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4 **IN THE COMPETITION**

5 **APPEAL TRIBUNAL**

Case No. 1424/5/7/21 (T)

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7  
8 Salisbury Square House  
9 8 Salisbury Square  
10 London EC4Y 8AP

11 Thursday 23<sup>rd</sup> March 2023

12  
13 Before:

14  
15 Justin Turner KC  
16 (Chair)  
17 (Sitting as a Tribunal in England and Wales)

18  
19  
20 BETWEEN:

21  
22 KELKOO.COM (UK) LTD AND OTHERS

Claimants

23  
24  
25 v

26  
27 GOOGLE UK LTD AND OTHERS

Defendants

28  
29  
30  
31 **A P P E A R A N C E S**

32  
33 Daniel Jowell KC and Allan Cerim (instructed by Linklaters LLP appeared on behalf of the  
34 Claimants)

35  
36 Meredith Pickford KC (instructed by Herbert Smith Freehills LLP appeared on behalf of the  
37 Defendants)

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1  
2 **Thursday, 23 March 2023**

3 **(10.30 am)**

4 **THE CHAIR:** Some of you are joining us via live stream on our website, so I must  
5 start, therefore, with the customary warning.

6 An official recording is being made and an authorised transcript will be produced, but  
7 it is strictly prohibited for anyone else to make an unauthorised recording, whether  
8 audio or visual, of the proceedings. Breach of that provision is punishable as contempt  
9 of court.

10 I'm sorry to ask you to come to court. I know there was an agreed disclosure order,  
11 which is generally welcome, of course, and I appreciate the cooperation. As you will  
12 have seen, the concern really is third party documents and preserving the position of  
13 third parties. I just wanted to -- I've read the recent correspondence. Can I just tell  
14 you what I've been thinking, in order that you can tell me why it's a bad idea or why  
15 you think there should be an alternative approach.

16 What I was thinking might be an appropriate way is for there to be initial disclosure,  
17 I'm obviously talking about the third party documents, on the basis they're external  
18 advisers only; and that will enable the parties, and particularly Kelkoo, to take a view  
19 as to which documents are likely to be deployed. It may be a subset of the 4,000-odd.  
20 Then the parties can obviously not only identify the documents but take a view as to  
21 how they should be handled going forward. At that stage there should be  
22 communication to the third parties, giving them an opportunity to object to their use or  
23 their terms of use. That way we might be able to avoid having to write to quite so  
24 many third parties. Maybe that's not a practical suggestion, but I don't know if you  
25 want to let me know what your view of that would be.

26 **MR JOWELL:** Yes, could I start just by making a few preliminary points.

1 **THE CHAIR:** Yes, of course.

2 **MR JOWELL:** Just, if you like, to set the picture, and then to address your proposal  
3 and how that might work or might not work.

4 It is important, we say, to bear in mind the starting point, which is that documents  
5 should only be placed in an inner ring in highly exceptional circumstances. Just to  
6 show you the authorities on that point, if I may, just very quickly, the first is really  
7 a Court of Appeal authority in OnePlus v Mitsubishi, I don't know if you have the small  
8 bundle, but it's at tab 30.

9 **THE CHAIR:** I have it electronically.

10 **MR JOWELL:** It's the judgment of Lord Justice Floyd in the Court of Appeal. At  
11 page 230 and paragraph 39, there's a very neat summary of the authorities.

12 **THE CHAIR:** Paragraph 39, you say?

13 **MR JOWELL:** Yes. You'll see that there's a recognition there of balance between the  
14 interests of the receiving party and having the fullest possible access to relevant  
15 documents against the interests of the disclosing party or third parties. But the  
16 particular point we would rely on is subparagraph (iv), where the court reminds us that:  
17 "The court must be alert to the fact that restricting disclosure to external eyes only at  
18 any stage is exceptional."

19 So the question is, is this the sort of exceptional circumstance in which these  
20 documents should go into an inner ring?

21 We say, essentially for the reasons that are outlined in the letter that you will have  
22 received, Mr Chairman, at paragraph 11, that this isn't the kind of exceptional  
23 circumstances, essentially for three reasons: first, because the documents in question  
24 are very old, they are all at least six years old; secondly, the really highly sensitive  
25 ones have been excluded because they were never provided to begin with. Those are  
26 the inaccessible third party documents.

1 **THE CHAIR:** I have that in mind, yes.

2 **MR JOWELL:** One must also bear in mind that this Tribunal has already, in the  
3 Foundem proceedings, in an order disclosed the same documents into an outer ring  
4 in parallel proceedings brought against Google by Foundem. So it's difficult to say, in  
5 our submission, that in those circumstances --

6 **THE CHAIR:** Just explain that a bit more fully to me?

7 **MR JOWELL:** There have been parallel proceedings brought by Infederation Limited,  
8 commonly known as Foundem, against Google, and in those proceedings  
9 I understand that these same documents have been disclosed, and disclosed into  
10 an outer ring. At tab 24 of this bundle, you will see the Foundem order.

11 **THE CHAIR:** Yes.

12 **MR JOWELL:** It's true that that was by consent, but nevertheless, if you like, with no  
13 pun intended, the cat in a sense is already out of the bag.

14 **THE CHAIR:** I'll take it at face value that the documents are the same, but we don't  
15 really know what happened to them, do we?

16 **MR JOWELL:** They have been disclosed to the outer ring of Foundem. Of course it's  
17 not that there is no protection afforded by an outer ring, the parties to the outer ring  
18 are bound by obligations of confidence and by the collateral use restrictions. So it is  
19 a confidentiality ring, it's just not the --

20 **THE CHAIR:** But they've not been disclosed to your client?

21 **MR JOWELL:** No, they've not been disclosed to my client, that's absolutely true.

22 **THE CHAIR:** The fact that they've been disclosed to somebody else is not a perfect  
23 answer.

24 **MR JOWELL:** It's not a perfect answer, but there is an oddity if my client is to be  
25 disadvantaged by comparison to another claimant against the same -- basically also  
26 relying on the same decision in the same tribunals.

1 So, in principle, we say there are strong reasons to suppose that these documents are  
2 outer ring appropriate, and not the kind of exceptionally confidential documents that  
3 merit inner ring protection.

4 **THE CHAIR:** We don't know what the documents -- I mean you've not seen the  
5 documents yet, as I understand it.

6 **MR JOWELL:** We've not seen the documents.

7 **THE CHAIR:** I understand they may well be of low confidentiality, because we know  
8 there was a tighter group of documents that were protected otherwise, and they're six  
9 years old, and there may be nothing that could properly be called confidential in them.  
10 But I can't form a view on that, can I, sitting here today? I don't have the materials.

11 **MR JOWELL:** Yes, but I think rather the burden of proof is really the other way round,  
12 that in principle at least -- and I'm not saying that your solution is wrong, but I think it  
13 is important to bear against the background that in principle one should really only be  
14 forcing people to look at things in an inner ring in exceptional circumstances.

15 **THE CHAIR:** I accept that.

16 **MR JOWELL:** And there are no indicia here that these are the kind of exceptionally  
17 confidential documents that would bear that hallmark.

18 So I don't say that the cautious approach you're taking, Mr Chairman, is wrong, but  
19 I just say that the default position, if you like, is these have every indication of being  
20 appropriate for an outer ring and no indicia really of inner ring confidentiality.

21 There are real problems for my client in looking at these types of documents in an inner  
22 ring, because we simply don't -- they are documents that are likely to be related to the  
23 business of comparative shopping, and so, in order to have an informed view on their  
24 relevance and their significance for the case, it is going to be necessary to involve the  
25 employees and the directors of Kelkoo in order to assess their significance.

26 **THE CHAIR:** Right, but I'm not in any way suggesting that shouldn't take place.

1 **MR JOWELL:** No, exactly.

2 **THE CHAIR:** Just do it in a staged manner.

3 **MR JOWELL:** And I totally appreciate that, but I do just make those points, because  
4 we would be very concerned indeed if they were to get, if you like, stuck in an inner  
5 ring; and it would be wrong in my respectful submission.

6 The problem with the solution, at least as proposed by Google in their letter last night,  
7 is that they will get stuck, because, under the current confidentiality order, once  
8 something is designated as inner ring confidential, it's then necessary on a document  
9 by document basis for the party that wants it to be re-designated to give a reasoned  
10 justification for why it should be re-designated.

11 **THE CHAIR:** Yes. You're pushing at an open door, if I may say. I'm not going to  
12 make any decision today which is going to make it a presumption of these being inner  
13 ring confidentiality documents.

14 **MR JOWELL:** We're very grateful to hear that. But what we need then is -- we're also  
15 concerned by the delay.

16 **THE CHAIR:** Yes. No, that I understand.

17 **MR JOWELL:** We don't object in principle to the idea that we have, if you like, a first  
18 look at these in the inner ring in order to assess whether some of them we can say,  
19 "Well, these are nothing to do with anything, and we can put those aside".

20 **THE CHAIR:** Yes.

21 **MR JOWELL:** But we do apprehend that for the most part either they're going to be  
22 relevant, and we're going to want our people to see them in the outer ring to appreciate  
23 their significance, or the lawyers in the inner ring are simply not going to be able to  
24 take a view.

25 **THE CHAIR:** Yes.

26 **MR JOWELL:** So we apprehend that most of those documents we are going to wish

1 to move to the outer ring. What we want to ensure is that today we have a way forward  
2 where we're not gummed up, as it were, by the provisions of the confidentiality regime  
3 where we have to give an explanation for each document. We think that would be  
4 completely unfair.

5 **THE CHAIR:** Yes.

6 **MR JOWELL:** And also unacceptable because it would require us --

7 **THE CHAIR:** As I say, you don't need to keep making that point.

8 **MR JOWELL:** We don't mind having a first look to try and sift out some, then to notify  
9 Google and then to have a procedure going forward for how then third  
10 parties -- I suppose there are one of two solutions. Either at that point Google then  
11 notifies all the third parties, or the CAT at that point grasps the nettle and says, "Okay,  
12 you don't have to notify this number of third parties".

13 **THE CHAIR:** Yes, I was interested, and it was in your letter, why you say it's Google  
14 that's going to be doing all the hard work.

15 **MR JOWELL:** Well it is their obligation, it's their documents, and it isn't on the --

16 **THE CHAIR:** Well they're third party documents, aren't they, that's the issue. Insofar  
17 as you want things to happen quickly, I don't think you should assume that all the work  
18 is necessarily going to have to be done by Google.

19 **MR JOWELL:** I think we do make that assumption. You've seen in the Qualcomm  
20 case it was for Qualcomm to write, not for Which?. Although these originate from third  
21 parties, they're documents in Google's possession; they're not documents in our  
22 possession. So the obligation is then to disclose them, and if there are to be  
23 notifications made -- and Google is an enormously well resourced company, one  
24 doesn't need to feel sorry for them, and --

25 **THE CHAIR:** You're discussing timing, and I'm just saying, if you're very keen to press  
26 ahead with this, I see in principle no reason why you couldn't write to third parties just

1 as Google could write to third parties.

2 **MR JOWELL:** We see that in principle, but I think in practice it would not be just or  
3 fair for us to have to take over the burden of what is Google's responsibility. They also  
4 are the best placed to be able to obtain the requisite contact details. What we would  
5 propose is if these are in the first instance to come to us in an inner ring for a first look,  
6 then the next step is then for us to -- once we have informed Google, there should  
7 then be a deadline by which they must either obtain the CAT's dispensation not to  
8 write, or a period within which they must write. We think that in the meantime  
9 they should be getting on with the process of obtaining the contact details of all of  
10 these third parties, because really there shouldn't be any difficulty with them creating  
11 an Excel spreadsheet.

12 **THE CHAIR:** I understand all your caveats, fairly made, but in principle you're not  
13 objecting to some sort of structure along the lines of what I'm suggesting. Is that right?

14 **MR JOWELL:** Not in principle, but the devil is in the detail. We do say that, first of  
15 all, we should not have to make any reasoned justifications. We should just be entitled  
16 to say these are the documents that we consider are potentially relevant and we wish  
17 to be looked at in the outer ring. Secondly, we do insist, I'm afraid, that it should be  
18 on Google to notify the third parties or to obtain dispensation not to do so from the  
19 CAT; and that there shouldn't be undue delay. We really think that once we have  
20 identified Google, if they in the meantime have got the addresses, there is no reason  
21 why, for example, they shouldn't write within two weeks and then the third parties be  
22 given time --

23 **THE CHAIR:** How long do you need to sift through the documents?

24 **MR JOWELL:** Let me take instructions, if I may. **(Pause).**

25 We could try to do it in two weeks.

26 **THE CHAIR:** Shall I hear from Google, to see if we have a structure. Mr Pickford.



1 **MR PICKFORD:** The issue obviously is how we balance in this case on the one hand  
2 third party interests, in so far as they may have some, in relation to this  
3 information -- I'm going to come on to that, if I may, in a moment, because I think  
4 there's some useful material that I can show the Tribunal -- with on the other hand  
5 a workable and proportionate disclosure regime.

6 To be clear, we are content with Mr Jowell's primary case, that he would simply like all  
7 of these documents to go immediately into the outer ring. We don't oppose that, but  
8 we apprehended that the Tribunal might not be happy with that, and so we suggested  
9 an alternative. We are very happy to take this issue in stages. Indeed, that is the  
10 essence of the proposal that we made too.

11 Obviously the first thing to do is just to see how many of the 5,000 documents and 570  
12 third party interests that are engaged are really relevant and that really need to be  
13 considered. There is a terrible risk with the approach that Mr Jowell's clients propose  
14 as the starting point, which is that there's an enormous amount of waste of a lot of  
15 work that they want to impose on us that ultimately doesn't take anyone anywhere,  
16 because it's in relation to documents that ultimately never see the light of day.

17 **THE CHAIR:** You have some familiarity with these documents. I don't know if you're  
18 in a position --

19 **MR JOWELL:** I personally do not have any familiarity with the documents.

20 **THE CHAIR:** Somebody on your team.

21 **MR PICKFORD:** We have some familiarity with them, but we're not the third parties  
22 and what we have not sought to do is assess them from a third party perspective.  
23 However, I can assist --

24 **THE CHAIR:** Sorry to interrupt, but you're not submitting to me that all the documents  
25 are likely to be documents that Mr Jowell's clients will seek to rely on, you do think  
26 a sifting process may reduce the number of documents?

1 **MR PICKFORD:** Indeed, Sir, we certainly do.

2 It might be helpful if we just go to the bundle at tab 9, which is where there's a letter  
3 from my solicitors. At paragraphs 4 to 6, there's an explanation about the nature of  
4 the file in this case. What happened is, as is the case in competition proceedings, we  
5 were given access to the file, and there were certain safeguards that were put in place  
6 in relation to that access. So the first thing that happened is that the Commission  
7 removed from the file documents that it thought were too sensitive to go to Google,  
8 and it put them instead into a data room where only external advisers were able to  
9 view those documents. So what that means is that the documents that remain from  
10 third parties have already been sifted, and those that were considered to be sensitive  
11 have been removed. That's the first point.

12 **THE CHAIR:** Yes.

13 **MR PICKFORD:** Secondly, we also received the documents subject to redactions.  
14 So the file that we have is not a complete set of documents in their original form, it is  
15 documents that have been further redacted to remove confidential information. And  
16 not only confidential information -- this is a point which actually goes to the workability  
17 of Mr Jowell's proposals -- they also removed the identity of a number of the third  
18 parties who provided the information. So that's in essence the nature of the  
19 documents that we received.

20 Given that those were documents that we received in around 2016 and 2017, and it's  
21 been found by the Commission that we compete against most parties in most places  
22 in relation to the relevant markets, it's hard to see on its face, in fact, that the file is  
23 going to contain information that's particularly sensitive vis-à-vis Kelkoo, who is  
24 a competitor in one of the markets, namely comparison shopping, in which Google  
25 also participates.

26 So that's why we were content, in the first instance, and we said it was proportionate

1 in fact for these documents simply to go into a confidentiality ring, and we didn't need  
2 to contact the third parties.

3 I can address you, Sir, on the suggestions that have been made by Kelkoo in relation  
4 to us contacting the third parties, and whilst we would be content with a staged order  
5 where initially what happens is that they go into the inner ring, and then Kelkoo comes  
6 back and says, "Okay, we've sifted them, and here's what we propose", we say at that  
7 point it should be -- that's when we return to the Tribunal and we might have a joint  
8 proposal as to how we deal with that, or we might have a contested proposal. What  
9 the Tribunal shouldn't do at this stage is say, "Well, the presumption is that Google is  
10 going to write", because it may be that what Kelkoo says is, "Okay, we've sifted them,  
11 and it's not 570, but it's 470". At that point we would want to explain to you, Sir, or  
12 whoever is hearing the case, why trying to contact 470, hypothetically, third parties  
13 would still be a disproportionate thing to impose on us. I can make submissions about  
14 that --

15 **THE CHAIR:** It's not really a question of proportionality. Proportionality works  
16 between the parties, but if there's -- I don't feel I'm in a position to rule out the possibility  
17 that there's commercially sensitive, and even highly commercially sensitive, material  
18 in those documents, maybe sensitive particularly with regards to the claimants. I'm  
19 just not in a position to form a view on that. So the fact that there are a lot of them  
20 doesn't seem to impact on whether or not those third party interests should be  
21 protected. It may be, when the sifting has been done, the nature of the documents  
22 themselves will indicate that they don't have material confidential information in.  
23 Alternatively it may be unclear, in which case one can communicate to the third parties  
24 and they can make representations. But it's going to be unsatisfactory in both ways.  
25 It's unsatisfactory if third party commercial information isn't protected, particularly  
26 given the Commission has said it should be, if it isn't protected in circumstances where

1 third parties haven't even had an opportunity to say anything about it. That's the first  
2 thing. But it's equally unsatisfactory the other way, that a subsequent judgment by this  
3 Tribunal is redacted in the sense that it doesn't refer to third party material, which really  
4 isn't confidential. So both sides are potentially unattractive.

5 Let's just go back to possible ways forward. One is Mr Jowell gets his two weeks for  
6 what's obviously going to be a fairly rough sifting, one would imagine, because he  
7 hasn't had the opportunity to discuss with his clients in any detail, then at that point  
8 you're suggesting that you come back to the Tribunal. I mean that could be done  
9 presumably in writing, there's no need for another hearing?

10 **MR PICKFORD:** We're in a CMC also on 28 April, should a hearing be required.

11 **THE CHAIR:** Yes. But I'm anxious that the process shouldn't be delayed until 28 April  
12 necessarily.

13 **MR PICKFORD:** We can seek to expedite it, and one means of doing that may well  
14 be through written submissions. But we say it's important not to prejudge the right  
15 approach.

16 **THE CHAIR:** I'm not going to be in a position to judge -- they're still going to be third  
17 party documents, and I'm not going to have evidence that can tell me whether or not  
18 they're confidential or not from the perspective of the third parties, I just won't. So it's  
19 not so much a question of prejudging anything, it's just a question of how we handle  
20 them at that stage.

21 **MR PICKFORD:** In which case, Sir, I may need to make some submissions on how  
22 courts in the past have dealt with a similar issue, because, for instance, there was  
23 a case before the High Court when the court took it upon itself to say, following  
24 an opinion from the Commission in the Servier case where the Commission said: you  
25 have to remember, court, that there are third party interests here and they haven't had  
26 an opportunity to comment on the form of order, so be careful about that. The

1 approach of Mr Justice Henderson, as he then was, was to say, "Okay, I'm thinking  
2 about third party interests, and here is the nature of the order I'm going to make". The  
3 order was in two parts. He said, firstly, the documents should go into the outer ring,  
4 and then, secondly, it's for the claimant's lawyers to identify which of those documents  
5 on a need to know basis should be put into the -- sorry, did I say go into the outer ring?  
6 I meant to say inner ring. They go into the inner ring, and then it's for the claimant's  
7 lawyers to identify which of those documents need to go into the outer ring. He didn't  
8 require, as part of that, a notification process to all the third parties.

9 There are real practical issues here about whether that can be achieved, because the  
10 documents that we're concerned with here are between eight and 14 years old. They  
11 pertain, as we know, to 570 third parties. It's quite possible, indeed it's very likely, that  
12 a large number of those third parties will be difficult to contact. We don't know the  
13 identities of some of them, some of them have said we can't know. So that's a tranche,  
14 to begin with, that's going to be hard for us to deal with.

15 Then supposing we go to the Commission and say, "Please tell us the identities of the  
16 other parties and give us your contact details", well we can try approaching them. One  
17 can just imagine the process that then ensues, which is that there will be bounce  
18 backs, there will be queries about whether the person who's responding actually is  
19 properly in a position to respond, whether indeed anyone ever responds. One can  
20 see that there's going to be a very substantial rate of attrition, even if we try.

21 **THE CHAIR:** It may be complicated. I don't have the documents before me. They  
22 may be well established companies with head offices one can write to immediately.  
23 The ones that disappeared, given the nature of the documents, one may be able to  
24 form a view that actually it's very unlikely, particularly if the company doesn't exist  
25 anymore, that there's anything that needs a particular level of protection. But I'm  
26 extremely sensitive to Mr Jowell's submission that he wants to get on with this.

1 **MR PICKFORD:** Absolutely.

2 **THE CHAIR:** I want to avoid having to line up unnecessary hearings or delay until  
3 28 April if we can at all avoid that. So what I suggest ... I think I heard that. So you're  
4 saying --

5 **MR PICKFORD:** For the record, we have four weeks to give disclosure. Two weeks  
6 after that will take us beyond 28 April in any event.

7 **THE CHAIR:** Right, I see.

8 **MR PICKFORD:** So I think we are going to have to be pragmatic about quite how long  
9 it's going to take.

10 **THE CHAIR:** Yes.

11 **MR PICKFORD:** My point about the complications, Sir, is not that I'm necessarily,  
12 should we have a further hearing to discuss this, going to come back and say this  
13 could not possibly be done. But, in my submission, the right approach, if such  
14 an obligation is going to be imposed, is that there should be a draft order, from the  
15 party proposing it, setting out in more concrete terms what precisely is required. If  
16 there's going to be an order to which Google is subject, which is going to be very  
17 difficult to comply with, we will want to make representations about the precise form of  
18 that order. It's not really satisfactory to just be bounced into that right now. We don't  
19 even have a draft order to consider in relation to the means by which we will be  
20 required to comply.

21 **THE CHAIR:** There is a draft order, but I've raised the concern, I don't want to blame  
22 Kelkoo --

23 **MR PICKFORD:** No, and when I say it's not satisfactory, I'm not blaming Kelkoo,  
24 because we are where we are. It's that it wouldn't be nonetheless appropriate to try  
25 and make an order now without at least coming to court first with a draft order that can  
26 be considered, there can be exchanges between the parties' solicitors, where they

1 point out issues and difficulties.

2 I would note, Sir, that it's telling that Mr Jowell's enthusiasm for notification was,  
3 I would suggest, diminished, to say the least, when it was suggested that Kelkoo might  
4 like to take on the burden of dealing with this issue rather than Google. So --

5 **THE CHAIR:** I'm really not attracted to -- this is a pragmatic problem which is not the  
6 fault of either of the parties, and I do not think the burden falls on either of the parties  
7 particularly. I'm really not attracted by that sort of submission.

8 **MR PICKFORD:** My point, Sir, is simply that it's obviously going to be -- if it's required,  
9 it's going to be ultimately a difficult job, and it's important to think through first precisely  
10 what obligation is imposed on Google, because it would be wrong for this court to  
11 impose on Google an unworkable requirement.

12 **THE CHAIR:** Of course, yes.

13 **MR PICKFORD:** The best way of achieving that is for there to be an exchange of draft  
14 orders first, so that we can hammer out the details of what would be appropriate or not  
15 appropriate, and then we can come back to the court and we can ask the Tribunal to  
16 either endorse something that's by consent, or we can argue about the details. But  
17 my point is we can't really on the hoof, today, make the order and the terms of the  
18 order that actually impose the obligation on Google. That would be unfair.

19 **THE CHAIR:** When are you getting the documents to Mr Jowell? This has been  
20 delayed because of me, not because of anyone else. The order would have been  
21 made a couple of weeks ago, I think.

22 **MR PICKFORD:** It could be four weeks from today.

23 **MR JOWELL:** We were wondering whether it might be at least possible for the third  
24 party documents to come to us rather sooner than the four weeks.

25 **THE CHAIR:** I agree, Mr Jowell. What I'd like to do is have a timetable whereby, by  
26 the time we come to the next hearing, Mr Jowell has had at least two weeks

1 to -- I mean really there ought to be ideally three weeks between, so he can have  
2 two weeks for sifting, a week for communicating his position to you, and for you  
3 forming a view. So that would mean, working back from the 28th, does anyone have  
4 a ...

5 **MR PICKFORD:** That would be by 7 April I think.

6 **THE CHAIR:** 7 April. Could the third party documents go to Kelkoo by 7 April?

7 **MR PICKFORD:** Which I think is probably Good Friday, or around there. Could I just  
8 take instructions?

9 **THE CHAIR:** Yes, of course.

10 **(Pause).**

11 **MR PICKFORD:** I think what would be required on that timetable is that we do it within  
12 two weeks. The process is not being undertaken by those instructing me, it's by  
13 Google's e-discovery, I don't know whether it's internal or whether ... they have  
14 a mixture of internal and external e-discovery. They're not here giving me instructions  
15 on it at the moment.

16 **THE CHAIR:** No.

17 **MR PICKFORD:** But we would imagine that it would be possible to do it within  
18 two weeks. It might be that, if there is going to be such an order, there would need to  
19 be express liberty to apply. If they say, "No, it can't be done", we'd have to come back.

20 **THE CHAIR:** Understood. If we can resolve matters on the 28th it would just save  
21 another hearing for everybody.

22 Mr Jowell, does that sort of timetable ... ?

23 **MR JOWELL:** I don't know if it would be possible to get all of the documents in by the  
24 7th, that would be even better.

25 **MR PICKFORD:** Yes, that's what we would propose to do. That would be far easier  
26 for us, because we wouldn't have to parse them to get them into two separate



1 categories. We were proposing to provide the entire file.

2 **MR JOWELL:** They will have to be identified, because some will be inner ring and the  
3 remainder will be outer ring.

4 **(Pause).**

5 **MR PICKFORD:** Yes. It's correct that there will be identifiable as between those that  
6 go into the inner ring and those that go into the outer ring. However, there are Google  
7 documents going into the inner ring too.

8 **THE CHAIR:** How many Google documents are going to be in the inner ring?

9 **MR PICKFORD:** I'm afraid I don't know the answer to that.

10 **THE CHAIR:** But you presumably know which the third party documents are, because  
11 you very helpfully gave me the number and the number of third parties, so it must be  
12 possible ...

13 **MR PICKFORD:** That derives from information that we were given by the Commission  
14 at the time we received access to the file. What I'm not sure about, and I'm not sure  
15 that those alongside me can give me instructions on that now, is the extent to which  
16 that translates into the e-discovery database.

17 **THE CHAIR:** I understand.

18 **MR PICKFORD:** And there's obviously a matching issue there.

19 **MR JOWELL:** I think that will need to be clear to us, because otherwise we won't be  
20 able to know which documents to review, and would therefore not be able to do it  
21 within two weeks, I imagine. So if they can't, when they come --

22 **THE CHAIR:** I would be inclined to make an order that it's within two weeks, and that  
23 you will identify the third party documents, but you do have liberty to apply in the event  
24 that that can't be done in that time, but obviously there will need to be a substantive  
25 reason as opposed to just some hand waving.

26 **MR PICKFORD:** That's understood, Sir. Given that we're aiming at 28 April, I think

1 pragmatically we have to accept that.

2 **THE CHAIR:** But I think Kelkoo needs to know which the third party documents are,  
3 otherwise they have to sift potentially up to 40,000-odd documents, because we don't  
4 know how many Google documents are in the inner ring.

5 **MR PICKFORD:** My instructions are it's not going to be anywhere near that, but we  
6 understand.

7 **THE CHAIR:** Okay. I imagine you'll be able to see some. If there's a problem,  
8 obviously you can come back.

9 **MR PICKFORD:** Can I again just take instructions just to check that I'm not signing  
10 away our ...

11 **THE CHAIR:** Yes.

12 **(Pause).**

13 **MR PICKFORD:** There's nothing further, thank you.

14 **MR JOWELL:** One thing I should mention is that unfortunately on the 28th I'm  
15 probably not going to be able to attend, because I'm scheduled in the Court of Appeal  
16 on that date. I obviously intend no discourtesy, but I'm sure that someone else will be  
17 able to be here.

18 **THE CHAIR:** I'll just give a short judgment, unless there was anything else?

19 **MR JOWELL:** No, Sir.

20 **Ruling**

21 **THE CHAIR:** This is a claim by the claimants, whom I shall refer to as Kelkoo, against  
22 the defendants, whom I shall refer to as Google, for abuse of dominant position.

23 Broadly speaking, the allegation relates to the demoting and disadvantaging of  
24 competing comparison shopping engines. It is said that Google is promoting its own  
25 comparison shopping engine and making it prohibitively expensive for competing  
26 comparison shopping sites to gain access to the advertising space. It is also

1 complained that Google makes the conclusion of contracts with it for the provision of  
2 advertising services subject to exclusivity provisions, which preclude online publishers  
3 from contracting with competing services.

4 The hearing today concerns the terms of a disclosure order, which had been agreed  
5 between the parties. The Tribunal prompted this hearing, because the order  
6 contemplates disclosure by Google to Kelkoo of third party documents from the  
7 pre-decision European Commission file. The intention to provide such disclosure and  
8 terms of that disclosure were quite properly communicated by Herbert Smith Freehills  
9 to the Commission by letter on 22 February 2023. The Commission wrote back not  
10 objecting, but in its letter said that the CAT therefore bears full responsibility as to the  
11 protection of any confidential information in relation to the documents to be disclosed.

12 It has been pointed out to me that there is a further category of third party documents  
13 that were provided to the Commission which are referred to as inaccessible third party  
14 documents, which are more sensitive than those which it is proposed are disclosed.

15 I accept that there is no particular reason to believe the disclosable documents are  
16 commercially sensitive, or at least are highly commercially sensitive. Nevertheless,  
17 I do not know that, and it is appropriate that the relevant third parties have the  
18 opportunity to make submissions on the point, should they wish to, before documents  
19 are deployed or made available more broadly.

20 It has been pointed out to me that in another case, Infederation v Google, an order  
21 was made which may have resulted in these documents already having been  
22 disclosed to a third party under conditions of confidence, the third party being the  
23 claimant in that case. However, that does not mean that they are no longer confidential  
24 documents and do not need to be dealt with appropriately in the circumstances of this  
25 case.

26 A difficulty arises in that there are 4,950 documents from 570 third parties, and that it

1 | may be burdensome to contact them all, and may even not be possible to contact them  
2 | all. I am not unsympathetic to that submission, but I do not believe that it is an answer  
3 | to the fact that third party interests should be protected, or at least that third parties  
4 | should have an opportunity to come to this Tribunal and express their concerns.  
5 | I cannot rule out that these documents contain highly sensitive material.  
6 | Therefore, I am going to order that these documents be disclosed to external legal  
7 | advisers only at this stage -- I will come back to whether they should also go to named  
8 | experts -- on the terms -- and I will come back to this -- broadly of the order of  
9 | 8 July 2021. This will enable Kelkoo to form a view as to which documents it may wish  
10 | to deploy, and then further directions can be considered at the CMC on 28 April.  
11 | Disclosure of documents is to take place within 14 days. There is a general disclosure  
12 | order, but the third party documents should be identified from within that more general  
13 | disclosure that has been given.  
14 | I have been told that it has not been possible for Google to take full instructions on  
15 | whether those dates are workable at the moment, and it therefore will have liberty to  
16 | apply promptly if there are reasons why it cannot comply with that sort of timetable.  
17 | On the return date on 28 April, I would expect the parties to have considered the terms  
18 | upon which the subset of documents -- that is, the sifted documents that Kelkoo  
19 | believes it may wish to rely upon going forward -- will be protected going forward,  
20 | which obviously may depend on the documents. The view may be taken that some  
21 | do not require any confidentiality protection, alternatively that they should go into the  
22 | outer confidentiality ring, or alternatively to that, that it may be that they need to stay  
23 | in the inner confidentiality ring. So I would expect the parties to have broadly  
24 | considered that insofar as they are able to do in the time available.  
25 | I would also expect the parties to have discussed how communication to third parties  
26 | will take place with respect to that subset, and I would invite Google to have done

1 some thinking about how these people can be contacted. There is no reason why  
2 Kelkoo should not be doing the same, and also be considering how these third parties  
3 may be contacted, so that we are in a position to come up with a speedy and  
4 practicable solution on 28 April.

5 I will hear further argument on the 28th, but I think it is likely, insofar as any documents  
6 are potentially sensitive, that I will require an opportunity for third parties to be heard.

7 The parties should not work on the basis that these documents are going to go into  
8 an outer confidentiality ring without third parties having an opportunity to express their  
9 views first.

10 I don't know if that makes sense, and whether there is any further elaboration or  
11 qualification required at this stage?

12 **MR PICKFORD:** There's just one point, Sir, that occurs to me, which is that we don't  
13 currently have an 'external lawyers only' confidentiality ring. We have two rings. The  
14 inner ring has within it external lawyers, also some experts, and also in-house counsel.

15 **THE CHAIR:** Yes, I know. I need to hear Mr Jowell on the positions you need. So  
16 we have external lawyers. Do you need other people involved?

17 **MR JOWELL:** We do think, really, that the inclusion of the two in-house general  
18 counsel and one other counsel from Kelkoo is going to really assist in making this  
19 a more meaningful sifting process, because what external lawyers will be able to make  
20 of these may be ...

21 **THE CHAIR:** And they are not UK solicitors?

22 **MR JOWELL:** They are UK solicitors.

23 **THE CHAIR:** They are UK solicitors, so they'll be bound by obligations to the court?

24 **MR JOWELL:** They will indeed.

25 **THE CHAIR:** I have no objection to that. Do you?

26 **MR PICKFORD:** We have no objection. It was really a mechanical point that I raised,

1 simply because obviously the disclosure has to go into an established confidentiality  
2 ring, that's the way disclosure has happened so far, and my concern was just to make  
3 it work. So we're very happy for it to go into the inner ring, that would be the easiest  
4 way of dealing with it. Otherwise we would have to establish --

5 **THE CHAIR:** Remind me, who is in the inner ring?

6 **MR PICKFORD:** So it's external lawyers, it's three I think named in-house counsel  
7 from Kelkoo, and then it's also some of the experts who are instructed.

8 **THE CHAIR:** And again, the third in-house counsel is also a solicitor, is that right?

9 **MR PICKFORD:** If it's helpful, Sir, it's page 45 of the bundle, tab 13, that I think  
10 contains the current list.

11 **THE CHAIR:** They obviously just need to understand what their obligations are in  
12 respect of this order.

13 **MR JOWELL:** If the court has no objections, then we would obviously be grateful if  
14 we could have everybody in there, and they're all well aware of their obligations to the  
15 court.

16 **THE CHAIR:** Very good.

17 **MR JOWELL:** There is one thing, if we are, as it were, using the --

18 **THE CHAIR:** There's going to be no presumption that the burden then falls on you to  
19 move it to the outer ring.

20 **MR JOWELL:** No, so in other words paragraph 5, which is on paragraph 37 of the  
21 bundle, will be disapplied for these purposes. That's the paragraph that requires us to  
22 specify for each document why it's reasonable and necessary for the document to be  
23 respecified.

24 **THE CHAIR:** Yes.

25 **MR JOWELL:** So that will be disapplied.

26 **THE CHAIR:** Yes.

1 **MR JOWELL:** We're grateful for that clarification.

2 **THE CHAIR:** Anything else? Will somebody draw up an order?

3 **MR PICKFORD:** Nothing further from us, Sir, thank you.

4 **MR JOWELL:** Thank you.

5 **THE CHAIR:** Thank you. I wanted at least a short CMC on 28 April just so that  
6 I understand where the case is going in general terms, so we can obviously pick this  
7 up then. And costs in the case.

8 **MR JOWELL:** I think there have been some communications with the Tribunal about  
9 scheduling, if you like, a substantive CMC in possibly late July, but I think we will wait  
10 to hear from the Tribunal.

11 **THE CHAIR:** Fine.

12 **(11.20 am)**

13 **(The hearing concluded)**

14