IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1424/5/7/21
1589/5/7/23
1596/5/7/23
1636/5/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 26th March 2024

Before:

Justin Turner KC

The Honourable Mr Justice Peter Roth

(Sitting as a Tribunal in England and Wales)

BETWEEN:

KELKOO.COM (UK) LTD AND OTHERS
INFEDERATION LTD
WHITEWATER CAPITAL LTD
CONNEXITY UK LTD AND OTHERS

Claimants

v

GOOGLE UK LTD AND OTHERS

Defendants

A P P E A R AN C E S

Daniel Jowell KC and Hugh Whelan (on behalf of Kelkoo.com (UK) Ltd and Others and Whitewater Capital Ltd)

Gerard Rothschild (on behalf of Infederation Ltd)

Aidan Robertson KC (on behalf of Connexity UK Ltd and Others)

Jon Turner KC and Julianne Kerr Morrison (on behalf of Google UK Ltd and others)

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Tuesday, 26 March 2024

(10.30 am)

Housekeeping

MR JUSTICE ROTH: Good morning, everyone.

I start, as always, with a warning. These proceedings, like all proceedings in this Tribunal, are being livestreamed. An official recording of the proceedings is being made. It is strictly prohibited for anyone to make any unauthorised recording or take any visual image of the proceedings and to do so is punishable as a contempt of court.

We note that there are a number of confidential and highly confidential documents in the bundles provided to the court. We know that counsel will be very careful about referring to anything that is confidential, but we've been asked to make an order under rule 102 and been provided with an agreed draft order prohibiting anyone from seeing those documents without the court's permission, although they have been read by the court and we are content to make that order.

Can I just raise at the outset the question of forum. This concerns the Ciao proceedings which were started in the Tribunal and I think it's Mr Jowell, is it, who appears for Ciao?

MR JOWELL: Yes.

MR JUSTICE ROTH: I don't think any order has yet been made regarding the forum.

MR JOWELL: I think that's correct and for our part it clearly would be England and Wales.

MR JUSTICE ROTH: I think that's not opposed by Google, so shall we make that order now?

MR JOWELL: I am grateful --

MR JUSTICE ROTH: The forum is England and Wales.

The other proceedings now before us are all transfers from the High Court of England and Wales. I don't think one needs an order in those circumstances because I think they are treated as commenced in the High Court. If it's necessary, we can make a formal order that they are also in England and Wales, but I don't think that's necessary, but I think it's important, therefore, that all the proceedings before us are in the same forum.

We propose to deal with, as it were, the common matters first and then move on to Foundem's specific disclosure application which doesn't concern the other claimants and, as usual, we will take a break mid-morning at a suitable point for the benefit of the transcribers and indeed the benefit of everyone.

Case Management Conference

MR JUSTICE ROTH: I think the first question is whether these cases should be case managed together, not the same thing, of course, as being necessarily tried together, and I think it is proposed by a number of people that they should be case managed together. We don't see that in itself causes any delay to any trial, we note Foundem's concerns about delay. It seems clearly sensible and it seems to us sensible that the Connexity proceedings, albeit they have just arrived, as it were, in the Tribunal, should also be case managed with the others.

Unless anyone wants to push against that, that is what we propose to direct, so we will make that direction.

We will make clear we are not dealing with any other cases that are not now here, should there be any. Google, I think, says it's not aware of any others, there might anyway now be limitation problems if a case was to be started, but that is hypothetical.

In the light of that, it clearly makes sense, as suggested in a number of the skeleton arguments, that there should be a common confidentiality ring between all the parties and we understand from the skeleton some work is being done drafting that. We have not, I think, got a draft as yet, but is that something we can leave to the parties to get on with in the hope you can agree an order and then produce it to the Tribunal in due course?

Who wants to address that? Mr Jowell?

MR JOWELL: I think, as I understand the position, at least as between ourselves and Google, the terms of the confidentiality ring are themselves now agreed. I don't know about the position of Connexity or Foundem, but I think certainly as between us and Google the terms are agreed, with one slight wrinkle which is that Google wish to apply to have three additional members of their legal team, they say legal team, added to the ring and we wish to just take five days to consider those particular individuals to decide whether we take any objection to their entry to the ring, which is itself a division of the order. But the actual terms of the order itself, other than that, are agreed as between us and Google.

MR JUSTICE ROTH: Foundem has had a confidentiality ring for a long time.

MR JOWELL: Yes, it has. It's now enjoined.

MR JUSTICE ROTH: I am talking about a joint one with Foundem.

MR JOWELL: -- with Foundem.

MR JUSTICE ROTH: And with Ciao.

MR JOWELL: And with Ciao and with Connexity.

MR JUSTICE ROTH: And with Connexity.

MR JOWELL: Others can speak for themselves.

MR JUSTICE ROTH: Yes, Mr Rothschild.

MR ROTHSCHILD: If I can assist, the current draft is in the CMC bundle which has just been updated behind tab 85, I believe. Speaking for Foundem, we are neutral on what Mr Jowell calls the wrinkle and, save for the wrinkle, it's agreed.

MR JUSTICE ROTH: Yes. If you can in due course either sort out the wrinkle or if you can't submit your alternatives and we can deal with that on the papers. Is that the sensible way of proceeding, Mr Turner?

MR TURNER: Yes, it is. The wrinkle, we hope, is not really a wrinkle. These individuals were notified some eleven days ago, but we hope to sort that out expeditiously without troubling you.

MR JUSTICE ROTH: Yes, thank you.

The next point that occurred to us is that two of the claims include claims based on the AdSense decision. I think that's the Kelkoo claim and the Connexity claim and we think, subject to anything anyone says, that it's appropriate to stay those parts of those two claims for the time being. Obviously pending the appeals.

MR JOWELL: We have no objection to that course.

MR JUSTICE ROTH: Yes, Mr Robertson.

MR ROBERTSON: Nor does Connexity. That seems very sensible.

MR TURNER: Nor does Google.

MR JUSTICE ROTH: So we will stay those parts of those two actions that concern the AdSense decision.

Right. The next point that we've noted is pleadings and clearly the claimants wish or may wish to amend following the judgment pending from the Court of Justice and that's understood by everyone, including Google, and the question is what sort of direction we should make for that.

We understand the case was heard by the Grand Chamber of 15 judges in

Luxembourg. On that basis, it seems to us it is almost certain that judgment will come by 6 October when the terms of some of the judges expire. We don't know who the judges are, no one has so far been able to tell us who the 15 judges are who heard the case, but I think 11 judges are leaving the court, it would be extraordinary if none of the 15 were among those 11. So on that basis, we think, a working assumption is that we will have judgment from the Court of Justice by 6 October. It may be only on 6 October, but it will come then.

On that basis, we think we can proceed to consider what directions for amendments should be made. We have a number of sort of proposals. If we take, just for convenience, Google's most recent draft which came with its skeleton, which says all claimants file any amended particulars of claim within six weeks of the judgment, we were minded to suggest within one month of the judgment but excluding the month of August, so that if it did come in late July, we can understand then you would need six weeks, but in fact you'll have until the end of September. But if it comes in October, that you should be able to do it in a month. Mr Jowell.

MR JOWELL: We are certainly content with that.

MR JUSTICE ROTH: Yes, Mr Rothschild.

MR ROTHSCHILD: Likewise for Foundem.

MR ROBERTSON: I am not going to step out of line with that, we are rolling up our sleeves.

MR JUSTICE ROTH: Yes. Within one month of the judgment, excluding the month of August, Google's amended defences, Mr Turner you suggested ten weeks, it seems to us two months should be adequate. They are going to be pretty similar. I know there are four claims, but they are all being amended on the same lines.

MR TURNER: My Lord, they are being amended on the same lines. This is something

on which we did give careful consideration. The difference between two months and ten weeks is not great and we feel that there is a realistic possibility that given the need to consider a disparate group of pleadings and the points that may be raised, ten weeks is a responsible estimate and we would not wish to have to come back and say may we have an extra two weeks, so we would tentatively, therefore, reluctantly ask for ten.

MR JUSTICE ROTH: The reason -- I know two weeks doesn't sound much, but we are, as it were, working towards an end point. Just one moment. No, Mr Turner it will be two months. There is liberty to apply if you find for some reason there's something so extraordinary in the amendments that you need to come back, but you'll have to show good reason. You have a team, you are well resourced, we think two months. Then it's suggested here three weeks for amended replies. That seems reasonable. Everyone content with that?

MR JOWELL: Yes, we have no objection.

MR JUSTICE ROTH: That means that we shall get all our pleadings, amended pleadings, by some time in January, approximately mid-January, if the judgment, of course, should come in early July it will be quicker, but assuming it's in early October. There may be objections to the amendments. One can't anticipate what might happen. If there are to be objections, we think, rather than tying that to a CMC, that that can be done by an online hearing. It may not indeed involve all the claimants, it may be just one party that amendments are objected to and it can be dealt with on a one-hour hearing online and it may not need both chairmen and we should deal with it that way, rather than tying it to a full CMC. Unless, again, if anyone is outraged by that suggestion.

Disclosure should continue between now and October and the amendments. There's

no reason to delay the progress of disclosure and we see it's ongoing in Foundem and it's ongoing, I think, in Kelkoo.

In the Ciao proceedings, is disclosure now proceeding to match what has happened in Kelkoo, that is our understanding, I think, Mr Jowell from --

MR JOWELL: Yes.

MR JUSTICE ROTH: Yes, so you are content with that, with the way that is --

MR JOWELL: Yes.

MR JUSTICE ROTH: So that really leaves Connexity. It's important that Connexity should catch up between now and October and we've not been presented with any draft orders. Can we assume that the sort of disclosure that has been given by Google to Kelkoo and Ciao can similarly be given to Connexity? I think Dr Lawrance sets it out in her witness statement somewhere, summarises it helpfully.

MR TURNER: Yes, my Lord, you can assume that. We will be asking for reciprocal disclosure along the lines that the other claimants have given to Google.

MR JUSTICE ROTH: Yes, that seems sensible. So we can leave you in a sensible way to agree timing and so on, again if you can't agree, you can always submit alternatives, but I think the parties can very sensibly in between now and October, November, you should be able to catch up.

MR ROBERTSON: Yes, again that's what we had in mind by rolling up our sleeves.

MR JUSTICE ROTH: On that basis, we think we should list another CMC and we will come back to quite when that should be. We can see there is one view that it should be after pleadings close, but there may be other reasons to have it a bit earlier. It certainly should not be before everyone has had time to digest the judgment of the Court of Justice, so it's no earlier than Michaelmas of 2024.

MR JOWELL: Yes, I would like to address you on that, but actually I stood up for

a different reason.

MR JUSTICE ROTH: Yes.

MR JOWELL: I should just perhaps slightly qualify the point about Ciao, which is that we may be seeking some equivalent disclosure to Ciao for that which we've already sought for Kelkoo, namely in particular penalty server data from Google that relates to Ciao.

MR JUSTICE ROTH: Yes.

MR JOWELL: So it may be necessary to wrap that up with Connexity's applications.

MR JUSTICE ROTH: Yes. We are not making any rulings on disclosure.

MR JOWELL: No, indeed.

MR JUSTICE ROTH: There are no applications before us.

MR JOWELL: No, I just wanted to make clear --

MR JUSTICE ROTH: You have put down your position.

MR JOWELL: -- not categorically there will be no --

MR JUSTICE ROTH: Again, if there are disputes on disclosure, we can hear, either on the papers or by a short online hearing --

MR JOWELL: Yes, indeed.

MR JUSTICE ROTH: -- any disputed disclosure application over the coming months.

MR JOWELL: Yes. Would it be convenient to hear us on the date for disclosure now or --

MR JUSTICE ROTH: Date for disclosure?

MR JOWELL: Disclosure application now, or do you --

MR JUSTICE ROTH: You have not put one in yet, have you?

MR JOWELL: No, no, but there is the debate you have just mentioned as between when the next CMC should be.

MR JUSTICE ROTH: Well, I think there are two quite distinct things. One is any disclosure application --

MR JOWELL: Yes.

MR JUSTICE ROTH: -- which will have to be dealt with over the following months --

MR JOWELL: Yes.

MR JUSTICE ROTH: -- and which I hope can be dealt with either on the papers or by an online hearing. Quite separately, there's a CMC in all the cases, together, which will come after we've heard the judgment of the Court of Justice.

MR JOWELL: I see. That certainly seems very sensible to us, so as long as we can get on from the disclosure applications in the meantime.

MR JUSTICE ROTH: Yes. That's the idea.

MR JOWELL: Yes.

MR JUSTICE ROTH: You first, in the usual way, you make your requests, you correspond, you see if you can agree what is required and by when, and if you can't agree one or other of those things, then you make an application to the Tribunal and we'll deal with it reasonably promptly --

MR JOWELL: Yes.

MR JUSTICE ROTH: -- in the interim.

MR JOWELL: But it may be sensible, in our respectful submission, to have some deadlines, if you like, by which disclosure applications or at least initial disclosure applications should be made because otherwise there is a possibility of it drifting and then all coming on only in the Michaelmas term.

MR JUSTICE ROTH: Why don't you discuss that with Mr Turner for Google and indeed Mr Robertson who has not had any disclosure yet.

MR JOWELL: We proposed a date of 27 May for Google to make further disclosure

applications which will be many months since they've had our current round.

MR JUSTICE ROTH: This is for Google to apply from you?

MR JOWELL: From us, yes.

MR JUSTICE ROTH: Yes, well I am not sure we need to fix a date, do we, by which it has to be made?

MR JOWELL: Well, what we are keen to do is to try to wrap it up substantially before the summer.

MR JUSTICE ROTH: Yes.

MR JOWELL: Otherwise there is a risk that if it runs in -- if, say, we have the CMC in the Michaelmas term and they only decide on what disclosure they want from us in October or November, and we have a CMC possibly in November or December, we are then -- one then has to go back and provide the disclosure, everything is put back by many months.

MR JUSTICE ROTH: It depends on how the case is going to proceed, I think.

MR JOWELL: That's true.

MR JUSTICE ROTH: So let's deal with that first and come back to this.

We understand from what we've read that there is some dispute between at least some of the parties and Google as to what is binding under the Commission's Google Shopping decision. Is that apprehension correct?

MR TURNER: That's right.

MR JUSTICE ROTH: On that basis, we think there is strong merit in having a preliminary issue on that question. In other words, what is binding, what factual findings or legal conclusions under the Commission decision are binding? Obviously it can't be determined before the Court of Justice judgment because some may be set aside, but if it's a preliminary issue, it's a short issue, it will be few days hearing and

we see no reason why it can't be heard in the spring of next year.

So that is our proposal. We think it is sensible to do it as a preliminary issue because until you know what is binding, you don't know what has to be proved, and what evidence you have to lead. If it turns out something Google says is not binding and the Tribunal decides is binding, you would be wasting your time and money preparing evidence on it. So that is the first stage and we see no reason why we can't fix that now. We need not fix the actual dates now because you'll need to consult calendars, but on the basis that that will be heard in March/April of next year.

MR TURNER: We agree with that. Just one rider, which is that there is also a dispute between the parties not just on what is binding, but on what is actually the content of the Commission decision, whether you will be familiar from the Foundem case the infringement found refers to ranking algorithms by themselves in some cases that you may recall the Panda algorithm.

MR JUSTICE ROTH: Yes.

MR TURNER: There is a dispute as to whether the decision actually covers that behaviour, so that would also conveniently be part of such a hearing.

MR JUSTICE ROTH: Yes, that seems sensible. Mr Rothschild, do you agree with that?

MR ROTHSCHILD: Yes, Foundem's position is the final determination should not be delayed, so if steps were advanced, that is very much consistent with our position.

May I raise a point about disclosure at a convenient juncture?

MR JUSTICE ROTH: No, we'll come back to disclosure. This preliminary issue doesn't need any disclosure.

MR ROTHSCHILD: I was just going back to the last agenda item, if I may.

MR JUSTICE ROTH: We'll come back to disclosure.

Mr Jowell.

MR JOWELL: We don't object, but I put in one proviso which is that we also think there are other preliminary issues or issues going to liability that could usefully be determined as well.

MR JUSTICE ROTH: In March?

MR JOWELL: Not in March 2015 (sic) but at a later date.

MR JUSTICE ROTH: Yes, we are not dealing with that.

MR JOWELL: No, indeed, but I just want to --

MR JUSTICE ROTH: No, we'll come back to that.

MR JOWELL: The fact that one has a preliminary issue of one issue early shouldn't prejudice the progress of those other issues.

MR JUSTICE ROTH: No, it doesn't.

MR JOWELL: Because those are terribly important for the resolution of these disputes.

MR JUSTICE ROTH: No, we understand that.

MR JOWELL: And determining which recitals are binding will get one only so far in this particular case because there are substantial other disputes.

MR JUSTICE ROTH: We appreciate that.

MR JOWELL: Which I --

MR JUSTICE ROTH: We appreciate there are other disputes. We think the scope of the other disputes may be narrowed when we know what is binding.

MR JOWELL: Yes, they may be.

MR JUSTICE ROTH: That's the point. Mr Robertson, are you content?

MR ROBERTSON: That seems eminently sensible to us.

MR JUSTICE ROTH: Thank you. This is obviously common to all the cases and we

trust -- so we will decide that there be such a preliminary issue as to what is binding under the Commission decision and any dispute as to what the Commission decision means and there should then be pleadings or submissions, as it were, on that, clarifying the parties' position and if this is to be heard, how many days would it need? Is it three days or shall we say three to four days?

MR JOWELL: Yes, I think probably four days.

MR TURNER: Three with one in reserve.

MR JUSTICE ROTH: Yes. If we say three to four. So three to four days. I think before Easter of, whenever that is, in 2025. Then we'll need a timetable for submissions which probably might be sequential, I think, first from the claimants and then Google in response. I am not sure we need a reply, but we can think about that. If you would like to consider over the adjournment what is a suitable timetable for those submissions on the decision to come in sort of January, February 2025.

Apart from that, we think -- we've read what you've all said helpfully about other issues and we think, subject to what you all wish to say, that these cases should have a split trial which is not quite the same as a common issues trial, it's a split trial, and that trial one should -- and this is what we are suggesting for you to consider -- be conducted on the assumption that Google is dominant in all relevant markets and then consider on that assumption these questions: whether, on the assumption that Google is dominant in the relevant markets, it abused that dominant position and, if so, in what respects and over what periods. Whether, on the assumption that Google is dominant in the relevant markets, abused that dominant position and, if so, in what respects and over what periods. So to explain, that will therefore cover the additional abuses alleged by some of the claimants, Foundem in particular, which are clearly not part of the Commission decision, and it will cover the periods alleged by, I think, all the claimants

post the Commission decision and by some of the claimants pre-the Commission decision.

So these issues are not quite common to all the claimants, but it's the same issue and we think it can be decided together in one trial.

The second question to be decided in that trial is: What is the appropriate counterfactual? The reason for proposing that these be done in a first trial is that we do not see how quantum issues can really be sensibly addressed until one knows what are the abuses and what is the counterfactual. Otherwise, as I think one of the skeletons points out, the experts are having to deal with innumerable permutations many of which will fall away.

It also means that this trial can get on quicker by not having quantum and not having market definition in, in some cases, quite a number of different national markets which would involve no doubt a lot of evidence. We are not suggesting that disclosure on quantum should be delayed by this, it can continue, but that on that basis we think we should fix a trial date and that it could be in the early part of 2026, January, February 2026. In other words, a year after pleadings, the amended pleadings, have closed. That will enable the cases to be progressed effectively. We note Foundem's concern about the time this is taking. Obviously that's largely due to what's happening in Luxembourg, but still we want to get on with it.

It will then enable, once those matters are clarified, if there are going to be any discussions between the parties, they will be far better informed when they know what the abuses are and what the counterfactual is. Obviously, if Google succeeds on abuses beyond the Commission decision, that narrows the scope and so on.

Now, we appreciate you are going to want a little time to take instructions on those proposals. What we have in mind is that we would rise for 20 minutes so that you can

consult your respective teams as to whether you agree with that and then we would wish to fix a trial date so that everyone gets it in their diaries, think about how long that trial would take. We think on that basis it shouldn't be more than six weeks maximum, but you can think about that as well. The question of the CMC is tied to that because we think the questions of timetabling of evidence, expert evidence and so on, how many experts might be held over to a CMC in November, we can address it now, but you will need to think carefully about expert witnesses and so on.

That is what we'd like you to think about. Unless anyone has any queries, we would then rise and let you take full instructions.

MR ROTHSCHILD: Before you rise may I go back to the point on disclosure --

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: Relating to joint case management. You may have seen in Foundem's draft order the paragraph relating to joint case management suggested as an efficient option the documents disclosed by the defendants to the claimants in one set of these proceedings should be disclosed to the claimants in the other sets of proceedings. Also, that evidence in one set of proceedings stand as evidence in the others. I don't believe that that topic has been addressed and we would suggest that it's a proportionate and efficient way forward in relation to the matters that, Mr Chairman, you discussed with Mr Jowell and others in relation to disclosure in these matters.

MR JUSTICE ROTH: Yes. Well, taking those separately, certainly if there is going to be the trial which will involve all the claimants on the questions that we've just outlined, it will be on the basis that the evidence in one case stands in the other. So that deals with that point.

The preliminary issue trial won't involve any evidence, I think. Or if it does, it should

be non-contentious, straightforward evidence, just explaining some terms perhaps.

As regards disclosure, perhaps Mr Turner can think about that over the adjournment, whether that works. Clearly the disclosure the other way, from claimants to Google, may not necessarily be common because you are competitors so there may be some issues.

MR ROTHSCHILD: Yes, there may be some issues on confidentiality or relevance.

MR JUSTICE ROTH: Yes, but whether what is really being said is that Google gives the same disclosure to everyone, but there is some sort of claimant specific disclosure, I think, from Google. Would you like to consider that while we rise?

MR TURNER: Yes, but I will say briefly now that the joint order on confidentiality arrangements the parties have been considering considers common disclosure with adequate confidentiality arrangements for issues that are truly common so that they are relevant as between all of the parties.

MR JUSTICE ROTH: Yes, so it's sort of --

MR TURNER: It's being addressed.

MR JUSTICE ROTH: Yes, so we don't have to deal with that.

Right, is 20 minutes -- shall we say 11.30 to give you enough time? Will that suit everyone? Very well, 11.30.

(11.04 am)

(A short break)

(11.36 am)

MR JUSTICE ROTH: Yes. Who wants to go first? Mr Rothschild perhaps?

MR ROTHSCHILD: Thank you. We have considered the various matters over the adjournment and I think, taking them in turn, the first is pleadings for the preliminary issue.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: On behalf of Foundem the suggestion is that we should provide a list of what we say are the binding recitals by the same date as the defences are due and then Google would provide their responsive list, agreeing or disagreeing, around the date of our reply.

So we would be working, or they would be working, when we are working on our reply and vice versa. Then we would propose simultaneous exchange of skeleton arguments two weeks before the preliminary issues trial. I have not had an opportunity to discuss with my learned friends their position.

MR JUSTICE ROTH: Yes. There was also a point raised, I think by Mr Turner, as to the interpretation of parts of the decision. It may be --

MR ROTHSCHILD: That might render the preliminary issues hearing significantly more complicated or just slightly more complicated. As to what the Commission decision means beyond the simple question of which recitals are binding, that might need to await the close of pleadings to produce a list. We think that if the preliminary issues hearing is to be listed for three to four days, deciding the binding recitals might fill those three to four days.

MR JUSTICE ROTH: I think we need to cover everything. I would have thought it can be done in that time. As I understand it, without going into great detail, it's sort of when the Commission says penalty, or whatever word it might use, does this refer to just one particular kind of penalty or does it also refer to -- so it's a sort of definitional and I think that can be --

MR ROTHSCHILD: It's not a comprehensive list of every issue, but at least that one and others that will not cause us to overrun the time limit.

MR JUSTICE ROTH: I think one says you produce your list of recitals and, insofar as

necessary, any explanation of what you say it means, that recital means, and then that will perhaps address that point and we'll see where it goes.

So that's on the preliminary issue pleadings.

MR ROTHSCHILD: Yes, what the recital means insofar as that is anticipated to be controversial?

MR JUSTICE ROTH: Yes. Some obviously won't be controversial.

Let me hear from Mr Rothschild, let's hear from him on the other point as well. Then, as regards what one might call trial one, the split trial, what do you want to say about that?

MR ROTHSCHILD: I have a few submissions on whether a split is appropriate or the nature of a split. Foundem has a few concerns. The first concern -- and I hope it's clear from my skeleton argument -- is delay to the ultimate outcome. I am very grateful for the Tribunal having considered how to get matters on quicker, but we are particularly concerned about delay to the ultimate judgment and we say justice delayed is justice denied.

I have cited in my skeleton argument case law on fundamental rights, case law on Article 6. This Tribunal, I am sure, will have seen paragraph 15 of my skeleton argument. The other parties seem less concerned about what we say justice is in this case. For Foundem justice is reparation or compensation for the harm caused to its business.

MR JUSTICE ROTH: If I can interrupt you for a moment. The delay in large part is due to what's happening in Luxembourg. Nobody is suggesting, including Foundem, that this case could be tried before the judgment of the Court of Justice. So the judgment of the Court of Justice, if it comes in October, that is then the point from which this case can proceed. To have a trial in a year is not huge delay, but the real

point that we have concerns is if one were to include market definition over a period because your claim is for periods beyond the period of the decision, that involves a lot more evidence and economic evidence. If we are to include quantum -- and that is a point you've just made about reparation -- then we are looking at quantum on multiple alternatives without even knowing what the counterfactual is, and there's no way, it seems to me, you could get a trial of everything in a year from October. If it went to a full trial of everything, you would be looking at a lot later.

This is actually speeding things up on the basis that if you succeed in showing all the abuses you allege, then there's always, as we know with commercial parties, once matters are clarified the possibility of settlement, you are in a much better position to seek to do that and if Google succeeds, you are not wasting a lot of your funder's money.

MR ROTHSCHILD: We are very grateful for the consideration that the Tribunal has given to that, but we are concerned that what could happen after the stage one trial is then appeals and further delay before any judgments on quantum. So we would urge the Tribunal, at the very least, to indicate that it would be minded, if it found in the claimant's favour, to proceed, regardless of any appeals, to some determination on quantum without waiting for the outcome of those appeals.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: Otherwise there is a risk of another year, two, potentially three of hiatus. We know from bitter experience Google's propensity to appeal. It's their right, but they have a propensity.

That is the first concern.

The second point is that issues that might ordinarily need to be considered, in many cases under quantum and not under liability, will in this unusual case need to be

considered in we say the stage one trial. In particular, the extent to which traffic flows were diverted to Google.

The abuse in this case is, in essence, Google search doing two things: on the one hand demoting links to other CSSs in the list of search results; and on the other, promoting Google's own CSS by prominently placing traffic steering links to Google's CSS near the top of the search page or in special boxes on that page.

I just wish to note that we, Foundem, consider that to assess the nature of the abuse and the extent to which it might be objectively justified, the Tribunal will naturally need to look to quite an extensive degree at how traffic was diverted to Google's CSS. For example, that would be a means of assessing whether Google's traffic diverting conduct during the period covered directly by the decision continued in similar fashion afterwards or exactly when it commenced. So I just wish to flag, to identify, that assessing quantum may not be as complicated as one thinks and those issues of traffic diversion will need to be dealt with at the stage one trial that, Mr Chairman, sir, you are envisaging.

We think that quantum would not need a very lengthy further hearing. It could, therefore, easily be wrapped up, at least quantum in Foundem's case, in that main trial. Broadly, the way we say quantum would be calculated would be to consider the market size of the CSS market, the market share that Foundem would have achieved and what revenues Foundem would have generated from that share. Obviously what costs Foundem would have incurred during potentially really only three periods: the decision period, the pre-decision period and the post-decision period. We don't think that will take more than a few days of additional time.

MR JUSTICE ROTH: They seem quite difficult questions.

MR ROTHSCHILD: Well, they are questions that will need to be grappled with for the

purposes of any settlement of this case. The claims are substantial in value and it would be advantageous for the purposes of ADR, apart from anything else, to expedite the consideration of that aspect, but in my submissions they are not especially complicated.

We are concerned about a split, but if there is to be a split, I really wish to highlight the fact that, diversion of traffic would need to be considered in connection with abuse and I would urge the Tribunal to make some directions or to give some indication that the quantification exercise, the quantum, the damages calculation exercise, would come on reasonably quickly after the stage one trial.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: Those are my submissions on the split.

MR JUSTICE ROTH: Yes. Thank you. Mr Jowell?

MR JOWELL: Yes. On the preliminary, first preliminary view, we are content with the approach and indeed with the timetable that Mr Rothschild has proposed. I think on the timetable, on the basis that the defence comes in mid-January, then that would be sensible and our reply would come in in mid-February. Of course if -- an alternative would simply be to give fixed dates of that nature and then as proposed to have the skeletons two weeks before the hearing.

We would imagine that the Tribunal would find it helpful if the submissions didn't just identify the recitals that we said are binding and that Google said were not binding, but also gave brief reasons for why those recitals were binding which would then be expanded upon in the skeleton arguments. We are in your hands on that.

MR JUSTICE ROTH: Yes.

MR JOWELL: One issue that does arise is whether the question that we've identified in our skeleton argument at paragraph 27(c) would be resolved as part of the first

preliminary issues trial or the second trial. That is the question of whether, for the purposes of identifying the appropriate counterfactual in assessing the quantum of the claimant's claims, the Tribunal is bound to assume that Google would have engaged in neither the promotion nor the demotion elements of the Google Shopping abuse. Because it could be said that that issue flows out of which of the recitals are binding and which are not. So, for example, the Advocate General in her recent opinion in the Court of Justice's appeal in this case has made very clear that in her view the two aspects, the demotion and the promotion aspects, are, as she put it, inextricably interlinked and cannot be undone when considering the effects of the abuse.

Now, that is therefore something that could be said to flow from the bindingness of the recitals or it could be said to be a separate issue that is properly decided along with them as a quasi factual issue of what is the appropriate counterfactual in the second trial.

Again, we are in your hands, but we think there should be some clarity on that so that we know what we are debating when on which occasion.

MR JUSTICE ROTH: Yes.

MR JOWELL: It could be sensibly debated on either occasion, in our respectful submission, it is a pure point of law.

In terms of the preliminary issues -- forgive me, the second trial, the split trial, we respectfully concur with the Tribunal's proposal in its entirety and indeed with a very, if I may say so, pithy summary of the two core issues that have been identified and really couldn't improve upon that and also suggest that the timetable that you proposed is about as quick as it reasonably could be in the circumstances.

We do not concur with Mr Rothschild's proposal that it's necessary or appropriate to go into matters of quantum at this stage, but we do agree with him that of course it's

important that any quantum trial should come on rapidly and we would agree that in principle it shouldn't be delayed by any appeals. Certainly unless those appeals were expedited.

Unless I can assist you further, those are our submissions.

MR JUSTICE ROTH: Yes, thank you. Mr Robertson.

MR ROBERTSON: I just want to say that Connexity endorses Mr Jowell's submissions, in particular we are not attracted to the idea of quantum being tried together with liability and I think actually Mr Rothschild was effectively conceding at the end of his submissions on that point that actually quantum could come on quite quickly after trial one is determined.

MR JUSTICE ROTH: Yes, thank you. Mr Turner.

MR TURNER: My Lord, with your permission, I will address those points and would you also like to hear from me on our view on the timetable you proposed for the joint trial?

MR JUSTICE ROTH: Yes.

MR TURNER: First, taking the point that Mr Rothschild began with, the pleadings for the preliminary issue trial in, let us say, spring next year, we are content with the proposal that skeletons should be exchanged two weeks before the trial. There seems no reason here for a sequential approach.

We don't think that there needs to be a separate process of submissions because the re-pleading process that will occur after the Court of Justice has given judgment, which we are assuming will be by 6 October, will be the occasion when the parties can specify in their pleadings what they say now is binding and what is not. It does not seem efficient to elongate or complicate matters with some extra period for submissions.

So far as the split trial is concerned, we fully agree with the proposal that your Lordship made. We do not agree with Mr Rothschild that a trial on quantum in his case should proceed even while appeals are pending. We do think, we certainly aren't opposing rapid resolution of it, it doesn't make sense for a trial on quantum to go ahead while an appeal that may affect the entire expense and time is still in progress.

So far as the suggestion goes that the joint trial should consider not just what Google should have done in the lawful counterfactual, but more precisely how traffic was diverted in relation to a particular claimant and what the impacts on the particular claimant would have been, one is descending into a level of granularity that we think is far more naturally something that should be dealt with in the causation of loss and quantum trial. I think it should be dealt with in that way.

MR JUSTICE ROTH: I mean, it might depend how the case is put because what I think Mr Rothschild was saying is that to determine whether it's an abuse, to some extent you might need to ask whether it had any effect and therefore one looks at well, did it result in diversion of traffic and it may be, he suggested, it might come into any argument raised by Google on objective justification.

Now, I don't know quite how that will pan out. I don't think we would be ruling on whether it's in or out at this point. It's really -- to the extent that it's relevant to showing that there is an abuse, it comes in. To the extent it's not relevant, certainly one doesn't have to go to, as you put it, the level of granularity of the specific degree to which traffic from each individual claimant was diverted, but one might need to show -- I mean, if Google were, for example, to say "well, this wouldn't have had any effect on these claimants and therefore there's no abuse", there's some law saying that conduct to be an abuse must have some anti-competitive effect, so it could come in. I can see the point that he is making to that extent.

I don't think we'd be ruling on it. Clearly what is not necessary is to say: "this is the amount of traffic that would have gone to Foundem, Kelkoo, Ciao, Connexity". We are not going to be dealing with that.

MR TURNER: No. My Lord, may I say we respectfully agree with what you've said. We would only express caution about quite how far that goes and where one comes up against the question of a specific analysis of particular claimants.

To take the example that you have given, part of Foundem's claim is that one of the major algorithms led to their being given low search rankings without objective justification. So there is a question of principle that the Tribunal will consider whether in Google's operation of its search engine parties can say "well, we were given a low ranking and there should be some objective justification given or else it's abusive behaviour".

At a general level, that is certainly something that one can consider for the first trial. It is a major point of principle. But one shouldn't distort it by saying "well, in this particular case, with this website, one sees that the algorithm that was applied led to it appearing only on the 15th search page", or something of that kind, because that could distort the approach that one gives to the answer to the general question which is suitable for trial one.

But I say no more about it because it's not something where I understand one can draw a precise bright line.

MR JUSTICE ROTH: It may be difficult until one actually saw the final pleadings and indeed the witness evidence. There's always scope for one party or another to say this part of this witness's evidence really should not be admitted at trial one, but I think it's very difficult to lay a -- I think you agree -- clear dividing line, certainly in the abstract.

MR TURNER: Yes, we accept that. But --

MR JUSTICE ROTH: I think we've understood where you are coming from.

MR TURNER: There was one further point Mr Jowell made in relation to the outcome of the preliminary issues trial.

MR JUSTICE ROTH: Yes.

MR TURNER: He pointed out that one of the issues in Europe at the moment for the purpose of the regulatory appeal, the public law competition proceedings, is the counterfactual and the question whether, when Google's abuse is contended to be a combination both of applying ranking algorithms that led to a certain type of website comparison shopping featuring low down and Google placing its own alleged competing service at the top, that this would be removed as an abuse if, say, one was simply to apply the ranking algorithms to the generality of websites, but Google didn't apply that behaviour preferentially to its own service.

Now, one of the issues, as Mr Jowell says, in Europe and which the Advocate General has commented on is whether, for the regulatory proceedings, in determining the counterfactual one should consider both of those together or whether, as Google was contending and is contending there, it would be sufficient to get rid of one of them and then you would have a lawful situation.

Now, Google contends that irrespective of the outcome that may be achieved in Europe, when one turns to the damages proceedings here, it will be the case and we will argue that if you are applying in good faith a ranking algorithm in the interests of consumers that may lead to comparison shopping sites featuring low down in the search pages, that's a lawful counterfactual when one is considering the issue of compensation.

Therefore, we do not wish to be boxed in by the decision that is made in Europe on

that point and for it to be said: "well, that actually will determine the outcome of the damages proceedings before the English -- the Tribunal, the UK Tribunal". But that issue is a matter suitable to be determined in the trial, the joint trial, on damages, the first trial on liability, and it will form part of this Tribunal's consideration of the counterfactual issue.

MR JUSTICE ROTH: Isn't this then really anticipating an argument that may well arise at the preliminary issues trial, namely whether what the Commission, if upheld by the Court of Justice, say is the counterfactual is binding for the purpose of these damages claims. You say it's not binding because it's addressing a different question in some way. I expect the claimants will say it is binding. Well, that will be the argument.

MR TURNER: My Lord, that's right, that will be the argument.

MR JUSTICE ROTH: That will be --

MR TURNER: So far as it was suggested that that's something that naturally falls out --

MR JUSTICE ROTH: I don't think it was.

MR TURNER: In that case --

MR JUSTICE ROTH: I think Mr Jowell's concern was it should be addressed and he just raised the point of when will it be addressed and I would have thought it will be addressed in the preliminary issues trial because if the claimants are saying that what the Commission, if upheld by the court, says is the appropriate counterfactual and the claimants say "well, that's binding on this court", if you say it isn't, that's a question of what's binding through the Commission decision. So it falls within the preliminary issues trial.

MR TURNER: My Lord, we see that.

MR JUSTICE ROTH: Yes.

MR TURNER: The final point -- and this is a major point -- is the proposal for setting down the trial, the joint trial for early 2026. I think that you floated January or February 2026.

MR JUSTICE ROTH: Yes.

MR TURNER: On Google's side, and without any desire for delay, we have war-gamed what the steps required are and we do not believe that that is possible. We would say that, again making assumptions that everything turns out as we hope it will, the judgment from the CJEU is delivered by 6 October, it is far more realistic to look at a trial in June/July 2026. If I may, I will very briefly address you on why.

If it's convenient, if you could open up the skeleton from Kelkoo and Ciao and look at their timetable which led to a January/February listing. On page 16, in letters A to J, just to have that to hand, you can see there the assumptions that they walk through which led to a trial in that window.

MR JUSTICE ROTH: Yes.

MR TURNER: Now if we come back to what we think is the sensible decision of the Tribunal, but we make the assumption that the CJEU delivers its judgment by 6 October, and assume for the moment that that occurs, we then have the process of pleadings. Mr Jowell said a moment ago that that would lead to the reply coming in mid-February and the defence in mid-January 2025.

MR JUSTICE ROTH: No, I don't think that's what he meant. As I understood it, that was on, I thought, the preliminary issue submissions. On the basis that the -- if judgment is on 6 October and I think we said, did we not -- is it one month?

MR TURNER: One month from there.

MR JUSTICE ROTH: Amended pleadings, so that's early November.

MR TURNER: Yes.

MR JUSTICE ROTH: Then two months for -- so it's December, early January.

MR TURNER: Christmas, which is another point that occurred to us.

MR JUSTICE ROTH: Yes, we understand that. We have that in mind. Then -- well, I think it's late January.

MR TURNER: That's right. Yes, that's right. So we are talking about the pleadings closing late January.

MR JUSTICE ROTH: Yes.

MR TURNER: We are envisaging the preliminary issues hearing coming on in the intervening steps, further submissions, apart from the skeletons, let's say March/April 2025. Leave aside for the moment the possibility of an appeal from that, although certainly if an issue as important as the one we've just canvassed is in issue, it's a realistic possibility.

Even leaving that to one side, the importance of this step, with which we wholeheartedly agree, is that it will crystallise what essentially can be treated as binding, what will not, and therefore on what issues evidence will be required for the joint trial.

That may mean that at that point it becomes clear that either a large amount of factual and expert evidence is going to be required on some of these issues or it will not. So it's a very important point and that is why we say that the best time first of all to determine the date for trial would be on that occasion.

But proceeding on the basis that we are looking at a trial date now, which is the most suitable date, the judgment is given after the hearing, so that is in the Tribunal's hands, but let's say perhaps May/June 2025, and we then, as the parties collectively, need to decide on the witness evidence that we are going to be preparing by reference to the outcome of that and when it can be provided.

Now, on Google's side it remains at the moment entirely unclear how many factual witnesses there will be. A fair point has been made that there are a number of disparate points made extending at one end to, you will recall, the procedural abuse alleged by Foundem that Google didn't respond to its complaints clearly enough. There are also different time periods under consideration. The time period at one end following the imposition of the European remedy, where certain people were involved directly in that, and at the other end of the scale going all the way back to the year 2006, behaviours that took place then where you need to find the people who were involved and the reasons for the decisions which they took and then the period in between.

So from Google's side, facing these four different claims, it is quite a significant task. If one considers that the judgment on the preliminary issues trial may --

MR JUSTICE ROTH: Can I interrupt you just one moment? Those aspects, of course, don't depend on the outcome of the preliminary issues trial. It's quite clear the decision does not relate self-evidently to the period before the decision or to the period after the decision. So identifying those witnesses, obtaining statements, you can get on with that now. You don't need the judgment on the preliminary issues trial because no one is going to suggest that the decision covered periods beyond the period stated in the decision.

MR TURNER: My Lord, that's absolutely right for those periods.

MR JUSTICE ROTH: Yes.

MR TURNER: But that is a point in order to show the extent of the --

MR JUSTICE ROTH: No, I realise you have a lot of work, but you've got this year to do that.

MR TURNER: Quite. But in relation to the preliminary issues trial itself and for the

period of the infringement, there again we come back to this point about the ranking algorithms and the allegation of an abuse by demotion without objective justification. These are, in one sense, the major part of the allegations that are made against Google and those will depend, to a significant extent, on the outcome of that.

For those reasons -- and if I return to the thread -- we are assuming that the judgment from this Tribunal comes, let us say, in June 2025, let us abstract from the question of an appeal as well.

MR JUSTICE ROTH: Yes.

MR TURNER: Although it may be prudent to build in that there could be an appeal dealt with as expeditiously as the Court of Appeal would allow. We would therefore say that the factual evidence ought to be timetabled for the end of September. I am leaving aside the August holiday for that. But that gives from, Google's side, which is where the main burden comes, a period which is still tight but certainly far more realistic than envisaging that the witness statements come before the long vacation.

There would need to be reply factual evidence as well, so there will be evidence on the claimant's side to deal with and there will be evidence that we will need to put in on reply. If the reply factual evidence comes in, let us say, mid-October, November, 2025 you are then into the experts' evidence and here, if you look across to the timetable at Kelkoo and Ciao at letter D on that page, you will see there that they are envisaging in this version four different disciplines.

Now, it seems to us that, based on the approach that the Tribunal is envisaging taking the fourth of those, forensic accounting and business valuation almost certainly won't be something required for the joint trial. The others may well so there could be let's say three separate disciplines there.

We may also be facing separate reports, subject to the question of sharing, from three

separately represented claimant groups. So there could be up to nine expert reports on their side, subject to sharing, which we will have to field, and this is something which, even if it is consolidated to some extent, is something that we have to take very seriously.

We also consider that one of the steps that is missing from Kelkoo and Ciao's approach but which is beneficial in this sort of case and needs to be built in, which is the experts having the opportunity to discuss between themselves -- and the economists in particular -- what data sources they will be using, what issues they are going to be covering to avoid the problem of ships passing in the night, and there will need to be reply evidence.

Now, here Kelkoo and Ciao see that there will be three rounds. They say claimants go first, then defendants, then claimants again in a reply. In truth, it may be more efficient, certainly if one takes disciplines such as the economists, for it to be done in two rounds. That may not be the case for all of them. It may be the case that where the claimants are making the running on something like search engine optimisation for that sort of thing that it would be sensible for them to go first and for Google to respond for there to be a reply.

But if one therefore takes that as the issue that one has to grapple with and say that the Tribunal now needs to make a broad brush decision for the purpose of trying to estimate a date, we were talking about reply factual evidence that may come in, let's say, mid-October, beginning of November, the expert evidence, the main reports, we think could not be sooner than the end of February 2026 and reply two months after that, end of April.

That alone leaves, for a trial in June, only an eight-week period during which one has to timetable expert joint meetings and the joint statements, PTR and the skeletons.

Without developing it any further, we think on responsible assumptions we should be considering, if we are going to go down this route, a trial that is envisaged for June or July 2026 and with the caution, the health warning, that there are a number of things that may lead to it needing to be vacated which we would hope to avoid, but what we do not wish to happen is for a trial to be set down with too compressed a timetable which will mean more difficulty, more friction, higher cost and inefficiency; in other words, in that sense more haste, less speed.

My Lord, those are our submissions.

MR JUSTICE ROTH: Yes, thank you. Will you give us just a moment? **(Pause)**

What is going through our minds is this: it is a little difficult to be quite clear about these things at the moment until we see what is decided in the judgment of the Court of Justice. If we were to list a CMC in late November, it may be that we will be much better informed on these various points. We are not, to make it clear, at the moment persuaded that it has to be delayed until the summer of 2026, as Mr Turner has submitted, but it may be that January/February 2026 proves a bit ambitious, but we will have a much clearer understanding when we will have seen the judgment and how that is dealt with.

If we were to list a CMC in, say, mid/late November, we would then wish to direct that one of the steps in Kelkoo's list, namely that the parties exchange the names of the appointed experts, takes place before that CMC and we wish to indicate that we would expect that this is for trial one the claimants should be able to have joint experts.

We really don't see why one needs three experts on search engine optimisation, a discipline, as I seem to recall from an earlier hearing in Foundem where experts are in quite short supply anyway, and similarly for the other two of the four disciplines that are mentioned. It seems clear to us, as Mr Turner said, the accounting business

valuation doesn't come into trial one.

One is left with comparison shopping services, search engine optimisation and maybe competition economics. But you would come to that CMC with the position as to joint experts or, if you seek to persuade us no, you each need an individual expert, you'll have to persuade us of that. That will deal with one of the points raised by Mr Turner about the number of expert reports.

We can then think more clearly about what is feasible in a timetable for what will be a trial clearly in 2026, but whether it should be earlier in the year or just before the summer, as Mr Turner indicated, we will also have a clearer idea of quite how long, what is the appropriate length of that trial and whether it's four weeks or it needs more than four weeks. I mentioned earlier six weeks, slightly plucking figures out of the air, but you've only just digested the proposal of what will be in that trial. That, I think, we will come back to, Mr Rothschild, but I think we can say that we are not going to have a trial with quantum in it. It will be the trial to which I think the other claimants and Google have agreed. So that's the scope of the trial. Then you can think more clearly about the timetable for evidence and experts' reports.

So we are suggesting that not really to kick the can down the road, but because we think we can have a more informed discussion about that in November and it shouldn't prejudice the timetable. We would say and emphasise that while there may be some areas of evidence that at the moment Google is not clear whether it will have to address them, there are other areas where there can be no doubt that Google is going to have to address them. Apart from anything else, there are a series of allegations by Foundem which are not part of the decision which are stand-alone, so those are clearly not going to be governed by binding recitals, so Google can start preparing its evidence on that, as can Foundem.

There is the question of abuse prior to the date covered by the decision in 2008. That is not going to be the subject of binding recitals, so again, all parties can start preparing their evidence on that. We think quite a bit can be done well in advance of any judgment on the preliminary issues trial.

That's our immediate reaction and we think that we are not going to risk any slippage in the timetable if we say that we revisit this when you've all had a chance to think about it both in more detail than you could this morning and with the benefit of the judgment of the Court of Justice. Mr Jowell.

MR JOWELL: We certainly understand where the Tribunal is coming from. Our one concern is that there should be certainty that there will be a trial in the first half of 2026 and not even later, and in particular we understand that there are some -- from some other cases, that there have been indications that the CAT's availability to hear cases may be quite constrained even as far away as 2026. Of course, if we delay until November, the position may be worse and therefore if there is some solution to that issue, then we would be very grateful.

MR JUSTICE ROTH: I think Mr Turner was -- sorry to interrupt you -- Mr Turner was, even on his proposal, accepting it could be tried by July 2026.

MR JOWELL: Yes, he was.

MR JUSTICE ROTH: As far as the CAT's constraints are concerned, I mean, it's preferable if it can be heard in this building, but there has been a CAT trial held in the Rolls Building and, if necessary, I do not think that availability of the two courtrooms in Salisbury Square House should be a reason for putting this trial back. I make that very clear, it seems to me. If everyone is ready to have a trial, then we must find a courtroom where it can be held.

MR JOWELL: On that basis, we are content with that proposal.

MR JUSTICE ROTH: That would suggest, therefore, we have the CMC in November even though the pleadings will not have closed, but we then address this and we will direct that the parties exchange. First of all, you consider whether you want and can proceed with joint experts, as we would expect, that there won't be evidence of forensic accounting or business evaluation in that trial and you exchange the names of experts as in paragraph 48(d) of your proposal by, if we say, what is a suitable date for that, the end of September?

A CMC, one day, in mid to late November. The trial in any event by July 2026.

MR JOWELL: I am grateful.

MR JUSTICE ROTH: That leaves the question -- yes, just one moment. **(Pause)**

On the preliminary issues trial, it may be that the pleadings -- the amended pleadings -- cover this, but we do think it would be of assistance to have self-contained submissions on the binding recitals and their interpretation and so, Mr Turner, we are not with you on that and we think that the timetable that was suggested, I think by Mr Rothschild and concurred by the others, for those submissions is appropriate.

The question of whether the pleadings should include reasons. I am not sure that is really necessary because, first of all, some of them will be agreed and that will be for the skeletons where they are not agreed, so we don't think we need reasons in those submissions. There will be a list of recitals or part of recitals. I mean, if it's not obvious, then of course you can put in an explanation as to why and, equally, if it's not obvious, what the recital means, you will say, and when the decision uses the term, whatever it is algorithm, "this refers to Panda and algorithm A and X" or "it refers only to algorithm A" or whatever.

I mean, I think there's an element of common sense about how you do it, but I don't think we need a reason for each recital. They need not be very long documents, but

I think it would be quite helpful to have them separately from what are long pleadings.

MR TURNER: My Lord, may I just make one observation before we move on?

MR JUSTICE ROTH: Yes.

MR TURNER: Just in case it gets lost. On the timetable, you have made a ruling on the need for the separate submissions and obviously we accept that. But it's been drawn to my attention in terms of the detail of it, it appears to be unbalanced and I didn't address you on that.

MR JUSTICE ROTH: Yes.

MR TURNER: I just want to ensure that's addressed before we move on. The proposal appeared to be that they in the period of eight weeks following the judgment --

MR JUSTICE ROTH: It comes with the defence.

MR TURNER: With the recitals, and then we get three weeks to respond to their three different salvos.

MR JUSTICE ROTH: Yes.

MR TURNER: So essentially that does impose on us, if that's the sequence.

MR JUSTICE ROTH: But you can be working on it at the same time as they do. It's not like a pleading where you have to deal with allegations -- you will be reading the decision. I am sure Google will be crawling over the judgment and you can work out what you think are the binding recitals.

They could, frankly, be simultaneous. The only reason for saying you come afterwards is that it may be easier if you just agree with things and say where you don't agree. Indeed, Mr Turner raises the valuable point, if the claimants can do it jointly, that would be helpful.

MR TURNER: That would help solve things.

MR JOWELL: Yes, of course we will endeavour to cooperate --

MR JUSTICE ROTH: Yes.

MR JOWELL: -- as on the experts, but we cannot guarantee it.

MR JUSTICE ROTH: We won't direct that you do, but I don't see why you need a lengthy time to respond because, as I say, it's something you will be doing at the same time. It's not --

MR TURNER: No.

MR JUSTICE ROTH: -- really responsive in that sense.

MR TURNER: I see that. We had thought, because of the sequence, that we were going to be faced with documents in relation to each of which we'd need to give a response and this was deliberately designed on that basis.

MR JUSTICE ROTH: No, I don't think so. You will read the decision in the light of the judgment and decide what is binding and what isn't and then, as it were, cross-check it against what you receive from the claimants and say "we agree with the following, we disagree with these".

MR TURNER: We accept that.

MR JUSTICE ROTH: So I think three weeks is adequate.

MR JOWELL: Just to be absolutely clear, I understood from your exchange with Mr Turner that that first preliminary issues hearing will deal with this issue of the counterfactual.

MR JUSTICE ROTH: If it's been determined, you say, by the decision.

MR JOWELL: Yes.

MR JUSTICE ROTH: Then, yes.

MR JOWELL: Yes.

MR JUSTICE ROTH: We want to know what are the matters that this Tribunal is bound by.

MR JOWELL: Bound by.

MR JUSTICE ROTH: That's the question.

MR JOWELL: That makes sense.

MR JUSTICE ROTH: Yes. As Mr Turner validly points out, I think it should be a joint submission from the claimants. If there are disagreements between you, then you can highlight Foundem says recital 218 is binding, but Kelkoo and Ciao and Connexity do not agree with that.

MR JOWELL: We can certainly do that.

MR JUSTICE ROTH: Yes, so we have one document from the claimants and we'll have one document from Google and that will make Google's task easier as well.

MR JOWELL: Absolutely.

MR JUSTICE ROTH: Yes. Then on the preliminary issues trial, is there anything else we need to decide today, or can we proceed on the basis that then the Tribunal will get in touch with the parties about finding a suitable four days in March or April when that can be listed?

MR TURNER: Yes.

MR JUSTICE ROTH: I thinkobviously a third member has to be appointed.

Then on the trial one, we've agreed its scope and we've agreed that again we can proceed that the Tribunal will contact the parties about listing a CMC in mid to late November and that the parties will exchange the names of experts by 30 September, if that is a weekday, or the last weekday in September, and the defendants will endeavour to agree joint experts on the three disciplines suggested.

Very good. Just, then, I think a couple of minor things. Can I just ask you -- no doubt it's my mistake, Mr Jowell -- but in Kelkoo, I was just a bit puzzled on one thing. If you can help me with Kelkoo in your particulars of claim.

MR JOWELL: Yes.

MR JUSTICE ROTH: If you are able to turn that up. I am looking at the amended particulars of claim. There are some confidential passages, but it doesn't concern them. It's in my bundle at page 78, it's paragraph 3B, capital B of your pleading.

MR JOWELL: Yes.

MR JUSTICE ROTH: And 3B under subparagraph (a) says:

"Since at least 2006, Google deliberately demoted..."

And similarly paragraph 95A on page 127 in the bundle, 52 in the document, says:

"From at least 2006 onwards, Google abused its dominance."

Yes.

But paragraph 49A says:

"Between 2002 and ... Google facilitated and so through ... engaging in the exclusionary strategy".

MR JOWELL: Yes.

MR JUSTICE ROTH: I was just not clear, are you alleging abuse from 2002, which doesn't seem to be what the other paragraphs are saying, or is that just background and is your allegation that it starts in 2006?

MR JOWELL: Well, we have used the formulation of at least 2006 which, as you will know, is commonly used in competition claims where there is an asymmetry of information between the claimant and the defendant.

MR JUSTICE ROTH: Yes.

MR JOWELL: And so we effectively reserve our position to plead a longer prior period of abuse pending disclosure, pending full disclosure. Since we haven't had full disclosure yet, we reserve our position.

What we are saying in paragraph 49A is that we know that in that prior period from

2002 Google prepared, facilitated and prepared, for the promotion of its own comparative shopping service by engaging in the strategy and later developing the OneBox. So it's certainly possible that the abuse started before 2006.

MR JUSTICE ROTH: You are saying they engaged --

MR JOWELL: Yes.

MR JUSTICE ROTH: As I read it, you say from between 2002 they engaged in the exclusionary strategy.

MR JOWELL: Yes. Well, we say they prepared -- what -- it's qualified by the words "prepared for the promotion and commercial success". It's fair to say we don't have, if you like, a definitive pleading from 2002, but nor do we have a definitive pleading from 2006 because we've left it open. We are certainly saying that from 2006, but we are leaving open whether it may be earlier pending disclosure.

MR JUSTICE ROTH: I see.

MR JOWELL: That is the position. Obviously, when disclosure is completed by Google and indeed the Tribunal will expect us to go map on precisely when, whether it was earlier than 2006 or not, but at the current state of play we can't say.

MR JUSTICE ROTH: But you --

MR JOWELL: We certainly say that we were preparing for it.

MR JUSTICE ROTH: You will be able to say it by the time you do your amendments in November.

MR JOWELL: That depends if we get the disclosure.

MR JUSTICE ROTH: Well, I mean, it's rather important that one knows.

MR JOWELL: No, no, absolutely, it is important, but it does, as I say, depend --

MR JUSTICE ROTH: Well, it's really essential.

MR JOWELL: Yes, but that's --

MR JUSTICE ROTH: First draft.

MR JOWELL: That's exactly why we were very keen to try to get our disclosure application before the summer.

MR JUSTICE ROTH: Yes.

MR JOWELL: So that we can then get all that material.

MR JUSTICE ROTH: Yes, and that's something we are not being asked to make any orders about today.

MR JOWELL: No, but as you very helpfully indicated, you would be open to applications being made.

MR JUSTICE ROTH: Yes, disclosure certainly continues.

MR JOWELL: Yes.

MR JUSTICE ROTH: And disclosure on quantum can also continue, although we are going to address some of that in Foundem's application.

MR JOWELL: Yes.

MR JUSTICE ROTH: Yes, just one moment. **(Pause)**

Yes, the one other point that was raised was about the progress of these claims after the first trial. We are not going to address that now, we are not going to decide whether we continue with a trial on quantum pending appeals or whether we don't. I think we will deal with that as and when we give judgment on trial one or at least when we hear trial one, but we are not going to determine that at this point. We can see there are arguments both ways and it might well depend on what happens in trial one.

MR TURNER: My Lord, if I may very briefly, you made this point lightly, but I need to emphasise it.

MR JUSTICE ROTH: Yes.

MR TURNER: You rightly drew attention to that tension between paragraphs in

Kelkoo's pleading. As you indicated, it is, in practical terms, extremely important to know when it is they are alleging this abuse began from. I understand that at a previous CMC, which Mr Turner presided over, issues of disclosure were canvassed, including the date by which disclosure by Google should be started.

If you go back to 2002 now we are taking is the case that they are making, but that marks the start point for practical exercises and investigations with witnesses that we (inaudible due to audio distortion).

MR JUSTICE ROTH: Yes, I think it's clear they are not alleging anything earlier than 2002. As I understand it, they are leaving open at the moment whether they are alleging abuse between 2002 and 2006; is that right --

MR JOWELL: That's a very fair summary, yes.

MR JUSTICE ROTH: Yes. Then unless -- yes, Mr Rothschild.

MR ROTHSCHILD: I have a short point on sharing of disclosure between the cases.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: I referred earlier to paragraph 1 of Foundem's draft order, the provision of documents disclosed by the defendants to the claimants in one set of proceedings should be disclosed to the claimants in other set of proceedings.

Mr Turner suggested this was covered by the confidentiality order. My understanding is that the confidentiality order being agreed between the parties provides that such disclosure may be shared, but it doesn't require it to be shared.

MR JUSTICE ROTH: Sorry, you are in --

MR ROTHSCHILD: Page 12 of the CMC bundle, paragraph 1.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: A point I mentioned earlier.

MR JUSTICE ROTH: The evidence --

MR ROTHSCHILD: The final sentence.

MR JUSTICE ROTH: Documents disclosed to the claimants in one set of proceedings shall be disclosed to the claimants in the other set of proceedings.

MR ROTHSCHILD: I suggest that that would be efficient and Mr Turner, before the very short break, suggested that this was dealt with in the confidentiality order. I am instructed it isn't -- the confidentiality order simply permits such sharing, but it doesn't require such sharing and I would request an order -- hopefully it can be agreed -- in the terms of that sentence.

MR JUSTICE ROTH: Yes. We haven't got the latest version of the draft confidentiality order.

MR ROTHSCHILD: I believe it's been inserted into your bundles very recently, a few minutes before the hearing started.

MR JUSTICE ROTH: Well, we certainly haven't seen it.

MR ROTHSCHILD: It may be at the end of your second CMC bundle.

MR JUSTICE ROTH: Ah, yes. Right at the end, as you say.

MR ROTHSCHILD: I believe a version is behind tab 79, page 1288.

MR JUSTICE ROTH: We have it behind tab 85, I think. It's just been put in, I think.

MR ROTHSCHILD: Ah, yes, yes. At the very end.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: I can't put my finger on a provision that's identical to the sentence that I am asking the Tribunal to order. I hope -- maybe my learned friend, Mr Turner, should say his position on whether he's content for that to go into the directions order.

MR JUSTICE ROTH: There is something ... well, there is paragraph 1(a) defines common disclosure and has a proviso at the end and that relates to paragraph 12. So I think that is it:

"A party may exclude a document from common disclosure ... by specifying which are to be excluded".

MR ROTHSCHILD: It's my understanding that this order permits sharing and merging of the various confidentiality rings, but it doesn't require disclosure to be shared. That's the short point.

MR TURNER: My Lord, if I may assist, the mechanism that your Lordship has drawn attention to in the draft confidentiality order almost proceeds from, if you go back to the Foundem draft order at tab 2 of the CMC bundle --

MR JUSTICE ROTH: Yes.

MR TURNER: -- from the point that is made in Foundem's draft order, first that evidence in one stands as evidence in the other so far as relevant, documents disclosed in one set of proceedings should be disclosed in the other set of proceedings. The mechanism in the confidentiality order for the exclusion from the common documents is meant to build on that, that if there are documents that are not relevant, they do not need to be included in the common disclosure which is given.

MR JUSTICE ROTH: Yes. What I am just looking for is, common disclosure in paragraph 1 is just a definition. Where does that definition actually put into practice in terms of what is to be done.

MR ROTHSCHILD: I believe paragraphs 12 and 13.

MR JUSTICE ROTH: 12 is the exclusion from common disclosure. 12 and 13 are the exclusions. But something that's not excluded ...

MR TURNER: Well, it's not perfectly done, but at paragraph 6 there is a reference to the parties discussing with each other the documents or information that is common disclosure (inaudible due to audio distortion).

MR JUSTICE ROTH: I mean, there ought to be a paragraph saying that every party

shall disclose to every other party all documents that are covered, that are common disclosure and not excluded by the mechanism in paragraphs 12 and 13.

MR TURNER: Yes, the closest we get to that, my Lord, is in paragraph 5 which declares that the sharing relates to common disclosure, but I --

MR JUSTICE ROTH: I think Mr Rothschild's point, it is a sort of drafting point, is that it says "may" and it should be "should", but I don't think we need to redraft it in this hearing. The point is that if it's common disclosure, it's covered by common disclosure and it should be subject to common disclosure.

MR TURNER: Yes.

MR JUSTICE ROTH: That's all that is being said, but there is an exclusion mechanism which seems reasonable.

MR ROTHSCHILD: Yes, I am grateful for the Tribunal's indication, and hopefully the parties will --

MR JUSTICE ROTH: So if you could --

MR ROTHSCHILD: -- (inaudible due to overspeaking) simple wording in the order.

MR JUSTICE ROTH: So you submit the order to us.

Is there anything else on the joint case management before we address Foundem's disclosure application, specific disclosure application?

MR TURNER: My Lord, only by way of clarification of one point that I was asked to ensure. You said earlier that Mr Turner was accepting that the trial could be tried by June/July 2026 and my submission is that it may -- and one hopes it will -- but that that assumption that it can be is based on particular and optimistic premises and I mentioned a few; the timing of the Court of Justice judgment, any appeal from the preliminary issues trial, beneficial rationalisation on the claimant's side and finally unknown unknowns.

MR JUSTICE ROTH: Yes, well we won't say that you've accepted it can be tried by then. We'll say the Tribunal expects that it will.

There is then only one other matter we will just mention, which we think it's appropriate to mention it now, we've noted that Google appears to be using two firms of solicitors, both extremely experienced in this field. That is obviously a matter for Google. We just mention that because it may have costs implications and it may raise concerns on any assessment of costs, if one gets to that point, as to whether it's reasonable and proportionate now that these cases are being jointly case managed and at least up to the end of trial one are being tried together, that's appropriate. I say no more about that.

That, then, concludes the part of the hearing that concerns everyone, except for this: Foundem has an application for specific disclosure concerning revenues and costs of Google which the other parties, although not party to that application, may have seen.

It goes, obviously, to the question of quantum. Quantum is clearly going to be difficult in this case because of the nature of the case. It's not like a well-understood cartel where there is an inflated price as a result of the cartel and the question is what would have been the competitive price in the absence of a cartel, and everybody can understand conceptually how that works. It may not be easy to work it out, but the question is a very straightforward question.

Here, one is having to ask: "well, what would have happened if Google had conducted itself in a different way to the positioning of competitor websites on the Google general search page?" And then, as a result of that, what sort of degree of traffic would have been diverted to these competing websites, and what revenue would these competing websites have gained in consequence, quite aside from any loss of a chance claim

about expanding into new markets. So it's conceptually a much more difficult exercise on any view. It will have to be done, but it's not so obvious.

There may be various ways in which it might be done and the question of what information and data is needed depends on how it is going to be done. Foundem has its economic expert who is no doubt behind the request for information that it is making in terms of Google's revenues and costs.

Google's proposal in response is that, as the other claimants are also going to have economists looking at the question of quantification of damage, that it's sensible that the claimants' economic experts on that aspect should meet and consider how the quantification exercise on these claims should best proceed and then the question of what disclosure from Google is relevant should be addressed as a result of that discussion.

It is in Google's skeleton which you've obviously all read, I think near the end of the skeleton. You may not have -- the other parties -- focused on that, those paragraphs, as much because it's not your application, but it's essentially, if one looks at -- I think it's at --

MR TURNER: Paragraph 60.

MR JUSTICE ROTH: 60 and 61. No, it's really 60. We do see some force in that. We have said that disclosure on quantum should continue and not be held up because we are not including quantum in trial one, but equally it's not desperately urgent and we wonder if this is not something that could be addressed at the November CMC and therefore give time for the other claimants, some of whom may not have appointed their economists yet, to do so and to consider how are they going to approach quantification of loss, to meet with, I think it's Mr Reynolds from Compass Lexecon who is assisting Foundem, and really to put their heads together to say what is the

most effective way of trying to address the question of causation of loss and quantification of loss in the unusual circumstances that we are faced with.

Then to look at what data is going to be used and formulate a request for disclosure from Google which then covers all the claimants and avoid Google having to go back and go over the same data twice, three times.

We are not so sympathetic to the fact that it will take a Google technician three weeks to find it, that may be necessary, but it's more a question of them not having to do it four times and also to see really, because it seems us that one is going to have to look at quantification in a consistent way. So I mention that now because that affects everyone and I think I should first ask Mr Rothschild actually because it's his application.

MR ROTHSCHILD: Yes.

MR JUSTICE ROTH: That is the way we think this is most sensibly addressed, rather than to go into the detail of your application, Google's opposition to it and then get an application for disclosure from Google or from Kelkoo and then a few months later get one from Connexity, and so on.

MR ROTHSCHILD: Foundem's application, as you will have seen, has substantially narrowed.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: There were three elements to it.

MR JUSTICE ROTH: Yes, two have been agreed.

MR ROTHSCHILD: On costs and revenues, we are not pursuing costs on certain assumptions. It's really just about revenue data which is relevant to really the prices that people were paying in the market, paying the only CSS that was not affected by the abuse. Google, in other words.

So we say that data is going to be relevant in any event to everyone, almost certainly so. We are very concerned about slowing down disclosure of that data. To date, Foundem has really taken the lead on most issues of disclosure and the disclosure given to Foundem has then been shared with Kelkoo.

Mr Chairman, you suggested the parties' experts might liaise, but as far as we are aware, Connexity doesn't yet have an expert or at the very least has been stayed until only a couple of weeks ago.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: So if this disclosure application were parked, it could lead to further delay in data which is very useful, very important to modelling the value of Foundem's claim and could therefore be very useful to ADR.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: We would seek to pursue our application at least for the revenue data today. Costs is more complicated and it may be that that we need to revisit, but the revenue data is a very short point.

MR JUSTICE ROTH: ADR is not realistic before the court's judgment, is it?

MR ROTHSCHILD: It can't be ruled out.

MR JUSTICE ROTH: Well, nothing can be ruled out.

MR ROTHSCHILD: We already have the Advocate General's opinion --

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: -- (inaudible due to overspeaking).

MR JUSTICE ROTH: -- I think it does seem to me pretty unlikely. Well, if we are going to -- we have floated that. If we are going to hear you on it, then of course we'll have to hear Mr Turner and we'll do it after lunch.

MR ROTHSCHILD: Yes, it's a very short point.

MR JUSTICE ROTH: It may be a short point, but it involves a number of considerations. As I say, our concern is that different people may approach what is relevant in different ways and we note that in your application you do ask for different periods. One is a short, relatively short, period, I think, because you've had it from -- to January, end of January, revenues --

MR ROTHSCHILD: That's correct. Mr Chairman, you are referring to the January 2017 to September 2017 period.

MR JUSTICE ROTH: That's right.

MR ROTHSCHILD: That data, Google says, is available.

MR JUSTICE ROTH: Yes. Well --

MR ROTHSCHILD: Without (inaudible due to overspeaking).

MR JUSTICE ROTH: -- that's not a very long period. I mean, it may be that one might be minded to order that and it doesn't involve a lot of work and I don't know how strongly that alone is resisted, but the rest of it, going back to 2006 --

MR ROTHSCHILD: Yes.

MR JUSTICE ROTH: -- we will have to hear clearly Mr Turner or, if you are pursuing that now, and we are minded, as I have indicated, not to order that until we've understood what the other experts are going to seek in terms of quantification.

MR ROTHSCHILD: Can I take instructions on it?

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: We would wish to persist with the application, but recognise the time.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: And hopefully it will be a relatively short --

MR JUSTICE ROTH: Yes, we'll then hear that at 2 o'clock. We are not anticipating

how we may resolve it, but we may in any event wish to encourage the economists, once appointed, to consider together how these questions of quantification of loss are going to be approached, because otherwise we will be getting a succession of disclosure applications from the Claimants which is not efficient, proportionate or indeed fair to Google.

But on that basis I think all the other parties, that's to say Kelkoo, Ciao, Connexity, are released and we will hear Foundem's application at 2 o'clock.

(12.57 pm)

(The luncheon adjournment)

(2.00 pm)

MR JUSTICE ROTH: Yes, Mr Rothschild.

Application by MR ROTHSCHILD

MR ROTHSCHILD: (Inaudible due to audio distortion)

MR JUSTICE ROTH: We have been given -- is that what -- have you -- it's come from someone?

MR ROTHSCHILD: It has come from my instructing solicitor. I don't know how magically it's appeared before you, but we don't have copies on this side. But may I just confer with those behind me?

MR JUSTICE ROTH: Yes, do we have copies for ... Apparently we were asked, the Tribunal was asked to print copies for the Tribunal. We don't normally print copies for other people.

MR ROTHSCHILD: Might I proceed while they --

MR JUSTICE ROTH: Well, if it's --

MR ROTHSCHILD: -- obtain their own copies.

MR JUSTICE ROTH: I mean, it should have been supplied to Google if you were going to rely on it.

MR ROTHSCHILD: That was my intention. Perhaps I can, in the meanwhile, proceed with the application.

MR JUSTICE ROTH: If we have spare copies, do you have any spares? It should be really for those instructing you to make arrangements to print out documents that you need and to provide them to the other parties.

MR ROTHSCHILD: May I proceed with the application which I understand is the only item remaining on the agenda.

MR JUSTICE ROTH: Correct. Yes.

MR ROTHSCHILD: There were originally three parts to this application, when started on 5 March, but as identified before the adjournment, it has narrowed now to revenues data and costs data. May I start with costs?

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: In relation to cost data, the application is not pursued on certain understandings. Now, before I go into the detail, if I may just step back to explain why this data is relevant, relevant to a lost profits calculation and relevant, I submit, to anyone, any of the claimants in the joined matters, wishing to calculate their lost profits. Because for that purpose one would need data on three things.

Firstly, traffic. The clicks through to the CSS. Secondly, revenue per click, how much would have been earned per click. Thirdly, the costs of the CSS, because in calculating profits one needs to take costs away from revenues.

MR JUSTICE ROTH: Sorry when, you say how much would have been earned per click, just so I understand how it works, the shopping site charges the -- whom does it charge to get the revenue? It charges the supplier, is it?

MR ROTHSCHILD: Well, it would be the advertiser.

MR JUSTICE ROTH: Yes, charged to the advertiser. But it sets its own charges, its shopping comparison site sets its own charges presumably.

MR ROTHSCHILD: It's the price for the services provided.

MR JUSTICE ROTH: Yes, but they may compete on price, the different comparison sites presumably. I mean, the amount the firm then charges --

MR ROTHSCHILD: (Inaudible due to overspeaking)

MR JUSTICE ROTH: -- Kelkoo.

MR ROTHSCHILD: Yes.

MR JUSTICE ROTH: Well, Kelkoo and Foundem and all these others are competitors, I think.

MR ROTHSCHILD: Where if I -- if I may hand up the document which mysteriously reached the Tribunal before the parties. My learned friend has not seen it yet.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: But if I may explain, it's based on data that was disclosed by Google and it's simply a graphic illustration of the point that I will make very briefly orally.

So this chart is based on confidential information.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: But it shows in red -- well, the Y axis shows clicks.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: In red, the clicks from Google's search engine to Google's CSS and in the other colours one can see the other CSSs and one can see moving towards the right, towards 2016, the -- well, dominance of Google.

MR JUSTICE ROTH: Yes, so Google -- when you say this is derived from disclosure

from Google, Google has disclosed the number of clicks?

MR ROTHSCHILD: Correct. So identified three categories of information, firstly traffic or clicks. We have that illustrated in the chart.

Secondly, my second category was Revenue per click. We have much of that, but not for the two periods for which I am seeking the data in this application namely --

MR JUSTICE ROTH: I am trying to understand why that's relevant. This is not a restitutionary claim.

MR ROTHSCHILD: No.

MR JUSTICE ROTH: I mean, I can see you need the traffic, but the revenue per click that you are claiming for is the revenue your client would have made per click.

MR ROTHSCHILD: Quite. If it had not been affected by the abuse. The only clean comparator there is Google. There may be arguments as to whether Google is -- pricing as a clean comparator or not -- Google is a comparator or not and needs to be adjusted, but it's the only data we have in the market on revenue per click for a CSS unaffected by the abuse.

MR JUSTIN TURNER: Leaving aside your price and any different price you might have to Google, or might have had to Google, is the pricing structure the same between all the participants in the market?

MR ROTHSCHILD: Well --

MR JUSTIN TURNER: They are charged the same way.

MR ROTHSCHILD: They are all serving very similar customers.

MR JUSTIN TURNER: Yes.

MR ROTHSCHILD: As to whether the pricing structure is identical, that's something I would need to take instructions on, I am not sure we necessarily know that's the case.

MR JUSTIN TURNER: Just in a very high level, how are you going to quantify your

loss in terms of both the number of clicks you would have got because you can't -- and as against Google as against your competitors.

MR ROTHSCHILD: Yes.

MR JUSTICE ROTH: And indeed your pricing structure, how in just a bird's eye view was that going to be done when it comes to quantum?

MR ROTHSCHILD: Well, there will obviously be a share -- but for the traffic diverting conduct, a share of the clicks would have gone to Foundem.

MR JUSTIN TURNER: And how --

MR ROTHSCHILD: The Tribunal will need to form a view at the quantum trial as to what that share would have been by reference to trends. One might look, for example, at how Foundem expanded in the very limited period when it could or how other markets have evolved. The Tribunal will need to form a view on the appropriate trend of the data.

MR JUSTIN TURNER: On what comparators or what information will we be able to draw upon to do that? You have not got a clean period to -- or have you -- from which to extrapolate?

MR ROTHSCHILD: Well, it may be necessary to look at other similar markets. This is a matter for evidence in due course. Our case has not been --

MR JUSTICE ROTH: This disclosure is not going to help on that point, is it, on what share --

MR ROTHSCHILD: No, I am just saying we have data on traffic and we will want to be making a case as to the proportion of that traffic.

MR JUSTICE ROTH: Yes, and this data that you are now seeking is not going to help on --

MR ROTHSCHILD: No.

MR JUSTICE ROTH: So it's --

MR ROTHSCHILD: The data on revenue per click, in other words, how Google is monetising it and how much a CSS, unaffected by the abuse, could charge for it.

MR JUSTICE ROTH: That's what I don't understand. I see that you want to know the number of the total volume of traffic. You will then have to come up with some basis for estimating what share Foundem would have got absent their views.

MR ROTHSCHILD: Yes.

MR JUSTICE ROTH: But the revenue Foundem would have got would have been on Foundem's own pricing structure, not Google's pricing structure. It would have been Foundem that says: "we charge so much per click" and you would apply that.

MR ROTHSCHILD: That's part of the analysis. It's obviously not a restitutionary claim.

MR JUSTICE ROTH: No, but why --

MR ROTHSCHILD: This is a data point that is relevant to the assessment.

MR JUSTICE ROTH: But in what way? That's what I don't -- why is it relevant?

MR ROTHSCHILD: The advertiser of widgets wouldn't pay very much more to one CSS than to another CSS, in the same way as those who sell -- farmers who sell milk to one supermarket are going to pay a similar amount -- are going to be paid a similar amount by another supermarket, it's indicative of prices in the market.

MR JUSTICE ROTH: That's the sort of pricing structure as opposed to revenue, isn't it? I mean, Google total revenues -- you want to know what was their charge per click.

MR ROTHSCHILD: Yes, and that's the standard metric in the CSS market, a charge per click, revenue per click.

MR JUSTICE ROTH: Does that tend to be fixed for any kind of click or is it a different price if it's an airline or if it's a supplier of white goods or if it's an entertainment venue?

I don't know how these pricing -- your client will know how they are priced.

MR ROTHSCHILD: Yes. What we are looking for, by this application, is obviously the average revenue per click. It may be in due course that one needs to come back for more granular detail or the experts will look at more granular detail, but this is a very important --

MR JUSTICE ROTH: I am thinking not of revenue as such and how that might be calculated, but do -- to operate as a CSS tend to have a tariff that they have for what they charge for advertisers?

MR ROTHSCHILD: May I just take instructions on this point?

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: I am instructed that there is a tariff indeed.

MR JUSTICE ROTH: So, I mean, if you add Google's tariff over the period, if they also have a tariff, well that would tell you -- you could work out on the basis that your client might have charged similarly or would allege it did what it might have got.

MR ROTHSCHILD: That will certainly be a starting point. In fact, it's subject to very substantial negotiation and there is a big variety, then it might not tell us the whole story, but it would certainly be a starting point.

MR JUSTICE ROTH: The costs -- I mean, the costs would be quite -- you are not pursuing it at the moment, so perhaps we need not address costs, but I imagine they could be completely different for different kinds of operation, but we are not dealing with costs.

I mean, if you've got -- I don't know if that's available or whether I am just setting a hare running, but if Google had tariffs that it produced, that might be a lot easier and less onerous than going into actual revenue calculations.

MR ROTHSCHILD: It might be, but Google has identified how long it would

take -- I don't believe this is confidential, it was mentioned before the break, although I know my learned friend, Mr Turner, is very sensitive as to the content of Ms Lawrance's witness statement -- but the suggestion is that it would take three weeks to produce the data for the period of 2006 to 2013 for a single Google software engineer. There are no monetary figures here as to how much that would cost Google, but in the scale of this case and other disclosure exercises in this case that is not especially significant.

MR JUSTIN TURNER: But don't you want the cost per click because you are then -- or the price per click because you are then trying to extrapolate that to your situation with --

MR ROTHSCHILD: Yes, (overspeaking).

MR JUSTIN TURNER: So you don't want total revenues because then all you are going to do is work back to a price per click.

MR ROTHSCHILD: Yes. I appreciate that, but -- yes, of course, that would be useful to have. The way my client currently sees it is that if they have the total revenues, they could divide it by total number of clicks, but as Mr Turner said, you have identified an alternative way of finding the price per click which would also be useful. We don't know, the suggestion has not been made before today of Google's tariffs being disclosed, if such documents exist.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: The only real objection, principal objection, that's been made by Google has been the proportionality of the exercise.

MR JUSTICE ROTH: I think they say relevance as well. They do say it's not relevant. That's why we've been asking -- oh dear, what has happened here.

MR ROTHSCHILD: We already have the revenue per click, as I have indicated, for

the period February 2013 to December 2016 and have applied it to the framework I've just described and we would like to be able to complete the analysis and that, in essence, is the reason why we are seeking that information. I mean, in respect of the short period in 2017, it's apparently available, so Ms Lawrance says in her witness statement. It wouldn't require any significant effort to disclose it.

MR JUSTICE ROTH: Well, she says it would require a software engineer to spend least three weeks dedicated to working solely on this task. The data would also require analysis and validation and --

MR ROTHSCHILD: Yes, that's for the period prior to 2013.

MR JUSTICE ROTH: Prior to 2013.

MR TURNER: I hesitate to interrupt, I am being told this is entering into somewhat sensitive territory. If we can avoid to some extent reading out this information, it would be helpful.

MR JUSTICE ROTH: I have highlighted -- I am sorry. I thought -- perhaps I don't. It should be. Yes, have we got --

MR TURNER: It may not be on this copy, I think it's also livestreamed this.

MR JUSTICE ROTH: Yes, it is livestreamed. Normally, the confidential witness statements are highlighting the bits that are confidential. I see it's marked confidential, actually now I can't see anything highlighted. Do we have a non-confidential version?

MR TURNER: We don't.

MR JUSTICE ROTH: We should.

MR TURNER: I am told, yes, there should be. We had not, by the time of this hearing, managed to get internal sign-off to identify the confidential parts and we apologise for that.

MR JUSTICE ROTH: Yes. This was 18 March, this was made. You had plenty of

time to do that.

MR TURNER: Yes, I understand.

MR JUSTICE ROTH: Because, I mean, that's really not very satisfactory. Someone must know and there's ample time to consider what is confidential. Clearly some things are obviously not confidential in that statement and it makes Mr Rothschild's task and our task rather difficult just to be told: "well, there are things in this witness statement that are confidential but I can't tell you what they are", and this is the witness statement you are relying on to oppose this application.

MR TURNER: My Lord, we fully appreciate that and I take it on board.

MR JUSTICE ROTH: Well, you can take it on board, the question is how we proceed. I mean, I can see that some bits one might think are obviously -- might be confidential, but I mean the paragraph I was looking at, namely how long it takes to extract information, is fundamental to the argument and if you are not able to tell me what in paragraph 42 is confidential and what isn't, that ... that is not impressive.

MR TURNER: My Lord, I entirely accept that. I can only suggest as a practical solution that the Tribunal is directed to the paragraph and the points that you are asked to read and if it's necessary to debate them, I will try to get instructions immediately in relation to any particular item. I'm afraid I can't do better than that now.

MR JUSTICE ROTH: Well, we will proceed that way. But I have to say I think that is extremely unhelpful conduct by Google which is certainly not lacking in resources and this statement made over a week before this hearing and obviously drafted several days before that, and to say that Google's solicitors and counsel are not able to tell the Tribunal which bits of this are confidential and we are not looking at the earlier parts explaining the development of Google's product, we are just looking at what work is needed to extract the information sought.

So I would like you, please, to take in -- ask someone behind you to take instructions about specifically paragraph 42.

MR TURNER: Will you give us a moment? (Pause)

MR JUSTICE ROTH: Yes.

MR TURNER: I am able to assist, my Lord. Paragraph 42.

MR JUSTICE ROTH: Yes.

MR TURNER: All of this is able to be referred to, subject to, at the very end, you see a sentence five lines up from the bottom on my copy which begins:

"I understand that the data in the form it is preserved".

MR JUSTICE ROTH: Yes.

MR TURNER: What follows that is said to be confidential, those propositions until the final sentence beginning "machine costs".

MR JUSTICE ROTH: But excluding the final sentence?

MR TURNER: But excluding, yes, the final sentence is again ...

MR JUSTICE ROTH: Yes, all right. Yes. Okay, well, that is a lot clearer.

MR ROTHSCHILD: It's somewhat cryptic. Paragraph 42B expressed lockdown and not readily accessible, but the key point is that it would take --

MR JUSTICE ROTH: It does enable you to pursue the point that a Google software engineer at least three weeks, which you've -- would require data, would require analysis and validation, so that's what they say about the burden.

MR ROTHSCHILD: It's proportionate.

MR JUSTICE ROTH: Yes, and you say that's not disproportionate given the scale of the case and the amount of the claim.

MR ROTHSCHILD: The Tribunal suggested an alternative of tariffs. That had not been suggested by the parties previously. It may well be a red herring in the sense

that these tariffs may not exist. They may not -- the pricing may be very much negotiable, but the global revenue here will be objective data. As I've identified, we'd seek to divide by the number of clicks to get the metric revenue per click, which I am instructed is commonplace, standard, regularly referred to in the CSS market.

MR JUSTIN TURNER: Revenue per click is commonly referred to.

MR ROTHSCHILD: Those are my instructions, yes. Obviously it's an average, but it's a very informative average.

MR JUSTICE ROTH: Yes, I understand.

MR ROTHSCHILD: It may well be at trial there will be submissions as to how relevant it is or not, but we are not at the trial yet, we are at the disclosure stage to get the data that will allow submissions to be made at trial.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: The form of order that we seek, we modified it very slightly. The disclosure bundle at page 339 has a suggestion of the wording that was sent to Google in the last week or so.

MR JUSTICE ROTH: 339.

MR ROTHSCHILD: Page 339. That's a draft consent order. Google didn't consent to it, but ... The order that we are seeking today is the order at paragraph 1 on page 339 defining the data by reference to Ms Lawrance's witness statement. It's the same in substance as the draft order referred to in my skeleton argument, but it's tying it to data that Ms Lawrance has specifically described and explains exists.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: Those are my submissions on revenue data. As far as cost data is concerned, in light of Ms Lawrance's evidence as to the inconvenience which it says would be caused by having to retrieve such data, we are not pursuing that application,

but on the understanding set out in paragraph 46 of my skeleton argument, firstly, what I suppose you might call a forewarning and secondly a point about ambush.

The point about forewarning is, as Google is not able to provide this data without, it says, significant inconvenience, we intend to rely on information provided in Google's monitoring reports to the European Commission as a proxy. There may be submissions at trial as to whether it is an appropriate proxy, but that's our intention and we are making that clear.

Secondly, the point about ambush. We say it would be entirely unacceptable if Google were to change its mind at a later date and suddenly discover that this data was readily accessible.

Why do we say that? Well, there is some history of Google, perhaps it is unsurprising for a very large company in litigation sometimes saying that something does not exist and then changing its mind. I can give an example in some US litigation in the northern district of California behind page -- well, at page 345 of the disclosure bundle, there is an order in litigation, class action litigation against Google. I probably don't need to dwell on the detail, but it's an example of a case where Google was ordered to provide information as to whether there were additional logs by 31 May 2022 and Google said that there was no further information, but then three weeks later found some information and provided it.

We don't want to be ambushed in that way, so those are the two points that I make in withdrawing the application for costs data.

MR JUSTICE ROTH: Yes. Thank you. Yes.

Submissions by MR TURNER

MR TURNER: I will deal with this as succinctly as I can.

I begin with two short preliminary points on context. The context of this application before you today is that there have been repeated disclosure applications and repeated disclosure has been given by Google to Foundem, as your Lordship knows, over more than 10 years now between October 2013 and December last year. It's referred to in Ms Lawrance's ninth statement. We have disclosed more than 66,000 documents. So what this is part of is a sort of succession of requests following one after the other.

The second preliminary point is illustrated by what Ms Lawrance says in her ninth witness statement, if you would just open that up, in the first bundle at tab 10, page 137.

MR JUSTICE ROTH: Yes.

MR TURNER: There, you can see that she is referring to --

MR JUSTIN TURNER: Sorry, can you give me the paragraph number again, I beg your pardon?

MR TURNER: Yes, so these are the subparagraphs 2 and 3. If you go to the previous page in paragraph 53B.

The point that is made in 2, subparagraph 2 on page 137, is that in relation to documents concerning implementation of the Commission's remedy, first there was a request made and acceded to in relation to Foundem and after that Kelkoo makes a slightly different request in relation to the same category of information. You will see from five lines down that the Kelkoo request requires Google to revisit and extend the scope of the exercise it had conducted.

Then the same point is made -- and these are simply two examples -- in paragraph 3 below, penalty server files of a type also disclosed in the Foundem proceedings, which have mentioned Kelkoo domains, so this is to look at demotions of comparison

shopping services sites for a particular period were provided.

They were first provided in relation to Foundem and then again, when we got an overlapping request, we had to revisit and extend a reconstruction exercise previously carried out for the Foundem proceedings. The point that we have made and which you fairly articulated before the short adjournment is not a theoretical point. This is the way in which these proceedings have been going and now that we are in a period where we are beginning with joint case management with the other parties, we cleave to the point, my Lord, that you made before the short adjournment that the sensible approach for this financial data, and for other data more broadly, is for requests to be thought about for them to be expert led and then to be advanced in a coherent way and that that is the right approach to apply in relation to this request today and there is no reason to accede to it.

What the Tribunal is confronted with here is a revised application for financial data from Google. It is not actually based on the considerations which underpin the application when it was made. You've seen that it's a request for revenue data for particular periods and we did certainly make the point on relevance that the relevance to Foundem of revenue information and serving Google's income to compare against the obviously different business model of Foundem is extremely obscure.

Even taking this new graph at face value, this simply illustrates the huge differences between the businesses. The Tribunal asked about the pricing structure, which is a relevant question. We have given some information in Ms Lawrance's tenth statement in a part that is -- I will be corrected but certainly not confidential, I hope, about the structure of this. Just for your note, it's in Ms Lawrance's tenth statement, paragraphs 20 and 21, where you will see from paragraph 20, she was referring there to the earlier period. You see she has an illustration of what one had there, shopping

results for teak furniture and she described then in terms -- paragraph 20 -- how the services were monetised. It was an entirely different model from what I understand to be the business of the comparison shopping sites such as Foundem's which rely on clicks being monetised via a payment from the relative merchant to which the link leads.

MR JUSTICE ROTH: That's in the period. Just so I am clear, this in 2007 to 2009; is that right?

MR TURNER: Up to 2012. Then if you go forward over the page --

MR JUSTICE ROTH: Sorry, from 2009 says, 21, they started using something else.

MR TURNER: Yes. It says that, my Lord, but that's from 2009 in the United States of America.

MR JUSTICE ROTH: I see.

MR TURNER: If you read on --

MR JUSTICE ROTH: Was it introduced during the course of 2011 and 2012?

MR TURNER: Yes, then there is a description for the later period, which is abbreviated again, paragraph 22, which is where we now have the shopping units on the general search page. You will see here, just above the final illustration:

"For the avoidance of doubt, unlike Froogle and Google Product Search from 2013 onwards, merchants did pay the product listing ads (PLAs) to appear in shopping units and on the separate Google Shopping page."

Subject to that, this is not a question, the difference in the pricing structure or the existence of tariffs or other salient features which has yet been addressed. The right way to do it would be for the relevant experts to sit down and decide what is actually needed for the case and that is not what has happened here.

Now, Mr Reynolds of Compass Lexecon did not say that this information is needed as

the inspiration for this application today, at least as we read his short statement. It is terse and it is simply reactive to a request already having been made.

If I can just invite you to see all that he says. It's in bundle DA, the disclosure bundle, at tab 43, single page, bundle number 326.

MR JUSTICE ROTH: Yes.

MR TURNER: Rather than him saying "This is something that I need having reflected on this and here are the reasons why", it begins:

"I understand that Foundem is considering making an application for disclosure of information relating to the costs and revenues of Google's CSS during the period."

And so on. So he is simply responding to a request to comment on the application under consideration. Then, when you read on, he explains in -- his reasoning is very short, last two paragraphs on that page, and particularly the final paragraph, he says:

"In my opinion, this information would be relevant to estimating Foundem's likely revenues and costs in the counterfactual since it would provide a benchmark."

It says nothing further than that. There is no consideration of the relevant points that have been canvassed in the course of this hearing.

MR JUSTICE ROTH: This was written before Dr Lawrance's tenth witness statement.

MR TURNER: This was written on 4 March.

MR JUSTICE ROTH: Yes, and the statement is 18 March, so Mr Reynolds didn't have the opportunity to consider what he said.

MR TURNER: He didn't have the -- but in launching or in commenting on the application as it had been framed originally, this is all he says by way of support for it. So what you see is that he has not applied his mind to this request, or at least on paper, in any detailed manner and that that is the sum total of the support that it gets.

MR JUSTICE ROTH: Yes.

MR TURNER: We have made the point, though I shan't labour it further, that for the information in relation to the earlier period, the old revenue data from the archived logs, that there will be significant work involved and then, as your Lordship says, the further process of validation. That was Ms Lawrance's tenth statement, paragraph 42. Again, that is a significant cost that would be imposed on the Google business were that aspect of this request acceded to. It would entail also a distraction from work on the business itself, which would be aggravated were this to be part of a series of overlapping requests from other parties following on from this one.

That leads me to again what is really the central point which is that above all this application today is an example of a piecemeal request on the hoof at a case management conference. Our essential submission is that the principle ought to be that this kind of application should be an expert-led process on the part of the claimants jointly, with our expert able to comment too, because that will provide a solid basis for what is said to be needed for the fair adjudication of the dispute.

To do it otherwise is not just inefficient, in a case with multiple parties of this scale, it is quite contrary to the governing principles of the Tribunal. We wish to avoid repeated search exercises being imposed unnecessarily on Google's business.

Finally, even in relation to that short period, January to September 2017, we say something about that too. First, what we said was that it is accessible, not that it's off-the-shelf and we can print it out tomorrow. There's still a cost. We have to find the right person in Google, we have to extract the data. We have to deal internally with the point that this is a granular piece of financial data that is being sought for use in UK litigation.

We have to make sure that it's the correct entry and that extraneous information is not provided and matters of that kind. There is a significant cost which --

MR JUSTICE ROTH: To be fair, Mr Turner, Dr Lawrance doesn't say in 42A that really this is a burdensome exercise to do it for those nine months by distinct to what is said in 42B. She quite deliberately separates that out and really the points made there is about relevance, it's not about any difficulties for Google.

MR TURNER: Yes, my Lord, but the point I am seeking to make is not that this is burdensome in the sense that the earlier information is explained to be burdensome.

MR JUSTICE ROTH: Yes.

MR TURNER: But merely that one should not take away the impression that this is costless.

MR JUSTICE ROTH: No, (overspeaking) I understand that. Nothing is cost free.

MR TURNER: It fits into the wider submission I am making which is that, when one views this in the context of what is now multi-party litigation with the dynamic that I have explained and illustrated, this is not an appropriate request.

MR JUSTICE ROTH: Yes.

MR TURNER: I point out, moreover, that it's not merely that this fills a gap or completes information that they already have relating to the period 2006 to 2016 where revenue data was provided to the Commission in relation to EU Member States, it's not clear for exactly what that purpose, that might have been part of the fining issue, but here one has a request, as you see from Foundem's application, for information in relation to six or seven European states and the United States of America.

MR JUSTICE ROTH: Yes.

MR TURNER: So that now comes into the picture which has never been in the picture before either, and this would be the platform, the form of this request, for repeating overlapping requests from other parties.

MR JUSTICE ROTH: Just so I can understand, the position between 2013 and the

end of 2016 which is not being asked for, is that because it's been provided through -- I assume it's not been asked for because Foundem has it. Where did they get it -- is it through what's given to the Commission?

MR TURNER: Yes, that's right. It was part of what was provided by Google to the Commission for their purposes and, as I say, we are not sure that I --

MR JUSTICE ROTH: That covers these markets including the United States?

MR TURNER: No, it doesn't cover the United States. It covered 13 of the Member States.

MR JUSTICE ROTH: In fact, Foundem hasn't got 2013 to 2016 for the United States?

MR TURNER: No, it does not.

MR JUSTICE ROTH: Although it's not asking for it.

MR TURNER: No, that's right. So it's simply nine months --

MR JUSTICE ROTH: Yes.

MR TURNER: -- thrown in at the end.

MR JUSTICE ROTH: Yes.

MR TURNER: If that's going to provide the seed corn for further applications in relation to that, it really does need to be thought about --

MR JUSTICE ROTH: Yes.

MR TURNER: -- in a certain respect. If the Tribunal therefore sees our point, we say that this is important. It is a situation where there is a principle at stake as to how disclosure should be approached in this sort of case, and adhering to that principle is important in sending out the right signal and is a matter of some realistic weight.

MR JUSTICE ROTH: Yes.

MR TURNER: So far as concerns costs, we've made clear and it's accepted that there are great difficulties in relation to the provision of that information. There is no question

of an ambush.

Now, Mr Rothschild says well -- referring to some US class action case where Google thought it --

MR JUSTICE ROTH: I wouldn't worry about that. Don't worry. I mean, his basic point is "okay, we are not pursuing disclosure for costs". It wouldn't be fair if, in ten months' time, you start relying on information about costs that you've got without having made complete disclosure on costs when it comes to arguments about quantum. If costs are going to be relevant to arguments about quantum, then they ought to be disclosed. If they are not relevant, then you shouldn't rely on them either. I think that's basically what he's saying.

MR TURNER: As an abstract point, that must be right. But if we come back to the way I was putting our point, if this case develops in the way that the claimants' expert say "well, this is how we are going to calculate loss" --

MR JUSTICE ROTH: Yes.

MR TURNER: -- and they have put forward some coherent methodology that now does engage costs which hadn't been seen before, then one may need to take a very hard look at that question again.

MR JUSTICE ROTH: Mm-hmm. And that might involve then disclosure from you.

MR TURNER: It might involve it. But that merely illustrates that the way that this has been gone about is not the appropriate way.

MR JUSTICE ROTH: Yes, I think we've got the point.

MR TURNER: My Lord, those are our submissions.

MR JUSTICE ROTH: Yes, just a moment. **(Pause)**

Well, Mr Rothschild, yes, what do you want to say in response?

Reply submissions by MR ROTHSCHILD

MR ROTHSCHILD: My learned friend's submissions really are a continuation of the strategy of delay on the part of Google. In effect, he's saying postpone all this until the --

MR JUSTICE ROTH: No, no, it's not quite that. I really don't think that is fair. What he is saying is there are now four actions being tried together. There is a detailed explanation in Dr Lawrance's tenth witness statement of how Google priced over different periods. Mr Reynolds -- even your expert has not considered that because -- or if he has, we don't know what he's said about it because his short opinion letter is about ten days before that statement.

To start doing this in that way before even your expert has considered it and when there are other experts for the other parties, so it can be done in a coordinated way, is much more proportionate and efficient. That's what they are saying, not about delay. Then one can have a considered application for the way in which the claimants are going to quantify it. Then we deal with it and can make appropriate orders. So I don't think it can be just condemned as simply a delaying strategy.

MR ROTHSCHILD: If it's not considered until the hearing at the end of the year and then Google says it will take another few months, we won't get this disclosure until 2025.

Looking backwards rather than forwards, Mr Chairman, you will recall the substantial two-day CMC almost exactly a year ago in the Competition List in the Foundem case in which you made quite extensive disclosures orders and no disclosure applications have been made since then. This particular request was raised in correspondence by my instructing solicitors on 1 December. It has been brewing, debated in correspondence now for approaching four months. That is why I say that it's a strategy

of delay on the part of Google. What has happened previously in this litigation is that Foundem has been ahead on disclosure to use his -- disclosure orders have been made in the Foundem proceedings and the disclosure has been copied across to other actions.

This revenue data is -- Google need perhaps to put in some software engineering effort to extract it but not to refine it. It may well be that other parties want more refined data broken down into more granular detail, we are simply asking for quite high level information. Perhaps other parties will come back to ask for more, but this is what Foundem thinks will be required as the bare minimum and Mr Reynolds is clear that he considers it to be relevant. There are only ever going to be a certain number of rounds of evidence in the lead-up to a disclosure hearing and this is one, as I said, that has been brewing in correspondence since the start of December.

My submission remains that this three weeks or so of work is fully proportionate and will mean, as with the directions that the Tribunal made this morning, that the case can be advanced and not paused.

MR JUSTICE ROTH: Why is the United States removed?

MR ROTHSCHILD: It's a market into which Foundem considers its service would have expanded absent the conduct. Mr Chairman, by your question you are suggesting that it could have some but not all of these jurisdictions as a proportionate --

MR JUSTICE ROTH: But you haven't got the United States, as I understand it, between 2006 and -- between 2013 and 2017 -- 2013 and 2016.

MR ROTHSCHILD: I am sorry, it was an oversight, we might have asked for a bit more if --

MR JUSTICE ROTH: It would have been covering a whole period which -- and the

table that you -- the graph you handed up.

MR ROTHSCHILD: Yes.

MR JUSTICE ROTH: This is UK traffic.

MR ROTHSCHILD: Yes.

MR JUSTICE ROTH: Have you -- you say you have disclosure -- have you had disclosure on US traffic?

MR ROTHSCHILD: I will just check. (Pause) We have not.

MR JUSTICE ROTH: No, so it's not going to give you revenue, average revenue per click for the US, is it, because you don't know the number of clicks in the US?

MR ROTHSCHILD: Well, that must follow.

MR JUSTICE ROTH: Yes.

MR ROTHSCHILD: I apologise, it was an oversight.

MR JUSTICE ROTH: Well, that's the whole idea --

MR ROTHSCHILD: If it's a substantial additional burden -- (overspeaking) --

MR JUSTICE ROTH: It is a major market for Google, clearly.

MR ROTHSCHILD: Well, it may be that removing that at this stage will lessen the burden on Google and make the request even more proportionate.

MR JUSTICE ROTH: Yes. Right. Thank you. We will just take a moment. **(Pause)**

(Ruling given but reserved for approval)

MR TURNER: I am obliged, my Lord. We propose to provide this information -- we did ask this in the short adjournment -- within a three-week period. I have outlined some of the work that will be involved before that can be done.

MR JUSTICE ROTH: Three weeks from today.

MR TURNER: Three weeks from today.

MR ROTHSCHILD: Yes, we are content with that.

MR JUSTICE ROTH: Very well. That's what we will order. Is there anything else?

MR TURNER: Not from our side.

MR JUSTICE ROTH: I think we should have said this morning, but I think costs are all for the hearing today are in the cases, I think.

MR TURNER: Yes.

MR JUSTICE ROTH: Right. We will return the precious map or graph, I should say.

MR TURNER: On behalf of all the parties, including those not here, we are very grateful for the attention the Tribunal has given to this case.

MR JUSTICE ROTH: If you could submit in the usual way an order, a draft order, drawn up with the agreement of the other side.

MR TURNER: Yes.

(3.13 pm)

(The hearing adjourned)