorting competition in such ways was both the objective purpose of the Campaign and its subjective aim. Pending disclosure, VL pleads as follows in this respect:

- (1) Microsoft has no legitimate interest in acquiring pre-owned licences of its own software. It can produce new licences for its own software at near-zero incremental cost. Indeed, the Impugned Terms do not even purport to confer rights in the affected pre-owned licences to Microsoft.
- (2) Nor does Microsoft have a legitimate commercial interest in restricting the supply of pre-owned licences to competitors such as VL.
- (3) Microsoft can easily reward customers that have made previous investments in its software by offering them discounted User SLs, without making any demand in respect of perpetual licences owned by those customers – as indeed it does in the case of EAS customers, as explained at §33 above.
- (4) The Impugned Terms that Microsoft has made a condition of agreeing contracts for discounted User SLs thus have no legitimate commercial connection to such contracts.
- (5) Rather, the only purpose of the Campaign, including the Impugned Terms, is to prevent the affected pre-owned licences from coming on to the market, and so harm competitors including VL and strengthen Microsoft's position as set out above.
- (6) Microsoft has, in short, sought to turn its near-monopoly in the supply of the dominant products in the relevant markets into a total monopoly.

57. This restriction and/or distortion of competition:
- (1) was (and is) not objectively necessary for (let alone proportionate to) any legitimate purpose (nor has Microsoft suggested otherwise in pre-action correspondence); and
 - (2) was (and is) plainly capable of affecting trade in the UK, and/or between EU Member States and/or EEA contracting parties, given the relevant geographic market.
58. VL reserves the right to plead further in these respects in light of disclosure and expert evidence.
59. The Campaign has caused loss and damage to VL in particular, as set out in section F below.

E. Microsoft's breaches of competition law

Applicable law

60. The laws applicable to VL's claims are as follows:
- (1) Insofar as they concern events giving rise to damage that occurred in the Pre-Brexit Period, the claims are governed by English law, pursuant to article 6(3)(b) of Regulation (EC) No 864/2007 ("**Rome II**"). The UK market was (and is) amongst those directly and substantially affected by the restrictions of competition on which those claims are based.
 - (2) Insofar as they concern events giving rise to damage occurring in the Post-Brexit Period, the claims are governed by the law of the country where the market is, or is likely to be, affected, pursuant to article 6(3)(b) of Rome II, as amended by s.11 of the Law Applicable to

Contractual Obligations and Non-Contractual Obligations
(Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834).

61. As set out below, the substantive competition rules of the UK and the Relevant Territories – i.e., the EU Member States and Iceland, Liechtenstein and Norway (the “**EEA EFTA States**”) – are materially identical.

The competition rules

The prohibitions against abuse

62. Article 102 TFEU (which forms part of the domestic rules of EU Member States) provides:

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
 - (b) limiting production, markets or technical development to the prejudice of consumers;
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”
63. Article 54 of the EEA Agreement is in materially the same terms, save that it is concerned with abuses of dominant positions within the EEA that affect trade between EEA contracting parties. It has been implemented in domestic law in the EEA EFTA States. Section 18 CA98 is also in materially the same terms, save that it is concerned with abuses of dominant positions within, and which affect trade within, the UK.

The prohibitions against anti-competitive agreements

64. Article 101 TFEU (which forms part of the domestic rules of EU Member States) materially provides:

“1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.”

65. Article 53 of the EEA Agreement is in materially the same terms, save that it is concerned with arrangements that distort competition within the EEA and affect trade between EEA contracting parties. It has been implemented in domestic law in the EEA EFTA States. Section 2 CA98 is also in materially the same terms, save that it is concerned with arrangements that distort competition and affect trade within the UK.

Competition claims in respect of the Pre-Brexit Period

66. Pursuant to regulation 64 and paragraph 14 of Part 4 of the Competition (Amendment etc.) (EU Exit) Regulations 2019, VL is entitled to claim under

English law for infringements of Articles 101/102 TFEU and/or Articles 53/54 EEA Agreement that took place during the Pre-Brexit Period, notwithstanding that those Articles ceased to have effect domestically at the end of the Pre-Brexit Period pursuant to s.62 of those Regulations.

Particulars of breach

Breach of the prohibitions against abuse

67. Contrary to the prohibitions against abuse, Microsoft has abused its dominant position in the relevant markets through the Campaign, including its use of the Impugned Terms (individually and/or taken together). Paragraphs 52–56 above are repeated. Such conduct is not competition on the merits.

Breach of the prohibitions against anti-competitive agreements

68. The Impugned Terms contravened (and continue to contravene) the prohibitions against anti-competitive agreements in that: (1) they were (and are) all agreements between undertakings, namely Microsoft on the one hand, and certain customers switching from perpetual licences to discounted User SLs on the other; (2) in light of the facts and matters set out in paragraphs 54–58 above the object and/or effect of the Campaign was to restrict and/or distort competition in the relevant market; and (3) such restriction and/or distortion of competition was (and remains) appreciable, particularly given Microsoft's dominance in the relevant markets.

Joint and several liability

69. The Defendants are jointly and severally liable for the loss and damage caused to VL as a result of the said breaches.

F. Loss and damage

70. By reason of Microsoft's unlawful conduct, VL has suffered loss and damage. But for that conduct, VL would have been able to purchase and resell, and/or broker the purchase and resale of, a much larger volume of pre-owned licences. The measure of VL's loss is the difference between the profits that it would have made absent Microsoft's unlawful conduct (alternatively, the profits that it lost the chance to make) and the profits that it made in fact.
71. Such loss is continuing. It will continue even after the Campaign is brought to an end, because when that happens the secondary market will start from a much smaller and weaker position than it otherwise would have done.
72. The quantum of VL's loss will be a matter for expert evidence in due course. VL's present estimate is that, as of the date of this claim, it has suffered damages of the order of £270 million. Such damage is continuing, at a present rate of approximately £87,000 a day.

G. Interest

73. But for Microsoft's unlawful conduct, VL would have reinvested a substantial part of the sums of which it has been deprived in its business, and thereby generated further profits. VL claims compound interest on its primary losses in compensation for such further loss of profit.
74. In the alternative, VL claims interest pursuant to section 35A of the Senior Courts Act 1981, at such rate and for such period as the Court deems fit.

H. Declarative relief

75. VL further claims a declaration that the Impugned Terms (and/or any terms with equivalent effect) are, and will continue to be, void and unenforceable in respect of perpetual licences first sold in the Relevant Territories.

I. Prayer

AND VL CLAIMS:

- (1) Damages;
- (2) Interest as pleaded in section G above;
- (3) Declaratory relief as pleaded in section H above;
- (4) Further or other relief; and
- (5) Costs.

MAYA LESTER QC
MAX SCHAEFER

Statement of truth

I believe that the facts stated in these Particulars of Claim are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: _____



Name: Jonathan Horley

Position: Managing Director

Date: 17 May 2021

Claim No. CL-2021-000208

IN THE HIGH COURT OF JUSTICE

**IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND
WALES**

COMMERCIAL COURT (QBD)

BETWEEN:

**JJH ENTERPRISES LIMITED
(trading as ValueLicensing)**

(Claimant)

- and -

(1) MICROSOFT CORPORATION

(2) MICROSOFT LIMITED

(3) MICROSOFT IRELAND OPERATIONS LIMITED

(Defendant)

PARTICULARS OF CLAIM

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