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IN THE COMPETITION
APPEAL TRIBUNAL

CaseNo:1589/5/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

10th October 2025

Before:
The Honourable Mr Justice Roth
Paula Riedel
Dinah Rose KC
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimant

Infederation Ltd

And

Defendant

Google Inc & Others
A P P E A R A N C E S

Colin West KC (Instructed by Hausfeld & Co LLP) on behalf of Infederation Ltd

Meredith Pickford KC & Julianne Kerr Morrison (Instructed by Bristows LLP and
Herbert Smith Freehills Kramer LLP)
on behalf of Google

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Friday, 10 October 2025

1 (10.33 am)

2 Housekeeping

3 THE CHAIR: Good morning.

4 I start, as always, with a warning. The proceedings are live streamed, as are all
5 proceedings before this Tribunal, and an official transcript is made of the proceedings.

6 It's strictly forbidden for anyone to take any image or sound recording of the
7 proceedings, and to do so is punishable as a contempt of court.

8 Can I also mention at the outset we see there are some confidential materials in our
9 Bundles, notably, of course, in the confidential version of the Commission Decision
10 which we've got. If someone can help me, we've got two colourings on that, some in
11 yellow and some in purple and I wasn't clear what the distinction is between those.
12 I imagine it's from Google's side that the --

13 MR PICKFORD: I need to take instructions.

14 THE CHAIR: Well, someone in your team must have done it.

15 MR PICKFORD: I'm sure they have. If it's of any comfort, certainly from my
16 submissions, I'm not intending to go near anything that's coloured at all as far as I'm
17 aware. But I will explain what is purple and what is yellow.

18 Yellow is outer ring and purple is inner ring.

19 THE CHAIR: Purple is inner ring. (Pause)

20 Thank you. And I should make the order under -- I can't remember offhand the rule -
21 - the fact that these have been looked at by the Tribunal. No one else is entitled to
22 access them without permission of the Tribunal. Someone can draw up that order, in
23 due course I will make it. So, thank you.

24 Yes, Mr Pickford, it's your application for Google.

25
26 Submissions by MR PICKFORD

1 MR PICKFORD: I appear for Google with Ms Morrison and Mr West appears for
2 Foundem. You should have -- and, I think, I can see that you do have -- a Bundle of
3 five Volumes. And this is our application to disallow and therefore strike out
4 paragraphs of Foundem's Particulars of Claim by which it seeks to introduce a new
5 claim into these proceedings, based on the allegation that Google's use of the OneBox
6 was unlawful.

7 And then, of course, it's also -- if we're right about the first stage of that, that this is
8 a new claim -- it's then Foundem's application for permission, under Rule 32 of the
9 Tribunal Rules, to nonetheless introduce that new claim.

10 Now Foundem say in their Response that they don't understand what the purpose of
11 this application is. We would say that that claimed lack of understanding is itself a little
12 hard to understand, but let me help explain what the purpose of this application indeed
13 is.

14 Its purpose is to prevent Foundem from introducing into these proceedings a claim to
15 which Google has a cast-iron limitation defence given that the conduct ended 17 years
16 ago and has never been secret.

17 Now, if it really were the case as Foundem now say, that the OneBox claim could
18 make no difference to the damages that Foundem seeks or anything else in these
19 proceedings, one does wonder why Foundem went to the trouble of amending its
20 claim to introduce it into the fifth iteration of its pleading. Why it then amended it yet
21 further in the sixth iteration of its pleading, and why Foundem is now fighting so
22 desperately to defend those amendments to the extent of making some of the
23 arguments that they do, in particular those in their postscript, which we say are simply
24 not arguable.

25 Now, why do any of that for something which Foundem says could make no possible
26 difference to the outcome of its claim?

1 The reality is that Mr West's protestations ring hollow. Foundem clearly believe that
2 they stand a better chance of obtaining damages for the pre-Decision period between
3 2006 and 2008, with, rather than without, the OneBox claim. Foundem is the only
4 party with any claim for damages for that period, and absent being permitted to amend
5 to introduce the OneBox claim, Foundem's existing claim is simply that Algorithm A of
6 itself was unlawful. It begins, and it ends, with Algorithm A in relation to that period.

7 THE CHAIR: Well, for that period, they complain about Algorithm A and they complain
8 about demotions, I think, don't they. Other penalties, I think, aside from Algorithm A.

9 MR PICKFORD: Well, the only concrete complaint is in relation to Algorithm A, but in
10 any event, I'm happy to put it in terms of demotions more generally. There isn't
11 anything particularised beyond.

12 THE CHAIR: And there's AdWords, I think. AdWords penalty.

13 MR PICKFORD: That, Sir, in my submission, we can put to one side. Neither party's
14 got anything to say about that. It's not about the presentation of general search results,
15 it's about the presentation of ads --

16 THE CHAIR: Yes.

17 MR PICKFORD: -- and it's not really engaged by this application.

18 THE CHAIR: Yes, but it's pre-2008.

19 MR PICKFORD: That's a fair point, sorry.

20 I'm focusing on that part of the claim that goes to general search results. You're right
21 to pick me up, Sir, that there is something that, I have to say, I'd rather put to the back
22 of my mind about AdWords, because it doesn't bear on either of our parties' cases.

23 So that's the focus of attention of the claim. It's on AdWords, which we can now put
24 to one side.

25 THE CHAIR: Yes.

26 MR PICKFORD: And demotions, of which, effectively, there is one in issue, which is

1 Algorithm A.

2 The Panda algorithm didn't come into force until later on, in the post-2008 period.

3 There is general reference to manual demotions, but there's no specific manual
4 demotions that are particularised. In any event, it doesn't make any difference for my
5 purposes, whether I say that the claim in relation to general search results is focused
6 on Algorithm A, or whether it's focused on demotions more broadly. It's all about that
7 aspect of Google's behaviour. That is what it did to Foundem not what it did to itself.

8 THE CHAIR: Well, isn't it both, because as I read the pleading, it's about
9 discrimination isn't it?

10 They say Algorithm A was applied to Foundem and other shopping sites, but not to
11 Google's own shopping site.

12 MR PICKFORD: Well I'm --

13 THE CHAIR: That's always been their claim.

14 MR PICKFORD: Well, that's the essence of their answer, and I do intend to take you
15 through carefully how they pleaded their claim prior to the amendments and how they
16 plead it now, and what the difference is between the two.

17 My answer is that it is not implicit in their earlier claim that there is any attack on the
18 OneBox, and, and one sees that by forensically going through their claim and
19 comparing it to the amended claim, which is what we're required to do under the law.

20 THE CHAIR: Yes. So that's the critical point, isn't it?

21 MR PICKFORD: It is a critical point. But it's one that we can't just do in general terms.
22 In my submission it's one that requires quite a careful analysis.

23 What I'm doing at the moment is just giving the Tribunal a quick overview of the
24 essence of the issues that we're going to be grappling with --

25 THE CHAIR: Yes.

26 MR PICKFORD: -- and what our points are on each of them.

1 I agree that's a critical point, but it's not the only point, and so, if I may, I'll deal with
2 that in due course.

3 So what we say has happened is this. The reason for the amendment is that Foundem
4 has woken up to the fact that, in its original form, its pleading has a problem because
5 it's not good enough just to attack Algorithm A and still rely on the reasoning in the
6 Decision. The Decision, as the Tribunal is well aware from the Preliminary Issues
7 Judgment, is founded on a combination abuse. It's the combination of, on the one
8 hand, Google applying demotion algorithms such as Algorithm A to comparison
9 shopping services such as Foundem, and on the other hand, promoting its own
10 comparison shopping services through Shopping Boxes. That's the basis for the
11 Commission Decision.

12 If it's helpful, I could take the Tribunal to paragraph 70 of the Preliminary Issues
13 Judgment that spells that out, but I imagine it's relatively fresh in the Tribunal's mind.
14 But why don't I take you there because it is an important issue. So it's in Bundle 4,
15 tab 2 and it's at page 303. The particular paragraph I want is at page 325.

16 And the Tribunal there sets out:

17 "As no part of the Commission's case was based on the notion that either limb
18 operating alone was unlawful, we can infer from this that the Commission considered
19 each limb lawful on a standalone basis. However, we agree with the Claimants that
20 there is no explicit and binding finding to that effect in the Decision, which only focuses
21 on the unlawfulness of the combination of the promotion and demotion limbs. It is
22 therefore open to any of the Claimants to advance an argument that either limb on its
23 own constituted an abuse, but that contention does not follow from the Decision and
24 Google is able to contest it."

25 So, in my submission, what will happen if Foundem is permitted to introduce the
26 amendments that it seeks to into its claim is that we're going to move from a pre-

1 Decision claim that only has the demotions limb of unlawful conduct. That is, it
2 complains about Foundem being demoted, but it doesn't have the promotions limb --
3 that is the complaint that Google gave itself lots of leg-ups via the use of the OneBox.
4 And we say that that is a very significant change in its case, because what it's intended
5 to do is bring it into line effectively with something that's similar to the reasoning in the
6 Commission Decision, and currently it isn't.

7 THE CHAIR: You accept that the demotion limb was always there?

8 MR PICKFORD: Yes, indeed, I do.

9 MS ROSE: Can I just clarify what exactly you mean by demotion limb?

10 MR PICKFORD: Yes.

11 MS ROSE: Do you mean merely that the algorithm, without justification, removes their
12 search from, say, the front page?

13 MR PICKFORD: Yes.

14 MS ROSE: Or do you mean that the algorithm treats them less favourably than
15 Google?

16 MR PICKFORD: So, I mean, my primary case is that all you will actually find in the
17 pre-amended pleading is the former of those.

18 MS ROSE: Right.

19 MR PICKFORD: It is said by Foundem that, in fact, it includes the latter. And I would
20 argue that even if it did include the latter, it still doesn't go far enough to introduce what
21 is now the new full attack in terms of attacking the promotional aspect of OneBoxes.
22 But my primary position is as articulated in, Ms Rose, your first encapsulation of what
23 I say they had pleaded.

24 So, set against that background, our case, in a nutshell, is going to be based on four
25 points.

26 The first point is that the OneBox claim is a new claim within the meaning of section 35

1 of the Limitation Act, 1980. I'm going to show you why that's so, but in summary terms,
2 it's because Foundem has always clearly distinguished between two different alleged
3 abuses. On the one hand, there is the application of demotions, search penalties to
4 general results, beginning with Algorithm A. And then, distinctly, there has been the
5 promotion by Google of its own services, beginning with Product Universals and then
6 moving on to Shopping Units, and that begins in 2008 when the Decision begins. As
7 such, the OneBox claim, which is about the promotion by Google of its own services
8 in the period between 2006 and 2008 is outside anything that Foundem has previously
9 pleaded. So that's the first of my four points.

10 The second point is that the limitation period, in respect of a new OneBox claim,
11 expired over a decade ago, which means that it's now incumbent on Foundem to
12 show, pursuant to the test under Rule 32(a) of the Tribunal Rules for allowing a new
13 claim out of time, that the claim arises out of the same -- or substantially the same --
14 facts, as the previously pleaded claim.

15 Now, it is common ground, I think, between me and my learned friend, that if it's a new
16 claim, the limitation period for it expired many years ago. I don't see any quarrel with
17 that in his submissions.

18 I'd like to be able to say it's also common ground that that means Foundem would
19 need to make an application under Rule 32(2)(a). Foundem don't agree with that; they
20 advance an argument in their postscript that they have managed to circumvent Rule
21 32(2)(a), and indeed section 35 of the Limitation Act. And so I'm going to need to
22 address you on the arguments in their postscript. That's my second point.

23 The third element of our case is that, as a matter of factual objective analysis, the new
24 claim does not arise out of the same -- or substantially the same -- facts as previously
25 in issue. It therefore follows that the application that Foundem now makes in its
26 response, under Rule 32(2), must fail. The claim raises new factual questions, in

1 particular about what Google could and would have done in the absence of the
2 OneBox, had it proved unlawful. Those were not matters that were in issue prior to
3 the proposed amendment. It also raises questions about whether Google's approach
4 to promotions in the OneBox was objectively justified. Those are matters about which
5 Google is bound from 2008, because of findings in the Decision. There are no such
6 binding findings in relation to objective justification between 2006 and 2008. So, in my
7 submission then, the third part of our Application is that the Tribunal would have no
8 power to allow the new claim.

9 My fourth point is that, in any event, even if the Tribunal did have the power to exercise
10 a discretion under Rule 32(2)(a) to allow the claim, it should not do so. Three key
11 points that I'll develop in relation to that.

12 Firstly, Foundem offers no explanation at all, let alone a good explanation, of why it
13 has waited some 17 years after the relevant conduct ended to bring the claim.

14 Secondly, Google would be significantly prejudiced by being asked to investigate and
15 defend a claim which has not been an issue in this litigation for so many years.

16 THE CHAIR: Doesn't it depend not how long the litigation went on, it's when the claim
17 was introduced compared to trial? That's the usual question, isn't it? Otherwise you're
18 not -- if trial was in ten years' time, the fact that litigation started ten years ago wouldn't
19 necessarily prejudice you, would it?

20 MR PICKFORD: Well, with respect, Sir, in my submission, it's both. I certainly adopt
21 the point that the closer it is to trial, then the more problematic it becomes. And that
22 is one of the problems here, because if we have to investigate this new issue, including
23 questions going to objective justification and to counterfactuals, that is going to throw
24 out the current timetable, and we don't have the slack in the timetable for a trial in what
25 I think is about nine months' time.

26 THE CHAIR: It came in -- when was it introduced? November 2024, wasn't it?

1 MR PICKFORD: Well, it was first pleaded in November 2024. Of course, there was
2 no application under Rule 32(2) at that point. It was only permissible, at that point, if
3 it were in fact not a new claim. So --

4 THE CHAIR: Yes, but you were on notice that they were seeking to advance that
5 argument, at the latest in November 2024.

6 MR PICKFORD: Yes, but there's no reason why, because we're on notice, that they
7 have what we say is a hugely out of time claim, which they're not permitted to advance,
8 but we should be seeking to investigate that claim, at that point in time. We put them
9 on notice, immediately afterwards, that we said the claim was out of time, and in my
10 submission it would be quite unfair and not conducive to the efficient management of
11 these proceedings to require Google to investigate points which, at the time they were
12 introduced, there was no basis for introducing.

13 It was incumbent -- obviously all of this only matters if it's a new claim -- sorry, if it's
14 not a new claim, none of this matters, because they've won at the first stage of the
15 analysis, and therefore that's it. This only matters if we're in the territory where it's not
16 a new claim, and they need to make an application -- sorry, it is a new claim, I beg
17 your pardon. It is a new claim, and they need to make an application under Rule 32
18 of the Tribunal Rules to introduce that new claim out of time. That application was not
19 made until about two weeks ago. Now, I'm not taking a point on that to say, well, they
20 can't make the application, but I am taking a point on it to say that, until two weeks
21 ago, there wasn't even an attempt to argue that this was justified, on the basis that it
22 was the same -- or substantially the same -- facts as already pleaded.

23 And so it couldn't have been reasonable for Google in those circumstances to have,
24 prior to that point, been investigating factual issues about a claim that Foundem simply
25 weren't entitled to advance. Because of the fact that we're obviously in the alternative
26 world here, that I win -- on the version of the world here -- on the new claims point.

1 So, in my submission, this is very late, in terms of the ability for Google to prepare
2 properly for trial. The deadline for factual witness statements is a matter of a week or
3 two away, and it wouldn't have been reasonable for Google to have to be providing
4 facts and trying to investigate something that wasn't part of the claim at that point.

5 MS ROSE: What's the date for service of factual witness statements?

6 MR PICKFORD: I think it's two weeks, isn't it? The 23rd, so just under two weeks.

7 So that's the point, Sir, that you were asking me about, in relation to the relationship
8 between where we are now and the hearing. I say it's far too late, but if I could also
9 take a step back.

10 Sir, you put it to me that that was the only relevant consideration, and it wasn't relevant
11 that this was 17 years too late. In my submission, it is extremely relevant that this is
12 17 years out of time, and the reason for that is because 17 years in the life of Google
13 is the majority of its existence. And it is far more difficult now for Google to investigate
14 matters that occurred -- or rather ended -- 17 years ago than it would have been had
15 the claim been brought in time, and I'll take you to the evidence of Ms Lawrance that
16 expands on that.

17 My submission is going to be that both aspects of the timing tell against its inclusion,
18 even if we get to the point in the analysis where the Tribunal has a discretion as to
19 whether to permit the amendment.

20 THE CHAIR: Yes.

21 MR PICKFORD: Then turning to the legal framework, which I think we can cover
22 briefly, but I think it is still important to make sure that we touch on it. If I could ask the
23 Tribunal, please, to pick up Volume 5 and go to tab 1 of the Authorities Bundle,
24 page 39, I believe it is, which sets out section 35 of the Limitation Act, 1980. And that
25 provides insofar as material --

26 THE CHAIR: Sorry, can I just ask: you say this is raised for the first time two weeks

1 ago, the section 32 point?

2 MR PICKFORD: Yes. The application is made.

3 THE CHAIR: Well, the application. But the section 32 point that Google was relying -
4 - Rule 32, sorry -- was pleaded in February, wasn't it? They were in the reply, yes.
5 You look at the reply. You said it's time barred, and their response, fairly quickly was,
6 "Well, it's not time barred, it's not a new claim, but if it is, it arises out of the same or
7 substantially the same facts". So that was in February.

8 MR PICKFORD: The application --

9 THE CHAIR: The actual application wasn't made, well nor was your strike out
10 application made. But both parties were on notice that those were the issues. That's
11 what I mean.

12 MR PICKFORD: But my submission is not based on the fact that we could never have
13 anticipated that they might make a Rule 32 application; that's not my point. My point -
14 - it was all very obvious that they might have sought to make that application. Indeed,
15 Sir, as you point out, in February they said that it would be justified on that basis.

16 The point is: it's an application, and it needs to be made, and until it is made and it
17 succeeds, the point is not in the proceedings; it's in the proceedings if it's not a new
18 claim. So if I'm wrong on my first point, then fine, then Foundem would be entitled to
19 say, "Well, it wasn't new, we were right about that all along, and therefore if you haven't
20 responded to it, well then that's down to you, you've got to make the running on that".

21 THE CHAIR: Yes. No, we understand that.

22 MR PICKFORD: But until it's in the proceedings, we shouldn't have to be running
23 around trying to respond to it.

24 So back to the legal framework, we're looking at section 35 of the Limitation Act, and
25 by subsection (1):

26 "For the purposes of this Act, any new claim made in the course of any action shall be

1 deemed to be a separate action and to have commenced ..."

2 And then the relevant subparagraph for us is (b):

3 "in the case of any other new claim, on the same date as the original action."

4 So that's the relation back rule, that we're all familiar with.

5 And then by subsection (2):

6 "In this section a new claim means any claim [...] [involving] [...]

7 "(a) the addition or substitution of a new cause of action ..."

8 So that's what we're focused on here.

9 And then by subsection (3):

10 "Except as provided by section 33 of this Act or by rules of the court, neither the
11 High Court nor [any] county court shall allow a new claim within subsection (1)(b)
12 above [...], to be made in the course of any action after the expiry of any time limit
13 under this Act which would affect a new action to enforce that claim.

14 So that's why we then have the exception to that, which in the Tribunal is obviously
15 embodied in Rule 32, which we're all familiar with. And that's what we see in
16 subsections (4) and (5).

17 So that's the basic statutory framework. If we could go please to Geo-
18 Minerals v Downing, which is to be found at tab 12 of the Authorities Bundle. This is
19 a judgment of the Court of Appeal, and it's Lord Justice Males giving the leading
20 judgment. And, the case concerned allegations of fraud by Geo-Minerals against
21 various defendants, and then it also concerns some allegations of professional
22 negligence against a patent attorney firm, Rouse, which the claimants sought to
23 amend. And that's the factual context in which the issues under section 35 arose.

24 And if we could go, please, to paragraph 25, that's on page 343. (Pause)

25 There's reference there to the "four stage test", as explained in Ballinger v Mercer, and
26 also Mulalley v Martlet Homes, and one will see that the four points that are set out

1 there -- those correspond to the four parts of my claim, apart from I have reversed the
2 order of two and one, because that seems to me, on our case, to be a more sensible
3 way of approaching those matters. But those are the very same four points that I base
4 my submissions on. (Pause)

5 And then one sees, at paragraph 27, that, in relation to the second stage -- so that's:
6 "Did the proposed amendments seek to add or substitute a new cause of action? ... it
7 was common ground that the applicable principles were, as set out by
8 Mr Stephen Morris QC in *Diamandis v Wills*, drawing on earlier authority." [as read]

9 First point: the cause of action is that combination of facts which gives rise to a legal
10 right. It is the factual situation, rather than a form of action used as a convenient
11 description of a particular category of factual situation. So that's the important point in
12 this case: it's about the facts. It's not about whether you call them then an abuse of
13 dominance, or you call them discrimination, what matters is the factual pleading.

14 And then in subparagraph (2), we see it picked out at (b), "whether the breaches
15 pleaded differ substantially" [as read]. I say, in our case, the breaches pleaded do
16 differ substantially.

17 (C) is: "where appropriate, the nature and extent of the damage of which complaint is
18 made" [as read]. I say that the damage may well differ, but I don't particularly rely on
19 that, because damage alone is, as the authorities go on to say, often not determinative.
20 The key point in this case is whether the breaches pleaded differ substantially. So
21 that's what I'm going to focus my submissions on.

22 The cause of action, it says at 3, is "... every fact which is material to be proved to
23 entitle the claimant to succeed." [as read]

24 So those are the essential principles going to the first question on whether it's a new
25 claim.

26 Then at paragraph 28, we then have a summary of the analysis that underpins the

1 second question about whether the new claim is arising out of the same or
2 substantially the same facts. A number of points emerge, particularly from Ballinger.

3 If I could ask the Tribunal, please, to read all of 1 to 5.

4 One point to note in passing there is on subsection 3, there's reference to not putting
5 the defendant in a position where they need to investigate matters which are outside
6 the facts that he could reasonably be assumed to have investigated for the purpose of
7 defending the unamended claim. So that goes back to the point that I was making
8 before. It's not that we have to anticipate things that might form part of an amended
9 claim. The question is: what did we have to investigate for the unamended claim?

10 That's the comparison.

11 In addition to this summary, which I say fairly sets out the principles, there is a further
12 case I'm going to address you on, which is the Court of Appeal's judgment in
13 Mastercard v Deutsche Bahn. That case is actually, we say, on very similar facts to
14 ours, and one sees that more clearly when we've gone through the pleadings. So I'm
15 actually going to come back to that case, after I've gone through Foundem's pleadings,
16 because in my submission, that's a more helpful way of looking at it.

17 THE CHAIR: I imagine each proposition is not in dispute.

18 MR PICKFORD: Those propositions are not in -- no. I'm grateful to my learned friend.
19 We then turn to the examination of the pleadings, what I said that we would do to
20 answer the point that you reasonably asked me at the outset. The easiest place to
21 begin that is to start with the fifth version of the Particulars of Claim, because that is
22 actually easier to see what the amendments were at that time, because there have
23 been further changes since. Those are in Volume 1, at tab 5, and I'm going to start at
24 page 80, which is in fact the first page.

25 What one sees at paragraph 2 is a summary of Foundem's case, which is that:

26 "Google imposed algorithmic penalties on Foundem's website without any objective

1 justification for doing so, which substantially decreased Foundem's rankings in Google
2 search results irrespective of their relevance to users' queries, and decreased
3 Foundem's AdWords Quality Scores, thereby increasing Foundem's advertising costs
4 to a prohibitive level." [as read]

5 So just pausing there. This in part goes to the question that Ms Rose asked me about:
6 what is the nature of the case? The nature of the case in relation to the demotions
7 was, as they say in terms here, we imposed penalties on Foundem without objective
8 justification for doing so. That is the case being advanced. Then (b), separately:

9 "... used Google's "Universal Search" mechanism to give preferential placement to
10 Google's services over those of its competitors, including Foundem's." [as read]

11 So the second limb is the preferencing limb, and that is focused on the promotional
12 element of what Google gave to itself. Two clear, distinct aspects: penalties that just
13 weren't justified; and preferencing via a leg up on the page. That begins with Universal
14 Search, and of course, we know that that begins in 2008.

15 We see that structure reflected throughout the pleading. If we could turn to page 94
16 of the Bundle, please, we see at paragraph 28 through to 29 that Foundem pleads to
17 Google's own specialised search services. Then at 30 to 31, they plead to the
18 introduction and operation of Universal Search. Then at 32 to 36, they plead to
19 AdWords, which for these purposes we don't need to trouble ourselves very much
20 with. Then at 37 through to 42, they plead to Google's use of algorithmic penalties
21 and whitelists. That's the part in which Algorithm A and demotions more generally
22 arise.

23 As Foundem has been forced to concede, there's not a single reference in any of that
24 to the OneBox. What we then get to at paragraph 61, which is on page 108, is we
25 then get to the pleading on abuse. We start three lines down at paragraph 61 with the
26 statement:

1 "Each instance of Google's conduct is an abuse on its own. Further, or alternatively,
2 Google's conduct and its anti-competitive effects were interrelated and together
3 constitute an abuse". [as read]

4 That's the structure by which Foundem advanced the following abuses.

5 Then at paragraph 62 to 68, we see the plea in relation to the Algorithm A search
6 penalty. What is argued -- what is pleaded here is that for the period from June 2006
7 to December 2009, Google acted abusively by applying Algorithm A to its site in
8 determining its ranking in general results when that wasn't objectively justified.

9 THE CHAIR: Is that all that it says? Because what about paragraph 64A,
10 subparagraph (b)?

11 MR PICKFORD: Yes. So --

12 THE CHAIR: It's not just about applying it to Foundem. It's about not applying it to
13 Google's own shopping service.

14 MR PICKFORD: Well, it must --

15 THE CHAIR: Isn't that -- what do you understand 64A(b) to be complaining about?

16 MR PICKFORD: What I understand that to be complaining about, read fairly as
17 a whole, is an objective justification point that what Foundem argued, and they argue
18 in these Particulars, is that Google's own CSS shares traits in common with Foundem's
19 CSS and therefore it can't have been objectively justified for Google to apply penalties
20 to Foundem when it didn't apply them to itself.

21 THE CHAIR: Sorry. So Google should not have applied penalties, and that's
22 Algorithm A, yes?

23 MR PICKFORD: Yes.

24 THE CHAIR: Penalties by Algorithm A to independent sites, when it didn't apply
25 Algorithm A to itself. Is that right?

26 MR PICKFORD: Yes. That supports -- that goes to the point that's summarised in

1 paragraph 2.

2 THE CHAIR: Isn't that discrimination? Well, when you say, "You applied this to me
3 but not to yourself", isn't that just a definition of discrimination?

4 MR PICKFORD: I have two answers to that. The first is, actually, it's not of itself
5 inherently a discrimination plea. It's a complaint about the fact that they were per se
6 affected because it was not objectively justified. The point they rely on in explaining
7 why it wasn't objectively justified is because they say, "We share exactly the same
8 traits as Google, and therefore you can't apply them to us and not to yourself".
9 That's my first response to that. I have a second approach.

10 MS ROSE: Hang on, before you move on from that. I mean, isn't what you've just
11 said just a longer way of saying "discrimination"? Also, if you look at 64A(c), isn't that
12 basically a discrimination plea?

13 MR PICKFORD: Well, in my submission, as I say, I have two answers to this. My first
14 line is actually just subtly different. What it is actually saying, consistent with the
15 summary in paragraph 2, is that the problem is that what Google did was it did bad
16 things -- in Foundem's view -- to Foundem when they weren't objectively justified. We
17 know that they weren't objectively justified because Google didn't do them to
18 themselves. I am happy, however, to still answer the claim on the alternative basis.
19 Let's suppose I am wrong about that. Let us suppose that the claim is simply -- the
20 claim goes beyond that and it says it is in fact a form of discrimination because it's the
21 complaint that you applied them to us, and at the same time, you didn't apply them, to
22 yourselves.

23 MS RIEDEL: Even though you were materially similar.

24 MR PICKFORD: Even though you were materially similar.

25 MS RIEDEL: So what they say, in terms, at 64A(c) is, "You demoted us using
26 Algorithm A. You did not demote Google's comparison shopping service, even though

1 several of the characteristics applied to your shopping service, just as they applied to
2 Foundem".

3 MR PICKFORD: Yes.

4 MS RIEDEL: That's exactly what it said in that paragraph, which is a complaint of
5 discrimination. "You treated me less favourably than you treated yourself, even though
6 we were in materially similar circumstances".

7 MR PICKFORD: Yes. Well, as I said, I read that initially in the light of how they
8 structure their case in paragraph 2. But I am happy, and I wish to make very clear,
9 I don't rest on that point. I'm very happy to approach this on the alternative basis that
10 in fact, contrary to paragraph 2, where -- and the way it's structured there and the fact
11 that the self-preferencing actually comes just in relation to the promotion element, that
12 there is an additional discrimination claim in relation to algorithmic treatment. Even
13 so, that claim is simply: "You applied the algorithm to me. You didn't apply it to
14 yourselves". That claim has nothing to do with the way in which you promoted yourself
15 on the page. It's simply that there were some algorithms which you applied to me and
16 you didn't apply to yourselves. And that is distinct from, as we will see through the
17 structure of this claim, a promotional claim.

18 THE CHAIR: I understand that, but if it's just a discrimination claim, as you I think
19 accept it might be read that way, as Ms Rose put it to you, the counterfactual to the
20 discrimination claim is no discrimination, isn't it?

21 MR PICKFORD: Yes. But the question is, what does that mean?

22 THE CHAIR: Well, it means that you apply Algorithm A to yourself as you have to
23 Foundem, and you don't do, therefore, what you did?

24 MR PICKFORD: No. In my submission, that's where we go further.

25 THE CHAIR: But the damages are going to be -- that's what you should have done in
26 the counterfactual. You compare the counterfactual to the factual. Well, isn't that how

1 | you work out damages in any of these cases?

2 | MR PICKFORD: Well, Sir, with respect, I don't agree with that. But I can understand
3 | why you're saying -- the reason why I don't agree with it is because the counterfactual
4 | for Google not applying Algorithm A to itself is, as you have rightly said, Google
5 | applying Algorithm A to itself in general search results. That is the counterfactual to
6 | that claim of discrimination. So what that would mean is that Google would appear in
7 | general search results in the same way as Foundem, but subject to Algorithm A. It
8 | would suffer the disadvantage that Foundem says that it suffered from being treated
9 | to, being subject to Algorithm A.

10 | That doesn't touch on a different question analytically, and certainly as set out in these
11 | Particulars, which is: what was Google doing elsewhere on the page? Was Google
12 | also promoting itself in a special box which was nearer the top of the page, or had nice
13 | features, or did things like that? That simply doesn't engage those issues. Now, the
14 | reason why I said that I had both an answer and I can understand why you're putting
15 | it to me is because logically, one can see that the only probably coherent case to make
16 | is to bring those two things together, to say it's not one. It's not just about algorithms.
17 | It's about algorithms in conjunction with promotion on the page. That is an argument
18 | that was had before the European courts. We actually had intervenors in that case --
19 | I can't recall whether Foundem was amongst them; I think it was -- who said, "No, no,
20 | no. The algorithm in itself is bad. You don't need to go -- I mean, we win on all sorts
21 | of points, but the algorithm itself is bad. You don't need to link it. You don't need this
22 | combination abuse." What was decided by the European courts and is reflected in the
23 | Tribunal's Preliminary Judgment that I showed you is that the Commission's Decision
24 | is based on the combination of the two.

25 | THE CHAIR: We know that, and equally, we know that it's open to Foundem as it's
26 | pleaded that you don't need the combination. That each part is an abuse on its own.

1 MR PICKFORD: Yes.

2 THE CHAIR: They have to establish that. There's no binding finding of that, but they
3 can run that argument as you showed us the passage, and they do run it --

4 MR PICKFORD: Yes.

5 THE CHAIR: -- expressly in paragraph 61, as you showed us. And I can quite
6 understand if you say that, well, bits of this pleading might seek to suggest that the
7 Product OneBox in itself, separately, was a form of abuse because of its self-
8 promotion, and you say that's entirely new. I understand that.

9 But if one puts that on one side and just focuses on this claim that the Algorithm A is
10 an abuse because of discrimination, then and therefore the counterfactual is the
11 application of Algorithm A to Google's comparison site as well, that's your
12 counterfactual and it's different from the factual.

13 MR PICKFORD: Well, in my submission, that isn't the counterfactual --

14 THE CHAIR: I thought you just said it was. I thought you said -- perhaps I wrote it
15 down wrongly -- that Google would apply Algorithm A to itself in the same way as it
16 applies it to other shopping sites?

17 MR PICKFORD: Within the generic search results. It says nothing about what Google
18 would do elsewhere on the page. Because that's not put into issue by the application
19 of Algorithm A in generic search results. And so --

20 THE CHAIR: I don't quite follow that.

21 MS RIEDEL: Could I just ask my question, because it sort of factors in. What I was
22 struggling with was, in terms of preparing your defence to 64A(b), don't you have to
23 look at what Google was doing at the time? So how is the Product OneBox not
24 relevant to your defence?

25 MR PICKFORD: Is it relevant, but in this importantly different way. Thanks for that
26 question because it may be a good way of trying to explain what my point is.

1 In the world where we just have what was originally pleaded by Foundem, which is an
2 attack on Algorithm A, which I'm willing to go so far as to accept is saying it's that
3 Algorithm A was discriminatory, the counterfactual to that involves removing -- well,
4 actually it could involve multiple things. It could involve applying Algorithm A to
5 Google. It could involve removing Algorithm A altogether. Both of those are at least
6 prima facie potential counterfactuals to that form of claim of discrimination.

7 In that counterfactual world, the OneBox would continue to exist because the OneBox
8 itself has not been impugned. And what is different about the new claim is that, in
9 addition to Algorithm A being impugned, now, the OneBox is also being impugned.

10 THE CHAIR: Well, I just don't quite understand.

11 MR PICKFORD: Perhaps it's easier to look at a OneBox. There's a blown-up example
12 in Foundem's response, which is in Bundle 1, tab 2, page 23. I think it's blown-up from
13 the General Court's judgment, but it's a bit small in the General Court's judgment.

14 It's a bit blurry, but it's a bit blurry in the judgment.

15 THE CHAIR: And so there we can see it. And Product OneBox, it's got some product
16 brands. And then it says in the fourth line, "Try Froogle: Search for", which is the
17 name, as I understand it, of the Google shopping comparison site as at that date.

18 So if Froogle was subject to Algorithm A, I don't see how it could be there at the top
19 and not ranked within the generic results according to how it would fare in the
20 algorithm, because this is specifically not applying Algorithm A to Froogle. It's putting
21 it right above all the generic searches.

22 It's the exact contrary, isn't it?

23 MR PICKFORD: There are a number of answers.

24 The first is we don't know where it would have -- had Algorithm A applied to the
25 Product OneBox, we don't know where it would have appeared. It might have
26 appeared higher than Foundem because it was better. That's the first point.

1 THE CHAIR: Well, that's something that would be explored in a trial.

2 MR PICKFORD: Second point is this. Equally an implication of Foundem's case is
3 that one simply stops applying the algorithm. What is said is that the algorithm was
4 unfair, it hurt us, and it wasn't objectively justified. So just stop applying the algorithm.
5 You stop applying the algorithm that does not bear in any way on what we do in the
6 Product OneBox. The OneBox is untouched and that is what, in my submission,
7 shows you analytically that these are in fact separate allegations. And I would like to
8 come back to the pleading to show you they are very separately set out as well by
9 Foundem.

10 THE CHAIR: Well, you have to apply an algorithm to rank the results.

11 MR PICKFORD: Mmm-hm.

12 THE CHAIR: And as I understand it, the algorithm that was applied was Algorithm A.

13 MR PICKFORD: Yes.

14 THE CHAIR: So you could apply a different algorithm to rank the results, that's true.
15 But that would apply to all of them, based on a neutral assessment of the site's
16 qualities.

17 MR PICKFORD: With respect, Sir, that is not the counterfactual to the complaint that
18 there's a problem with Algorithm A or there's a problem with some manual demotion.
19 A logical -- I'm not saying it is necessarily what Google would have done, but you can
20 test the distinction between the cases this way. A logical answer to that is to say fine,
21 remove Algorithm A, the OneBox is not affected by that at all.

22 THE CHAIR: But you have to have an algorithm. You have to rank results.

23 MR PICKFORD: Yes.

24 THE CHAIR: You have to apply that ranking also equally to Google's, to Froogle.
25 That's what the discrimination is, you don't apply to Google and you do apply it to
26 everybody else.

1 MR PICKFORD: Well, with respect, Sir, that is merging two different claims. What
2 one is about Algorithm A and Algorithm A was, in Foundem's submission, bad and
3 should not have been applied. And I can only repeat my submission that you can test
4 whether that is a different question to what one does in relation to the OneBox by
5 asking oneself, would it be conceivable to advance a logical counterfactual that you
6 just get rid of Algorithm A?

7 THE CHAIR: And have a different algorithm? You have to rank.

8 MR PICKFORD: Well, yes. I mean, there are 200 algorithms that you have.

9 THE CHAIR: Yes. But you have to apply an algorithm in a neutral way to all the sites.

10 MR PICKFORD: That is a different allegation.

11 The allegation was not, "There are 200 algorithms out there and you're applying all of
12 them differently, as between Google and Foundem". The allegation was there is
13 Algorithm A, and Algorithm A is hurting us.

14 THE CHAIR: Well, that's one, but the other allegations, both Ms Rose and I have
15 sought to point out, is the one at 64A, which is discrimination. You're saying, well, the
16 counterfactual to discrimination needn't be Algorithm A. All I'm saying is, well, then it's
17 some other algorithm, but it's a neutral. It's applied to Google and to everybody else
18 in the same way, because if the complaint's discrimination, the counterfactual is equal
19 treatment. Has to be it, doesn't it?

20 MR PICKFORD: Yes, but the question is, what type of equal treatment?

21 And the reason in my submission, Sir -- I think I'm not being effective at the moment
22 and I don't seem to be landing my point -- is because it is very tempting to move
23 analytically to what the European Court said the Commission's Decision had done,
24 which was to look at it holistically and to look at everything on the page, and to say
25 that we can't just look at the algorithms, we also have to look at the promotional aspect.
26 It's the combination of the two, that is the abuse. I can understand that is an

1 | intellectually satisfying way of approaching it.

2 | That is not what Foundem pleaded. It is what they have now sought to plead, but what
3 | they originally pleaded does not go that far. At its highest it says Algorithm A was
4 | applied to us, and it wasn't very nice, and you didn't apply it to yourself. And as I said,
5 | you can test logically whether that necessarily implies something about Product
6 | OneBox by asking the following question: could --

7 | THE CHAIR: When I'm struggling is -- if that's the allegation as you've just expressed
8 | it, what is the counterfactual?

9 | MS RIEDEL: If I may, I think what I'm hearing is you're suggesting that the
10 | counterfactual to the allegation could be either everybody being subject to Algorithm A
11 | or another algorithm, or nobody being subject to it, but in any event, Google could still
12 | put the Product OneBox wherever it wanted to, because that was never part of the
13 | original claim, so there could still be discrimination, but Foundem has never argued
14 | there was discrimination of that type.

15 | MR PICKFORD: Yes, there could be a different form of discrimination.

16 | MS RIEDEL: So one could resolve the discrimination claim in favour of Foundem, but
17 | they would still have been subject to discrimination, but they just never argued it.

18 | MR PICKFORD: That's right. That's a very helpful way of putting it, I respectfully say
19 | so.

20 | It's because there are different types of discrimination being pleaded here. And whilst
21 | it is most intellectually satisfying to say, okay, well, there is a type of discrimination,
22 | but surely what we really should be doing is getting rid of all discrimination, that then
23 | obviously brings those things together but what I say the implication of this is, is that
24 | the original version of the pleading fails because it doesn't go far enough. It doesn't
25 | impinge on the OneBox issue, and inevitably it's going to run into the buffers, I say.
26 | And with respect, Sir, and I'm not saying you're doing this in any way out of favouritism,

1 but what I say is happening is that that is an intellectually uncomfortable answer, and
2 so one looks to say, well, actually, what effectively saves this and turns it into
3 something logical. And the fact that it might not have been logical and might not have
4 ultimately got them what they wanted the first time, doesn't mean that they pleaded
5 anything differently.

6 MS ROSE: Can I just check factually what's happening in 2007. So, Google does not
7 apply --

8 Is it right that Google's own CSS's don't appear in generic search results at all? Is that
9 right?

10 MR PICKFORD: That's right. Because there's a --

11 MS ROSE: They're completely gone.

12 MR PICKFORD: Yes. There are two entirely distinct processes that are going on, on
13 the page.

14 In the pre-Decision world, before Universal Search, it does two things effectively
15 independently. On the one hand it's got general search results, and it doesn't put itself
16 in those.

17 MS ROSE: Yes. So that's what is described here as "generic results".

18 MR PICKFORD: Yes. But Foundem is not in those.

19 MS ROSE: So one complaint that Foundem might make is, "We're too low on the
20 generic search results. We're not on page 1. And actually we should be on page 1."

21 That that could be a complaint about the poor quality of Algorithm A and the way it
22 applies to them.

23 MR PICKFORD: Yes.

24 MS ROSE: Which is not discrimination in relation to Google, but just simply saying
25 they're being unfairly disadvantaged by Algorithm A.

26 MR PICKFORD: Yes.

1 MS ROSE: Okay. Go on.

2 MR PICKFORD: So, so that's one part of the page.

3 MS ROSE: Yes.

4 MR PICKFORD: And then there is a different part of the page, which is a different
5 mechanism which provides some specialist results. At this time, those are grouped in
6 something that we call the OneBox. And they are produced via different means with
7 different algorithms.

8 MS ROSE: Yeah.

9 MR PICKFORD: And my point which I'm --

10 MS ROSE: Is that that wasn't pleaded.

11 MR PICKFORD: Yes.

12 MS ROSE: That's a different form of discrimination.

13 MR PICKFORD: It's just separate; it's a different form of discrimination. It could have
14 been pleaded, it wasn't pleaded. All that was pleaded was the attack, in relation to
15 the --

16 MS ROSE: I mean, you could say that, in fact, you have a simple answer to the
17 pleaded form of discrimination at 64A, which is, yes, it's true that Algorithm A didn't
18 apply to Google, but that wasn't more favourable treatment, because Google's results
19 didn't appear in the generic results at all.

20 MR PICKFORD: Yes.

21 MS ROSE: So in fact, Froogle is more favourably treated than Google's CSS in
22 relation to the generic results, Froogle is in those results and Google -- sorry, Foundem
23 is in those results, but Google is not.

24 MR PICKFORD: Yes.

25 MS ROSE: So, your case is that that is actually the answer to that plea, and a separate
26 plea is: Google has discriminated, by having a separate process, the Product OneBox,

1 which puts its results always at the top of the page.

2 MR PICKFORD: Correct.

3 MS ROSE: And that's the thing you say was not pleaded.

4 MR PICKFORD: That is correct. And one sees that, in fact, it was pleaded from 2008,
5 and what changed in 2008 is that Google brought in Universal Search, and at that
6 point, the relationship between the two parts of the page became much stronger,
7 because Google brought in a mechanism for comparing the value to users in its
8 estimation of its own specialist results, versus results in the generic part of the page.
9 So, in that world -- and that's the world that the Commission focuses on and takes as
10 its starting point -- that separation begins to break down somewhat, because Google
11 says, "Well, there's a universal process here". But in the pre-2008 world, we don't
12 have that unification, that's brought about by Universal Search, and so, as you rightly
13 observed, an answer to the claim discrimination is: we treated ourselves worse,
14 because we nuked ourselves. We didn't just make it harder to see ourselves, we just
15 nuked ourselves altogether.

16 MS RIEDEL: But if we're thinking about the counterfactual, maybe you can refresh
17 me on the law, because don't we have to think about something that's realistic? So if,
18 at that time, what Google did was it took itself out of general search results and put
19 itself into Product OneBox, in a counterfactual world where it has to be, you know,
20 putting itself into Algorithm A, into the general search page, would it be realistic for it
21 also still to maintain Product OneBox? Because in a sense, the two went together. It
22 wasn't in general search, so it had its Product OneBox. But if it's in general search,
23 then surely something happens to Product OneBox, in a realistic counterfactual world,
24 unless I'm wrong on what the basis of the counterfactual has to be.

25 MR PICKFORD: Well, in my submission again, I give the same answer as I gave in
26 relation to the Chair's similar point to me, which is I understand why it is tempting to

1 say, well, surely, actually, if looked at holistically, wouldn't other things started to have
2 changed? And my answer to that is: actually looking at the particular pleaded abuse,
3 no. If all that's pleaded is you applied Algorithm A to us, and you didn't apply it to
4 yourself, then the logical and direct response to that is for us to say, well, but we were
5 in a worse position. If you want us to also be in generic search results with
6 Algorithm A, so we appear there, as well as in the OneBox, well that's fine, but the
7 OneBox isn't being impugned, under that.

8 MS RIEDEL: So our counterfactual, even if it's artificial, can only be the counterfactual
9 within the circumscribed limits of the applicant's case -- the claimant's case.

10 MR PICKFORD: Yes, and I say that's because of the artificiality of the case, because
11 the case as pleaded didn't really go -- at that point -- to the nub of what the Commission
12 found to be objectionable. And I would -- if I may -- like to go back to the pleaded
13 case, because that really becomes clear, as one goes through, their pleaded case.
14 (Pause)

15 So I think, where we were, is we'd gone through the pleaded facts --

16 THE CHAIR: Sorry to interrupt you; we need to take a short break.

17 MR PICKFORD: Yes, that would be a good moment.

18 THE CHAIR: For the transcriber. So take just a little over five minutes to break, and
19 we'll come back.

20 (11.43 am)

21 (A short break)

22 (11.56 am)

23 THE CHAIR: Yes, Mr Pickford.

24 MR PICKFORD: We were having a very helpful discussion about what the
25 counterfactual is, that's implied by Foundem's case on Algorithm A, and that was
26 prompted by the Tribunal referring me to paragraph 64A of the pleading. It might be

1 helpful to return to that, and to look at what Foundem is saying, in respect of
2 Algorithm A there. It says it "will rely on the Commission's findings in respect of
3 Algorithm A" [as read]. I, in particular, was pointed to 64A(c), and the comparison
4 made with Google that, by contrast, Google's comparison shopping service has never
5 been demoted by Algorithm A, despite the fact that Google's own comparison
6 shopping service exhibits several characteristics that make comparison shopping
7 services prone to being demoted.

8 There's a reference there, then, to the Decision. First, I'm going to pick up footnote 47,
9 if I may. There's also a reference to 46 in that paragraph, but there's also a reference,
10 in footnote 46, to another part of the Decision.

11 But at footnote 47, they refer to recital 380 of the Decision. So if you could please go
12 to Bundle 4, and pick that up at page 111, I think. (Pause)

13 From 379 -- it's helpful to actually, just before getting to 380, to step back here and
14 look at how the Commission is structuring its case in the Decision. So what the
15 Commission says, at 379, is:

16 "There are two main differences in the way that Google's own comparison shopping
17 service and competing comparison shopping services are positioned in Google's
18 general search results pages, despite Google's comparison shopping service having
19 similar characteristics to competing comparison shopping services." [as read]

20 And then, separately:

21 "(i) Google's own comparison shopping service is not subject to the same ranking
22 mechanisms as its competitors, including adjustment Algorithm A ...

23 (ii) when triggered, Google positions results from its own comparison shopping service
24 on its first general results page in a highly visible place (i.e. either above all generic
25 search results, or in the majority of cases, within, or at the level of, the first generic few
26 search results)." [as read]

1 So, what is happening there is that the Commission is, itself, talking about two distinct
2 forms of preferencing and self-preferencing, and the only one that Foundem picks up
3 on, for the period 2006 to 2008, is the first of those, in relation to the application of
4 algorithms. It does not pick up on the second of those, for the period of 2006 to 2008,
5 as I'm going to come on to show you.

6 And then what we see is that each of those different mechanisms is expanded upon.
7 So at recital 380 through to 383, we see the Commission's explanation of what Google
8 does in relation to ranking mechanisms for generic search results, and I'll let the --

9 THE CHAIR: Yes, some of this is confidential.

10 MR PICKFORD: Yes. (Pause)

11 So recital 380 is the key one, and then that continues with further explanation through
12 to the end of recital 383, and then indeed 384.

13 And then one sees at 385, they then turn to the second type of self-preferencing, which
14 is that since the launch of the Product Universal, until today, Google has positioned
15 results from its own comparison shopping service in its first general search results
16 page, either above all generic search results, or within, or at the level of, first generic
17 search results.

18 So that is the second form of self-preferencing, and what one sees, if one looks at the
19 references that Foundem gives back in its pleading that we were looking at, 64A(c), to
20 support its case, in relation to Algorithm A, are references to the first aspect that the
21 Commission focuses on of its two, namely the application of algorithmic penalties. An
22 example of that -- I'm not going to go through every single footnote, but they all
23 correspond to this general point -- is footnote 47, which refers back to recital 380,
24 which I've just showed you. (Pause)

25 It is not referring, in 64A, to any of the aspects of the Commission's Decision which
26 relate to the discrimination through promotion of Google's results on the page.

1 MS RIEDEL: How does that help us here? Because there's that second aspect:

2 "Anyhow only applies in the Commission's Decision from 2008, and we're concerned,
3 in this application, with the period pre-2008." [as read]

4 MR PICKFORD: So how did it help?

5 MS RIEDEL: Yes. How is that relevant to us if they're not cross-referring to the
6 Product Universal self-preferencing.

7 MR PICKFORD: Because what it shows is that the Algorithm A concern maps on
8 directly to the Commission's Algorithm A concern, which is the first of its two concerns.
9 What Foundem doesn't say is that their Algorithm A plea maps on not only to what the
10 Commission says about Algorithm A in the Decision, but it also maps on to mutatis
11 mutandis, what the Commission says about self-promotion on the page. That's what
12 it then introduces, when it introduces the OneBox plea.

13 So it goes on to say that later, at the end of last year, but it doesn't do that at this stage,
14 when we're in the pre-amendment form of the pleading. So that's why it's relevant.

15 MS ROSE: Would you say this shows these paragraphs that the Commission was
16 also looking at the Algorithm A issue, as itself being a discrimination issue,
17 independently of the form of discrimination resulting from promotion of Google's
18 results?

19 MR PICKFORD: Yes, that's probably fair, insofar as there is a correspondence
20 between Foundem's case and the Commission's case, we're very firmly in my
21 alternative world, which is that they're both discrimination cases. As I said at the
22 outset, I'm very happy to take the majority of the battle on that basis, because the
23 Tribunal is going to be very helpful to steer, in terms of its analysis of the pleadings.
24 (Pause)

25 But then the question, of course, is: what type of discrimination are we talking about?

26 And my answer is that there are two very different types of discrimination, which relate

1 to two different things. It's worth reminding the Tribunal -- and this comes back to
2 a point that I was making to Ms Rose before the short adjournment -- that the two
3 types of results on the page are doing different things, and the generic results are
4 based on crawling the web and applying algorithms that are relevant to web crawling
5 to generate what Google considers to be the most helpful generic results.

6 The OneBox was doing something entirely different; it was not based on crawling the
7 web, it was based on taking feeds from merchants of direct information and using
8 those as the basis for finding what were considered to be helpful results. So there's
9 different processes there, different things, and that's why the Commission, I say, has
10 appropriately analysed them separately in its Decision, and it reflects what Foundem
11 has done, which is only to pick up on the first of those, and not the second. And one
12 sees that they've done that, then we'll go through the rest of their pleadings.

13 So at 62 through to 68, we have the plea in relation to Algorithm A, and I think
14 I probably said all that I can in relation to what I say Algorithm A is directed at.

15 We then have at 69 to 71 -- sorry, so that begins at the AdWords (inaudible). Sorry.
16 Prior to that we've got other penalties, but that doesn't analytically change anything, in
17 my submission.

18 Then we've got the AdWords penalties case, which is at 69 through to 71. Again, I say
19 that doesn't have any particular bearing on what we're debating in this hearing.

20 We've then got 72 to 78, the case on objective justification. That's where we then have
21 the explanation as to how what Google does is effectively very similar to what
22 Foundem does, they say.

23 Then at 79 through to 81, we have a procedural abuse, so 84.

24 Then importantly, at 85 -- so we're now on page 123 -- we now move on to the part of
25 the pleading which corresponds to the second aspect of the Commission's case on
26 abuse; the second limb. That begins at Universal Search, just as the Commission's

1 case begins with Universal Search.

2 These are not part of the Algorithm A claims. They are clearly distinct. We were told
3 in paragraph 61 that we had to read them as distinct. If I could ask the Tribunal,
4 please, to read 85 through to 87. (Pause)

5 Importantly, what these paragraphs don't say is what Mr West now says is -- the other
6 side of the coin of what we were just describing, or the flip side of the Algorithm A
7 abuse is this: they say that Google's Universal Search mechanism constituted
8 a further abuse of its dominant position. The promotional aspect of its case is being
9 quite clearly positioned as something distinct and further to the complaint under
10 Algorithm A. It's not just the flip side; it's further. The complaints that are included in
11 this part of the pleading do not touch upon OneBox. They do not touch upon anything
12 prior to 2008. They only refer to the Commission Decision, and the Annexes 1 and 2
13 that are referred to in paragraph 89, which I know that the Tribunal asked for. They
14 focus on a comparison of the situation between 2007 and 2009. What they're focused
15 on is what changed in January 2008.

16 What I say is that neither this plea nor the factual background to Foundem's claim,
17 which is referred back to -- namely, paragraphs 30 and 31 of the Particulars of Claim -
18 - included any plea challenging the OneBox. All that was challenged for that period
19 was Algorithm A on its own.

20 That is why I say that the addition of the OneBox claim is new, and one sees how it's
21 new from its introduction a few paragraphs later. If we go to page 128, we see about
22 halfway down, "The period from 2006 to 2008. Product OneBox". [as read]

23 And then here they do plead, as they didn't plead previously, a challenge in relation to
24 Product OneBox, i.e. the self-promotion discrimination rather than the demotion
25 discrimination. If I could ask the Tribunal, please, to read that from 94C through to
26 94F.

1 THE CHAIR: Yes.

2 MR PICKFORD: So it's only at this stage in the amendment that Foundem is seeking
3 to fill in the hole and to bring the Product OneBox into play in the way that the Product
4 Universal was previously in play from the beginning. Indeed, it's notable that Foundem
5 refer to the Commission Decision here, mutatis mutandis, as their means of supporting
6 the OneBox claim. That's precisely what I noted they didn't do previously. It would
7 have been open to them, but they didn't. (Pause)

8 Yes. My learned friend points out (inaudible). But my point is the forensic one, that
9 we're comparing the difference between before and after the end of last year. Now --

10 MS ROSE: In fact, they refer explicitly to recital 379 --

11 MR PICKFORD: Yes.

12 MS ROSE: -- where the Commission identifies the two forms.

13 MR PICKFORD: Exactly. In my submission, basically, there was a problem with their
14 pleading. It didn't do what it really needed to do to fully advance the case that they
15 obviously want to advance. But that shouldn't rebound on us. It shouldn't be up to us
16 to say, oh, well, maybe there's a better case. They could have pleaded previously,
17 and therefore we'll prepare on the basis of a better case that they haven't pleaded.
18 The first time they seek to actually introduce the claim that they really now want to
19 pursue is at the end of last year, and that is woefully late.

20 What they've then done, I can deal with briefly in -- the further amendments in the sixth
21 Particulars is threefold. There are three changes that are relevant here. Those
22 Particulars are found in Volume 1, tab 8, and they begin on page 244. I'm going to go
23 to page 246.

24 So if we look at and begin with paragraph 2(b), I say that the changes here are
25 revealing, because whereas the second limb used to be concerned exclusively with
26 Google's Universal Search mechanisms, that was what was impugned. Now it's said

1 to be using various mechanisms. That's what gives them the cover to then introduce
2 the OneBox claims that they then have later. So the fact that they've made that
3 change, I say supports my position that the shift from focusing on Universal Search
4 only to Universal Search plus Product OneBox only comes in via the amendments.
5 So that's the first point in relation to the new pleading.

6 The second point we can see if we go to page 267. This is in particular at
7 paragraph 29E, new factual pleadings, please, in relation to OneBox. So if I could ask
8 the Tribunal, please, to read paragraph 29E. (Pause)

9 What I say that that underscores is that the OneBox plea is new. These are the core
10 facts that they now want to rely upon to make out the second part of their discrimination
11 claim, the second discrimination claim, and for it to map onto what the Commission
12 said about Product Universals. The fact that they're here now but weren't in the fourth
13 iteration of this pleading underscores the fact that all of this plea is new. It's a new
14 cause of action, focused now on the OneBox, which previously wasn't there.

15 It's also notable, at least in passing, that if you go back to the previous page, all of this
16 is under the heading "Universal Search". So they've sought to sandwich this new point
17 about Product OneBox under the heading "Universal Search". Of course it isn't
18 Universal Search. It's prior to Universal Search. That just underscores that they didn't
19 have a natural home for it in their original pleading, because it wasn't part of their case.
20 So they've had to put it somewhere where, strictly speaking, it doesn't actually go.

21 THE CHAIR: Can you just help me? I've been slightly puzzled by what Universal
22 Search actually is.

23 MR PICKFORD: Yes.

24 THE CHAIR: I mean, I understand the OneBox concept, sometimes described as
25 Universals. Then you have the -- I think it's then called, is it, "Product Universal",
26 which has the pictures, and then it's called a "Shopping Unit".

1 MR PICKFORD: Yes.

2 THE CHAIR: But what is "Universal Search"?

3 MR PICKFORD: So "Universal Search" is the name given to the approach that Google
4 applied when it brought in -- when it had Product Universals. But it doesn't correspond
5 to the approach that Google originally had in the Froogle Product OneBox world. The
6 core point about Universal Search is that Google developed a means of ranking
7 specialist results and generic results against one another, because as I was explaining
8 earlier, they are in fact produced by very distinct processes. One is based on crawling.
9 The other is based on direct feeds of information. In the OneBox world, those two
10 were essentially separate.

11 THE CHAIR: Yes.

12 MR PICKFORD: And what Universal Search did is it brought in a mechanism by which
13 Google could compare those different types of results to decide which would be most
14 appropriate and where, within the ranking on the page, it would be appropriate to put
15 either Product Universal initially, or later Shopping Unit.

16 THE CHAIR: I couldn't find it explained, really, in the Decision -- Universal Search.
17 I might have missed it because it was a long decision, but --

18 MR PICKFORD: I can help provide some references. Maybe at the lunch
19 adjournment?

20 THE CHAIR: Yes. I would find that very helpful, because (overspeaking) early on,
21 a sort of chronology of what happened.

22 MR PICKFORD: I can help on my feet to some degree. It may be that there are better
23 references (overspeaking).

24 THE CHAIR: Think about it over lunch, and it's not a long question, but if there is
25 something that --

26 MR PICKFORD: What the Tribunal may find it helpful to go to over lunch is -- the

1 General Court's judgment here is actually quite helpful -- the introductory passages to
2 that. For example --

3 THE CHAIR: They seem to put in new facts in the General Court judgment, which is
4 unusual, that you don't find in the Commission Decision.

5 MR PICKFORD: Yes.

6 THE CHAIR: Hmm.

7 MR PICKFORD: I agree, Sir, that is unusual. On this occasion in relation to this
8 question, it is however helpful in that the General Court provides some additional
9 assistance in relation to the question that you're asking me. So for instance,
10 paragraph 14.

11 THE CHAIR: Yes. Well, that's where you do have a mention of Universal Search in
12 the way that you've described it.

13 MR PICKFORD: There was a terminological issue here because it talks about
14 products covered by the Product OneBox. Sometimes the OneBox gets used in
15 different contexts. But the Universal Search did not exist -- at least in the United
16 Kingdom or Germany, which is when the Decision starts -- until 2008. So we are
17 talking about a different period than what I have described as the Product OneBox
18 period, which is talking about the pre-Universal Search era.

19 THE CHAIR: Yes. I think there is slight inconsistency in the way they use the
20 language, because I think they say Universal Search only came in in 2007.

21 MR PICKFORD: It did come in in 2007 in the United States.

22 THE CHAIR: Yes.

23 MR PICKFORD: It didn't come in in the UK and Germany, which were relevant for the
24 Decision, until the beginning of 2008.

25 MS RIEDEL: I'm looking at the POC 5, paragraph 30. I mean, leaving aside the last
26 sentence --

1 MR PICKFORD: Sorry. Can you tell me what page you are on?

2 MS RIEDEL: It's page 95 --

3 MR PICKFORD: Thank you.

4 MS RIEDEL: -- of Bundle 1.

5 MR PICKFORD: Yes.

6 MS RIEDEL: Leaving aside, I would say, the last couple of sentences, is that
7 a description that helps us in our understanding of Universal Search? I mean, would
8 you agree with it, I suppose I'm asking.

9 MR PICKFORD: On my feet, I'm not sure I'm willing to say whether I agree with that.
10 I don't think I do. What we say about it will obviously be in our Defence, and I'll have
11 to go through proposition by proposition. But what I do say about this paragraph is
12 this is the only thing that they are relying upon, of course, in the original version of the
13 pleading as the facts supporting the promotion allegation. It's got nowt to do with the
14 OneBox.

15 MS RIEDEL: I've lost the page, but I did want to ask for your response. You had
16 referred to some paragraphs again in that Particulars of Claim. I think 94, which is on
17 page 129 of the Bundle, and paragraph 94E --

18 MR PICKFORD: Yes.

19 MS RIEDEL: -- refers to a letter that was written, I think, by Bristows to Sidley Austin,
20 dated 14 April 2015. You hadn't mentioned anything. Obviously you were making
21 a different point in those paragraphs. But have you got anything to say about that
22 specific letter and its relevance or otherwise to this application?

23 MR PICKFORD: Yes. I say, I was going to come on to deal --

24 MS RIEDEL: Okay. Well, deal with it in your own time.

25 MR PICKFORD: I mean, the key point is it's not relevant. On this application,
26 fortunately for us, because it's difficult enough as it is, there's a relatively limited

1 number of documents we need to focus on. What the case law makes very clear is
2 that all we really need to be concerned with is two versions of pleadings. We need to
3 look at what was pleaded by Foundem originally and what they then sought to amend
4 to plead. It's that comparison that enables us to answer both of the questions that we
5 need to consider. Is it a new claim? We only need to look at the pleadings to
6 determine that. Secondly, if it is a new claim, is it the same or substantially the same
7 facts as already an issue? That's all we really need for that as well.

8 And in my submission, correspondence where we have -- I mean, no one denies that
9 the OneBox existed, where we have clarified aspects about the operation of how
10 Google worked are neither here nor there in answering that question.

11 So, if I may, I'll return then to the sixth iteration of the Particulars I showed you. In
12 paragraph 2, I showed you paragraph 29E and then finally, one can see if one goes
13 to page 292 --

14 MS ROSE: Before we go there, it's worth looking at the amended version of
15 paragraph 30, isn't it? Because we just looked at the previous paragraph on Universal
16 Search. It's now described as "an evolution of its OneBox mechanism". [as read]

17 MR PICKFORD: Yes. So, I mean, in my submission, it's 29E that's really doing the
18 work. But you're right, Madam, 30 also tells us something. What it tells us is that they
19 had to amend to make it now tell the story that it's an evolution, whereas previously
20 we began, this all began, with Universal Search. So forensically it's revealing.

21 If we then go to page 292 of the Bundle, please. What we see here now is that
22 Foundem have picked up the pleading that they, in the fifth iteration of their pleading
23 was a separate abuse of its own, and they've now placed it to sit underneath their
24 complaints about Algorithm A. In my view, that is a confusing and ultimately futile
25 change, and, indeed it is self-defeating, because the intention of it seems to be to
26 support the contention that this claim was always part of Algorithm A, and I say that

1 isn't sustainable for two reasons.

2 The first reason is a very obvious one, but it does need to be stated. These pleas are
3 new. The fact that they have been sandwiched into a part of the pleading with
4 Algorithm A by choice as of the middle of August this year is neither here nor there. It
5 doesn't make them part of what was originally pleaded under Algorithm A, and that's
6 what matters. So, in my submission, it's yet again revealing the change that they have
7 made because it shows what they hadn't done previously.

8 Second, the contrived nature of what Foundem has now done to suggest this is really
9 all part of the Algorithm A pleading is apparent from the following point. Were it true
10 that the promotional claim was always implicitly part of the search penalty's claim --
11 two sides of the same coin, as they now say -- then so too should the plea regarding
12 Universal Search have been incorporated in the same way. But I took you through the
13 original version of their pleading and the Universal Search plea and the alleged self-
14 preferencing there has always been separate and it remains separate even today. So
15 what that reflects is that, in truth, the penalty claim and the promotional claim are, in
16 fact, discrete, notwithstanding the attempted cover up, by putting in the Product
17 OneBox claim now into the Algorithm A claim and moving it around in the pleading.
18 That doesn't help them.

19 So having taken the Tribunal through the two versions of the pleadings, I can now
20 draw those strands together in relation to my submissions on why this is a new claim,
21 and hopefully this should be quite quick, because I think we've dealt with quite a lot of
22 this already.

23 I've shown you that there is no claim in Foundem's fourth iteration of its Particulars of
24 Claim, which is the key point of comparisons where we step off, that alleges that
25 Google's use of the OneBox was unlawful. There is no express claim of that sort,
26 that's quite clear. And there is, in my submission, implicit claim of that sort, because

1 there is a separation, an analytical separation, in their pleading between self-
2 preferencing through the use of algorithms and self-preferencing through promotion,
3 and being given a leg up on the page. And those are separate and they reflect the
4 separation in the Commission Decision as well.

5 So the OneBox claim represents a new cause of action. It's reflecting, as I said, what
6 the Commission did, and I probably don't really need to take that any further.

7 It's also, in my submission, the case that the damage may well differ as between those
8 two allegations, albeit we don't really need to focus in on damage because what is
9 said to be the cause of the damage is what matters. But I don't accept what my learned
10 friend says, that the damage is necessarily the same. The two different allegations
11 have potentially different types of response and different types of counterfactuals
12 associated with them, and therefore one can't assume that the damage would be the
13 same.

14 Now, Foundem has five basic responses, and I'm going to address those in turn.
15 I think it's probably sensible and helpful for me to do so now, rather than saving it all
16 up for reply.

17 The first is Foundem says that all its pleading does is introduce some new factual
18 material by way of amendment which simply identifies the mechanism complained
19 about. But, as I've sought to explain, the simple fact is that the new facts pleaded for
20 2006 and 2007 correspond to a new mechanism and to a different breach. So the
21 response that they identify the mechanism papers over the problem. It's a different
22 mechanism.

23 Second point is that Foundem says it's always alleged abuse of dominance. And my
24 response to that is that's not the test we saw in the case law, that one doesn't look to
25 the shorthand for the category of situation that's being pleaded. One looks at whether
26 a different factual situation is being pleaded.

1 Third point is that Foundem says that the claim attacking the OneBox was implicit in
2 its attack on Algorithm A, and I've sought to -- I think probably, in my submissions, I've
3 already given you my answer to that, but I'm just going to go through and check that
4 there's nothing more.

5 So the first of those, is, I say that's fundamentally inconsistent with the way that it
6 pleaded its case, and I've shown you the structure of that, and I don't think I really
7 need to revisit it.

8 Probably one point that it is, however, worth just picking up on here, which I didn't go
9 to in terms of its structure is, what I say, is a self-defeating new claim that's been
10 introduced at 68AE of the sixth iteration of the Particulars of Claim. So that's to be
11 found on page 294. It's just on from where I think we left off in that Bundle.

12 And they say:

13 "For [...] avoidance of doubt, it's not Foundem's case that the Product OneBox was,
14 in and of itself, an abuse of Google's dominant position. Further, if necessary to so to
15 contend, it's Foundem's case that the application of Algorithm A to Foundem's website
16 between [...] 2006 and December 2007 was discriminatory and without objective
17 justification, and would have been abusive even if not accompanied by the OneBox
18 conduct (if for any reason the OneBox conduct cannot be invoked)." [as read]

19 Now, in my submission, that is a very revealing amendment, but it does not help
20 Foundem, in fact condemns them, because what they're effectively saying here is that
21 if they are to lose this application and they are not going to be allowed to rely on the
22 new OneBox claim, as I am seeking to persuade the Tribunal is the appropriate
23 outcome, they say, "well, it doesn't matter, we're still going to rely on our case against
24 Algorithm A alone".

25 And that proves something very powerful. What that proves is that Foundem's
26 Algorithm A claim cannot inherently imply an attack on the OneBox. It logically just

1 can't do that by their own case here that they say they will continue to pursue it quite
2 independently, even if they can't apply it to an attack on the OneBox.

3 And that is, in my submission, an albeit potentially inadvertent recognition of the point
4 that I have been making, that you cannot leap from the Algorithm A claim to say
5 inherently that that must be bringing the OneBox into play. It's not on their own case.
6 So the second response to the point about the plea having been implicit, is for me to
7 quote from an oft-cited, dictum, Sir, of yours, in *Sel-Imperial*, that a claim of abuse of
8 dominant position cannot be pleaded by inference or implication: it must be pleaded
9 expressly

10 And that -- I'm sure you'll recall, was in your judgment but it's been, I'm sure, repeated
11 back to you many, many times -- reflects the fact that competition law claims are very
12 onerous and difficult ones to deal with, and it's just not good enough to say, "Well,
13 something was in there implicitly". You've got to pull it out expressly, and it's only in
14 that way that the parties know where they stand and can fairly deal with the points.

15 I think I will leave the next points to reply, because there are various aspects of
16 Foundem's pleading that they rely on to say, "Oh, well, if you look at this very closely,
17 you'll see it's in there". But those have changed a bit from skeleton et cetera from
18 letters. So, whichever ones are advanced, I'll come back to those in reply.

19 So then the fourth point that they make is they say, well, we've always had a claim in
20 relation to 2006-2007. Well, yes, of course they have. But that's besides the point.
21 The question is, what was the claim? What's the nature of the claim? And that's what
22 we're arguing about here. The fact that they had a claim does not mean that they had
23 a claim in relation to the OneBox.

24 And then the fifth point is Foundem say that its pleadings on Algorithm A raise the
25 factual question of what algorithm or other mechanism applied to determine the
26 placement and display of Google's own CSS on its SERP, and this comes back to

1 a large degree to the debate that I was having right at the outset of my submissions.
2 And the problem with this as an answer to my application is that Foundem can't point
3 to any part of its pleading that existed prior to the service of the fifth iteration of its
4 pleading that addresses that question. It can only point to its new pleading to address
5 that factual question, and the answer is found in paragraph 29E to 30 of the new
6 pleading. That is what proves that this is a new claim and not a claim that was already
7 there. So those are my submissions on why this is a new claim.
8 That then takes me on to point 2, which is it's out of time and therefore it requires
9 permission under Rule 32. Hopefully I can deal with this fairly quickly, certainly the
10 first point. I think it's common ground that if it is a new claim, it is out of time. So, it's
11 very out of time so that bit's easy.
12 The next question is, is it therefore necessary for my learned friend to succeed on an
13 application under Rule 32 to introduce it? He says it's not, because he says he's
14 already got it in there by virtue of the Tribunal's order that gave permission for the sixth
15 iteration of their pleadings. So I need to address you on why that is fundamentally
16 misconceived.
17 So this is their postscript point, and what they say is that all that matters, now post
18 service of their Particulars of Claim, is those Particulars, and they say that the provision
19 that allowed them to amend for those Particulars, didn't say anything about them, only
20 providing them in draft. It just said that they were to amend and then we were to
21 respond. And they say that that means that the whole issue of an application under
22 Rule 32 has been swept away because they automatically get relation back under
23 section 35 of the Limitation Act. That's the argument that they're advancing.
24 I say that is simply a nonstarter as an argument, and I have three points, I think, as to
25 why that argument cannot be correct.
26 The first is that the Tribunal simply doesn't have the power to grant an open-ended

1 permission to amend existing claims, to add new causes of action that are otherwise
2 time-barred. That is clear, in my submission, from the express terms of section 35 of
3 the Limitation Act that we looked at, and it's also clear from Rule 32(2). We haven't
4 looked at Rule 32(2) two yet, so it might be convenient just to quickly pick it up. It's in
5 Volume 5 of the Authorities Bundle at tab 3, and I'm going to page 81.

6 So what 32(2) says is:

7 "Where any relevant period of limitation has expired, the Tribunal may permit an
8 amendment (a) to add or substitute a new claim, but only if the new claim arises out
9 of the same facts, or substantially the same facts, as a claim in respect of which the
10 party applying for permission has already claimed a remedy in the proceedings."

11 [as read]

12 Now, whether it is a new claim or not, it's simply a question to be determined under
13 section 35 of the Limitation Act and Rule 32 only gives the Tribunal a power to
14 exercise any discretion if that test, that it arises out of the same facts, or substantially
15 the same facts is satisfied. So it simply isn't open to Foundem to read the fact that
16 they were given permission to serve an amended pleading as thereby impliedly saying
17 that the requirement under Rule 32(2) was swept away. The Tribunal only has the
18 power to allow that amendment in if the condition is satisfied.

19 MS ROSE: But, I mean, if the Tribunal made an order it didn't have the power to make,
20 the right remedy for that would be an appeal, wouldn't it?

21 MR PICKFORD: Well, there's -- I'm going to --

22 MS ROSE: I mean, your argument is about the plausibility of the interpretation, which
23 I understand.

24 MR PICKFORD: Yes.

25 MS ROSE: But if in fact that is what the Tribunal ordered, then the remedy would be
26 appealed, wouldn't it?

1 MR PICKFORD: Well, a remedy would be an appeal. But the Tribunal would not be
2 required to continue to act through the proceedings once it had been pointed out to it
3 that it had done something wrong. If it had --

4 MS ROSE: Does the Tribunal have the power to correct the (inaudible) order?
5 I'm sure the Chair will tell me.

6 THE CHAIR: Well, there was, I think, there was liberty to apply the order.

7 MR PICKFORD: Yes.

8 THE CHAIR: So what you would do is you'd apply to vary it.

9 MS ROSE: You'd apply to vary it.

10 MR PICKFORD: Yes.

11 MS ROSE: But you haven't made that application.

12 MR PICKFORD: We haven't made that --

13 THE CHAIR: I think your point is, you must interpret the order to be read as doing
14 something which the Tribunal can lawfully (overspeaking).

15 MS ROSE: As far as possible.

16 THE CHAIR: As far as possible. Quite.

17 MS ROSE: It would take quite a lot to persuade a Tribunal that it had made an
18 obviously unlawful order.

19 MR PICKFORD: Yes. That is my submission. My submission is going to be where
20 this takes us is that you cannot read into the fact that the order didn't say that they
21 served a draft pleading. It just said that they served a pleading. That the Tribunal was
22 thereby ignoring the limits on its powers under Rule 32. That would be an
23 extraordinary reading of what the Tribunal did, and in my submission, that is not what
24 the Tribunal did. If --

25 MS ROSE: And this is in relation to the sixth Particulars of Claim?

26 MR PICKFORD: It's in relation to the sixth.

1 MS ROSE: At a time when the Tribunal already knew that there was a dispute about
2 the sixth.

3 MR PICKFORD: Yes. So I've got three points to make on this.

4 MS ROSE: Yes.

5 MR PICKFORD: The first is that one needs to interpret what the Tribunal did as being
6 in accordance with the Tribunal's own powers under the Rules, and it would be a quite
7 extraordinary interpretation that the Tribunal swept away the constraints that are
8 imposed on the Tribunal in relation to what its powers are --

9 MS ROSE: Presumption.

10 MR PICKFORD: -- by giving a carte blanche to Foundem to amend its claim in
11 whatever way it wanted and because it didn't say the word "draft" then everyone is
12 stuck. In my submission, that is not what was implied. So that's the first point.

13 Since it has been raised against me, if the Tribunal really does come to the conclusion
14 that it did make such an unlawful order, I would then make an application to vary it.
15 But, in my submission, I don't need to go that far.

16 Second point is that as, Madam, you were referring to -- we're talking here about the
17 sixth iteration of their pleading. In the fifth iteration, we had already challenged the
18 introduction of the OneBox claim, and we had already, prior to the sixth iteration of the
19 pleading, brought our application under the Tribunal's rules for summary dismissal of
20 that part of their pleading. And there's no question, there's no suggestion from the
21 other side, that we weren't entitled to do that, because even they have to accept that
22 the previous order referred to, expressly reserved, our ability to challenge parts of their
23 pleading. They rely on it and they say, "Oh, well, you had that before, but you forgot
24 to include that the second time round, so therefore it's all different". So we had already
25 had on foot this application. And it can't be right, in my submission, that then just gets
26 swept aside by what happened in relation to their sixth iteration of their pleading.

1 And then the third point -- and it may be if you're persuaded by one or other of the first
2 two points I don't need to particularly go through the third point in detail -- but if you
3 look through the correspondence between the parties, it is very clear that the
4 Claimants were saying they wanted in principle to make changes to reflect the
5 Preliminary Issues Judgment.

6 And then, what Google said is, "Well, hold on a minute, it should be restricted to that".
7 And they said, "Well, no, we might want to do some other things as well, we might
8 want to tidy things up, bring things up to date, but that will be subject to permission in
9 the usual way."

10 And Foundem bought into that. It never said "Oh, no, we're looking for a different
11 approach". Foundem even referred to its own pleading as a draft pleading. They
12 simply rely on the fact that the order didn't include the word "draft". And, as I said,
13 I can take you through all of that correspondence to make it good. But they're now
14 trying to wriggle out of an assurance --

15 MS ROSE: Leave it aside for a minute. I mean, it would be good to know whether the
16 Claimants accept that the Tribunal would not have the power to grant permission to
17 amend, to plead a new claim that didn't arise out of substantially the same facts.

18 MR WEST: I think that must be right. For what it's worth, I also have to accept the
19 Tribunal has power to amend its application. And indeed, we pointed out in our
20 Response that no application to Tribunal to amend this order had been made, but one
21 has now been made. I think maybe that's the short answer to this.

22 THE CHAIR: I have no doubt that my subjective view may not be relevant, but as the
23 person who made the order, it was intended to give permission to amend, to reflect,
24 the Preliminary Judgment. That's why the order was made shortly afterwards. And,
25 as you said, if there was a tidying up that could be swept in, but it was not, clearly,
26 intended to override the application that had been made to strike out. That would have

1 | been an extraordinary order to make. But, as I say, my subjective view may not be
2 | relevant, but that's certainly what was the intention in making the order.

3 | MR PICKFORD: I think that Mr West --

4 | THE CHAIR: I think Mr West has --

5 | MR PICKFORD: -- has effectively withdrawn this point, so I don't --

6 | I think that's probably a sensible place to pause, because --

7 | MR WEST: (Overtalking) the submissions I'm slightly concerned about the timing -- .

8 | THE CHAIR: Well, I think we'll be all right.

9 | Mr Pickford, I think you needn't go on any longer, because I think you've dealt with the
10 | question of whether it's a new claim and the question of whether, it arises out of the
11 | same, or substantially same, facts is something for you, Mr West, to advance.

12 | So I think we'll return at 1.55 pm and start straight off with your submissions. Thank
13 | you.

14 | (12.55 pm)

15 | (The short adjournment)

16 | (1.57 pm)

17 | THE CHAIR: Just before you continue, Mr Pickford, did you find any useful references
18 | to Universal Search?

19 | MR PICKFORD: There is nothing better in the Bundle than what I've already referred
20 | the Tribunal to. The point is explained far more fully in an Annex to Google's Appeal
21 | to the European Courts. We can obviously provide that, if that would be helpful to you,
22 | but it's not in the Bundle.

23 | THE CHAIR: Yes. I don't think it's contentious, I believe not. If it is, then we shouldn't
24 | look at it, but it may be, Mr West, you haven't seen this Annex.

25 | MR WEST: I haven't personally seen it, but those behind me have.

26 | THE CHAIR: Yes. I think what I'd suggest is: send it to the solicitors, to Foundem,

1 and if they've no objection, and it's just -- as I say, I didn't ask it as a sort of
2 confrontational question, it's just to help me understand what it is. And if there's no
3 objection, then you can send it to us, but we don't want any commentary on it. If there
4 is an objection, we just won't see it, I think. Let's leave it like that, shall we?

5 MR PICKFORD: Thank you, Sir. My instructions are: they've got it, so they can let us
6 know whether they're happy for the --

7 THE CHAIR: Okay.

8 MR WEST: I don't want to take time now, but certainly at lunch time, it was made clear
9 to me that we don't agree with the exposition given by my learned friend (inaudible)
10 earlier on.

11 THE CHAIR: Yes, I think he was sort of paraphrasing what the General Court said in
12 paragraph 14, or whatever it was, but that was confusing, because it referred to the
13 OneBox. So, you know, it's not, all that clear either.
14 Yes.

15
16 Submissions by MR WEST

17 MR WEST: So the first issue which arises is whether the OneBox paragraphs amount
18 to a new claim. There doesn't appear to be any dispute as to the relevant authorities,
19 but I would just like to go back to Diamandis, if I may, that's at Authorities page 264.

20 THE CHAIR: Just a moment. (Pause)

21 Yes, I think we didn't go to the actual Diamandis judgment; we went to the quotation
22 from it, in the Court of Appeal, sort of approve it, in the Geo-Minerals case.

23 MR WEST: I have a different reference, but it's the same words.

24 THE CHAIR: That's at Authorities 12, at page 343. It quotes Diamandis, paragraph -
25 - well, actually it's the two bits -- one is, they just approve -- yes, exactly --

26 MR WEST: My learned friend read out to you at subparagraphs 1 and 2, and the first

1 paragraph of paragraph 3 of paragraph 48. But that paragraph goes on to say:
2 "Only those facts which are material to be proved are to be taken into account; the
3 pleading of unnecessary allegations of the addition of further instances does not
4 amount to a distinct cause of action. At this stage, the selection of the material facts
5 to define the cause of action must be made at the highest level of abstraction." [as
6 read]

7 And then at 4:

8 "In identifying a new cause of action the bare minimum ... essential facts abstracted
9 from the original pleading is to be compared with the minimum as it would be
10 constituted under the amended pleading". [as read]

11 And in my submission, what that is talking about is the difference between the
12 ingredients of a cause of action, and further particularisation of a cause of action. It is
13 not every fact in a pleading which amounts to an essential ingredient of a cause of
14 action, otherwise every application to amend would have to be brought within Rule 32.
15 It is only where the new fact amounts to a different cause of action, and that's why we
16 emphasise in our submissions that the OneBox pleading merely particularised the
17 mechanism on which we rely, because the mechanism of discrimination, in my
18 submission, is not an essential ingredient of the cause of action of itself.

19 I would suggest that the essential ingredients of a cause of action for abuse of
20 discrimination are firstly: market definition and dominance; and then a plea of abuse
21 by discrimination resulting in competitive harm, loss and damage. And if you've
22 pleaded those, then in my submission you are not liable to be struck out.

23 My learned friend did not submit to you that any of those ingredients are different,
24 under the new claim. His submission -- I'm going to be corrected in reply -- is that
25 simply pleading a different mechanism of discrimination is enough in itself. It isn't.

26 The version of the Particulars which we have been looking at, it's the fourth amended

1 Particulars of Claim. Could we therefore go to that, and tab 5 of Bundle 1?

2 MS ROSE: What do you mean by mechanism?

3 MR WEST: The means by which the discrimination was brought about. So we've

4 alleged the difference in treatment and the question of, well, how did that difference in

5 treatment arise?

6 THE CHAIR: And if you have discrimination on one ground and that's the case you

7 pursue, and then later you want to amend to say, actually there was discrimination

8 also on another ground, isn't that a new cause of action?

9 MR WEST: Well, it's different underlying facts of the discrimination itself. But if the

10 discrimination itself is the same, and the new pleading simply explains in more detail

11 how it came to pass, then in my submission, that isn't a new cause of action.

12 MS ROSE: Well, hang on, different underlying facts. Wouldn't a different mechanism

13 be a different underlying fact?

14 MR WEST: If it's a different form, if it's a different act of discrimination.

15 MS ROSE: Yes.

16 MR WEST: But if it's the same act of discrimination, then the pleading simply explains

17 how it happened. In my submission, that isn't a different cause of action.

18 MS ROSE: So the key question is whether it's the same act of discrimination or

19 a different act of discrimination.

20 MR WEST: In my submission, yes.

21 Going now to the draft Particulars in tab 5, Volume 1. So this is not the most recent

22 version, but second-most recent version, and the amendments which are objected to

23 here are all in yellow, so anything which is --

24 THE CHAIR: Just one second, sorry.

25 MS ROSE: Sorry, where are we?

26 MR WEST: Tab 5.

1 THE CHAIR: That's the fifth amendment, I think it's been referred to, isn't it. Starting
2 at page 80.

3 MR WEST: Yes. Only the yellow amendments are objected to here, so anything not
4 in yellow is accepted to form part of the case which Google has to answer.

5 We start by looking at paragraph 9A on page 83, we see a pleading of the European
6 Commission's decision. And what is said is that:

7 "The Decision establishes that the more favourable positioning and display by Google,
8 in its general search results pages, of its own comparison shopping service, compared
9 to competing comparison shopping services, including the imposition of [...] Algorithm
10 A and the Panda algorithm on such competing comparison shopping services but not
11 Google's comparison shopping services, ("the Conduct") infringes Article 102".
12 [as read]

13 And that is indeed what the European Commission found. And what I highlight about
14 that is that the discrimination was in the positioning and display of results in the general
15 search results pages. What seemed to be being submitted this morning was that
16 Foundem's complaint is and is only about the display of results in the organic results.
17 That's not the case. That isn't what the Commission Decision is about. It was about
18 the display of results on the page.

19 If we then go on to, paragraph 60(a) to (b), which is here on page 107. If you like, this
20 is the equivalent of the obligation which one would usually see in a tort case.

21 THE CHAIR: I'm sorry, Mr West, I'm catching up. Where are you?

22 MR WEST: 107 of tab 5.

23 THE CHAIR: Page 107?

24 MR WEST: Page 107 of the Bundle, yes.

25 Beginning or headed "Obligations arising from Google's dominance." 59 is the special
26 responsibility, and then 60 particularises, that one sees under (a):

1 "Only to impose penalties on the basis of fair, reasonable, non-discriminatory,
2 objectively justified, proportionate, transparent criteria; [and (b)] To apply the same
3 penalties and ranking principles and methods to all websites (including Google's own
4 offerings) in a non-discriminatory manner." [as read]

5 So we're seeing the obligation is to apply the same ranking principles and methods to
6 Google's own comparison shopping service and to competing comparison shopping
7 services. And, indeed, that makes perfect sense, because if we look at the example
8 in Foundem's response of the OneBox and how it appears on the page, which is
9 page 23 of tab 2 of Bundle 1.

10 What is added here with the green lines, these are Google's explanations of this page.
11 Those wouldn't appear on the page itself. One would simply see the results and what
12 one would see, in particular, on this page is one has some ads at the top which are
13 shaded, and then one has the Product OneBox as the top result. And below that one
14 has the generic results. So it makes no sense, in my submission, to suggest that all
15 Foundem was ever complaining about was the treatment of it and of Google by
16 comparison with each other in the generic results, and that Foundem --

17 MS ROSE: Can I just ask you a question about this diagram.

18 MR WEST: Yeah.

19 MS ROSE: The marginal comments: "Ads", "Product OneBox", "Generic results" [as
20 read]. Does that appear in the General Court judgment or is that -- so those different
21 categories are not something that Google's inserted for this hearing, those are in the
22 General Court judgment?

23 MR WEST: Yes, but the General Court judgment says that these are from Google.
24 Google provided these annotations --

25 THE CHAIR: So when you bring up the page, if you had done this in 2006 or 2007,
26 you wouldn't have, obviously, these green lines and explanations?

1 MR WEST: -- no. So as far as the user is concerned, there's no difference between
2 the organic results and the Product OneBox. They're simply a list of results.

3 MS ROSE: But there's a bit -- it's very hard to read because it's blurred -- but just to
4 the left of the results, what does it say? Something "search"?

5 THE CHAIR: "Product Search".

6 MS ROSE: Product Search. So Product Search -- is those four.

7 MR WEST: Yes. So clearly this is a search for a product, a particular camera or
8 something along those lines.

9 MS ROSE: Well, we see the search at the top.

10 MR WEST: Yes.

11 THE CHAIR: A Nikon camera.

12 MS RIEDEL: And then the fourth line is something "Froogle" but I can't read it.

13 THE CHAIR: It says, "Try Froogle: Search for Nikon [whatever it's called, Coolpix or
14 something, 995 or 955] and other products".

15 MS ROSE: So it gives you a product search and then it gives you what you would
16 think of as the general hits for that search term, which include reviews and so on.

17 MR WEST: Yes. And also a lot of merchants.

18 MS ROSE: So there is a distinction on the page.

19 MR WEST: There is a distinction of sorts. Whether that would be understood by the
20 user as meaning these are in different categories is one question, and also whether it
21 makes any difference to Foundem. Clearly, what Foundem is concerned about is
22 where it appears in the results compared to Google.

23 If we then go back to the pleading --

24 THE CHAIR: Basically, what you say, it's discrimination in what is sometimes called
25 the SERP, the search results page, not within that part of the page, which has the
26 generic results.

1 MR WEST: Yes. We were talking earlier this morning about interpreting something
2 in a sensible way, and my learned friend's submission seemed to be that a sensible
3 way to interpret Foundem's pleading of discrimination is that Foundem wouldn't
4 actually care if both its results and Google's results were at the bottom of the generic
5 results, and Google was in the OneBox, because all Foundem cares about is being
6 treated the same as Google in the generic results. In my submission, that is not
7 a tenable interpretation of our claim.

8 MS ROSE: Well, I mean, I think that that makes sense as a matter of substance, but
9 I think the question is whether that is the case that Foundem was actually advancing.

10 MR WEST: Yes. Let me come back to that. If we go back to Foundem's pleaded
11 case at tab 5. Paragraph 95 is the beginning of the plea of abuse of dominance on
12 page 131.

13 MS ROSE: Sorry, page ...?

14 MR WEST: 131. And -- sorry, that's the end of the plea of abuse of dominance. The
15 beginning of the plea of abuse of dominance is -- sorry, I had references to the next
16 version of the draft.

17 THE CHAIR: The beginning is on page 108. Paragraph 61, page 108.

18 MR WEST: My learned friend read paragraph 61.

19 The next heading is, therefore, the "Algorithm A search penalty". And if you look at
20 63, it's clear that we're here referring to including the initial period in this application,
21 beginning in 2006.

22 Below, the page at 64A. Again, this is expected to be part of the pleaded claim. It
23 says that:

24 "(b) Algorithm A did not apply to Google's comparison shopping service". [as read]

25 So that's a complaint that we make that Foundem was subject to Algorithm A and
26 Google wasn't. And then:

1 "(c) Comparison shopping services, including Foundem's, were prone to being
2 demoted by Algorithm A due to the characteristics of those services. By contrast,
3 Google's comparison shopping service has never been demoted by Algorithm A,
4 despite the fact that [it] exhibits several of the characteristics [which] make [it] prone
5 to being demoted". [as read]

6 And there is a reference in the footnote 47, the recital 380 of the Decision which my
7 friend also took you to. So if we go to that, please.

8 What we see is the Commission's saying first -- this on page 112:

9 "Google's own comparison shopping service is not subject to the same ranking
10 mechanisms as competing comparison shopping services, including adjustment
11 algorithms such as Algorithm A and Panda. This is despite the fact that Google's own
12 comparison shopping service exhibits several of the characteristics that make
13 competing comparison shopping services prone to being demoted." [as read]

14 And my friend accepted that we were relying on that paragraph because that's what
15 the footnote says, and that paragraph is talking about the display of results on the
16 page. And it's saying that the abuse which is being investigated is that Google's results
17 are not ranked in the same way as competing comparison shopping service results.
18 That is the first limb being investigated. It's not limited to organic results. It's the
19 results on the page.

20 MS ROSE: What do you mean by "organic results"? Do you mean "generic"?

21 MR WEST: "Generic", sometimes called "organic", yes. Sorry, it's confusing
22 terminology.

23 So that's the complaint. There's one set of algorithms for Google and a different set
24 of algorithms for everyone else.

25 And if we go forward to paragraph 78.

26 MS RIEDEL: Sorry, I'm just struggling. How do we infer from paragraph 30 that they're

1 talking about it being on the same page, because paragraph 30 doesn't explicitly say
2 that?

3 MR WEST: (Audio distortion) talking about presentation of the results being subject
4 to different ranking mechanisms.

5 THE CHAIR: I think it's 379, is it?

6 MS RIEDEL: The 379(ii) tort, but that's about Universal Search.

7 THE CHAIR: But just the opening of 379, two main differences. The way they're
8 positioned in Google's general search results page. So that's the general page.

9 MR WEST: The general page, but we're not talking about that as compared to
10 comparison shopping page.

11 THE CHAIR: But within that page it then distinguishes between two aspects of the
12 difference and the first one is the ranking mechanism, and the second one is a form
13 of OneBox or --

14 MS ROSE: The Universal.

15 THE CHAIR: Universals.

16 MR WEST: Yes. But my point is that the first abuse is using different algorithms to
17 present the results on the page.

18 MS ROSE: But you can't, surely, suggest that the Universal, Product Universal, is
19 encompassed within (i) at 379? That's the whole point of (ii), isn't it?

20 MR WEST: 380 is saying that simply using different algorithms to present the results -
21 -

22 MS ROSE: No, but can you answer the question? 379 says, first of all, in general
23 terms, it says there are two main differences in the way Google's own comparison
24 shopping services are positioned in the general search result pages. So we're talking
25 about position in the general search results pages, and then it says there are two
26 differences. So two forms of discrimination, two underlying sets of facts that constitute

1 discrimination. Yes?

2 The first is: the ranking mechanisms as the algorithm; and the second is: Google's

3 own position being placed above everybody else, as a result of the Product Universal.

4 (Pause)

5 So you can't say that (i) includes the Product Universal, surely.

6 MR WEST: (i) is the use of different ranking mechanisms.

7 MS ROSE: No, I'm asking you whether you think that includes Product Universal.

8 (Pause)

9 MR WEST: I don't think I can go further than simply to say it's the use of different

10 ranking.

11 MS ROSE: Well, yes or no?

12 MR WEST: Perhaps the answer is no.

13 MS ROSE: No, okay. (Pause)

14 MR WEST: Yes. Well, we're going to come onto this mechanism. The reason why

15 the rankings are different is precisely because Google's results are displayed in

16 a different way.

17 MS ROSE: Isn't that (ii)?

18 MR WEST: It's both. (Pause)

19 There is also a difference between the difference in treatment and getting special

20 preferential treatment to Google, through sort of bells and whistles, as was done later

21 with the Universal Search. (Pause)

22 My fundamental point is that, simply, the difference in treatment in itself is

23 discriminatory, and we're going to come onto this question of mechanism of how that

24 comes about. (Pause)

25 It wasn't in my submission alleging that there was discrimination in relation to

26 Algorithm A necessarily causes a comparison of what are you comparing it with.

1 (Pause)

2 THE CHAIR: And there is the sort of -- and I don't think it's a jury point -- but you sort
3 of step back from all this and say, well, if that's what was really meant when this was
4 pleaded -- and I appreciate it wasn't your pleading originally, indeed the pleading by
5 Lord Justice of Appeal -- why didn't they say so? If that's what they meant, then to
6 spend quite a lot of time talking about Product Universal, it could have been so easily
7 expressed.

8 MR WEST: Can I just come on later in chronology as to explain this, how this rules?

9 THE CHAIR: Yes.

10 MR WEST: But in my submission, the claim of discrimination must imply discrimination
11 in comparison to the way that Google is treated.

12 THE CHAIR: I understand the point.

13 MR WEST: And otherwise, how can one assert discrimination without asserting
14 a difference in treatment? And that involves looking both at how Foundem is treated
15 and how Google is treated.

16 MS ROSE: Okay, that's correct, but only as far as it goes, and I think it's important to
17 analyse what you mean, when you say discrimination and when you say difference in
18 treatment, okay? Because discrimination is a difference in treatment of two parties
19 who are similarly situated without justification; that's what we're looking at. But as the
20 Claimant, your task is to identify what it is that you say is the difference in treatment
21 between two who are similarly situated. Okay?

22 Now, I think what the case that's being put by Google is that there are different ways
23 that this case can be put. It could be put as Google demoted Foundem's search results
24 by penalising it under Algorithm A, treating it as if it were a thin, poor quality website,
25 and putting it to the back of the queue, and it didn't do that to its own products. That's
26 one claim.

1 Another claim is to say Google took its own products entirely out of generic search,
2 applied a different methodology to those products, and always put them at the top of
3 the page, come what may. That's a different complaint.

4 And a third is to say Google combined those courses of conduct by demoting
5 Foundem and treating itself more favourably.

6 Now, it may be that factually, what Google did was all three of those things. But that
7 doesn't matter, because what we're concerned with here is not what Google did, but
8 with what the Claimant complained about. So, for example, in an employment
9 discrimination situation, a claimant might be dismissed because they took a period of
10 maternity leave and because their boss thought women were not competent at the
11 particular type of job, and both of those might be factually true. But if the claimant only
12 made a claim saying that they'd been dismissed because of maternity leave, they
13 wouldn't be able to say, months or years out of time, "Oh, and by the way, a different
14 mechanism of discrimination in the same dismissal was that it was obvious that you
15 thought I was incompetent because of my sex", because that's a different complaint
16 of discrimination. Do you see what I mean?

17 MR WEST: Yes. But my submission is that the complaint which is pleaded here is
18 that Foundem was liable to have its site demoted, by virtue of Algorithm A, and Google
19 was not.

20 MS ROSE: Yes.

21 MR WEST: Google wasn't demoted by virtue of Algorithm A, and as a result of that, it
22 appeared higher up than did Foundem. And the question then arises: how did that
23 come about?

24 MS ROSE: Well, no, you see that's the jump, right? Because the first plea is simply
25 the application of Algorithm A. Now there are lots of algorithms that apply to the
26 ranking of searches, and the specific complaint is one of those algorithms is being

1 applied in a discriminatory fashion. I think what you're saying is it's necessarily implicit
2 in you complaining about the application of one algorithm, that any other form of more
3 favourable treatment Google applies to itself that you haven't pleaded, is implicit in
4 that complaint of discrimination.

5 MR WEST: Well, as I see it, the way I would put it is: that the reason that Google was
6 exempted from Algorithm A is because its results appear in the OneBox.

7 MS ROSE: I know that's the fact; that's factually the position. But what I'm putting to
8 you is what was pleaded by Foundem, and what I'm struggling with is the idea that,
9 because a party pleads that one particular form of less favourable treatment has been
10 applied to them, then if, as a matter of fact, there are other ways in which they've been
11 disadvantaged, they can pray all of those in aid and say, "Well, the reason, in fact, that
12 we were suffering this disadvantage wasn't just because of Algorithm A, but because
13 of all this other stuff as well". And indeed, you might find out that it was algorithms B
14 and C as well, and say, well, those were also being used.

15 MR WEST: So, one possibility might be that the OneBox has especially attractive
16 features, which meant that they were particularly effective. That might be a different
17 complaint of discrimination, but that isn't what we're alleging. What we're alleging is
18 that we were exempted from the application of the algorithm, and Google was not, and
19 as I say, that can only, in my submission, sensibly mean demoted within the overall
20 results, not just within the organic --

21 MS ROSE: But because of the operation of Algorithm A, not because of the operation
22 of OneBox.

23 MR WEST: The operation of Algorithm A, and the reason why Google isn't subject to
24 Algorithm A is because the OneBox isn't subject to Algorithm A.

25 MS ROSE: But that's the thing that wasn't pleaded.

26 MR WEST: What was pleaded is that they were not subject to Algorithm A, but we

1 were subject to Algorithm A.

2 We then come to the question of rulings at the CMC, in front of some people who are
3 on 31 March 2015, of how Google's results were presented prior to 2008. That
4 transcript is at transcript Bundle, so Bundle 2, tab 8, page 73. And I won't read this
5 out, because it is marked in private, but it's a page 10, page 11.

6 THE CHAIR: Page?

7 MR WEST: Wrong reference, I'm sorry. Page 89 of the Bundle. (Pause)

8 MS RIEDEL: Which page of the transcript are you talking about?

9 MR WEST: 75 of the transcript.

10 THE CHAIR: 75 of our Bundle? (Pause)

11 MS RIEDEL: Page 75 is page 16 to page 19 of the transcript.

12 MR WEST: Yes. Paragraph 81 and 82. Bundle page 89.

13 THE CHAIR: Bundle page 89? Just a minute.

14 MR WEST: Okay.

15 THE CHAIR: Page 75 within the transcript.

16 MR WEST: Yes. Can I just ask you to read that? Because it is marked in private.

17 (Pause)

18 MS ROSE: Sorry, who's representing who?

19 MR WEST: So Mr Turner was for Google. (Pause)

20 See, what Mr Turner says: they need to check, and that's then led to the letter.

21 THE CHAIR: Just a minute. (Pause)

22 He says what he wants to check is --

23 MR WEST: Yes.

24 THE CHAIR: -- this can't be confidential, whether Google's predecessor to Google
25 Product Search, that's to say Google Product Search is the Google CSS, it is not
26 subject to the ranking algorithms process that applied to other websites. So he wanted

1 to check whether that's the case.

2 MR WEST: Yes, and you will also then direct them to do so. And we see the letter
3 that resulted at tab 22 of Bundle 3.

4 MS ROSE: Tab 22, Bundle 3?

5 MR WEST: Yes. (Pause)

6 We referred to the discussion at the last CMC where the Defendants agreed to verify
7 whether the specialised Product Search results were subject to Google's search
8 algorithm, known as Algorithm A, prior to the introduction of Universal Product Search.

9 MS ROSE: Is this 5 April 2019?

10 MR WEST: Tab 22.

11 MS ROSE: Page 373, did you say? Bundle --

12 MR WEST: And the second paragraph: "As noted at paragraph 60.1 of the Amended
13 Defence: Google's own webpages (to the extent that they have static URLs and are
14 indexed) are treated in the same way as other webpages when ranked in its "general"
15 search results. [...] there is no mechanism to exempt Google owned pages
16 automatically from Algorithm A. Google confirms that to the best knowledge of the
17 relevant engineering personnel, Google owned properties have not been whitelisted
18 from the operation of Algorithm A." [as read]

19 They seem to be suggesting that they were subject to it.

20 But then in the third paragraph:

21 "Where Google webpages are treated equivalently to similar webpages in this sense,
22 it is noted that before the roll-out of Google's Product Universal (later
23 Google Shopping), Google used Product OneBoxes to display either single or grouped
24 product results among the "general" [...] results for some queries." [as read]

25 As with Universal Search, Product OneBoxes were triggered and placed by different
26 algorithms than those used to rank websites in Google's general results. (Pause)

1 So, in my submission, what this is explaining is precisely why it is that Google's results
2 on the web page were not subject to Algorithm A, although the second paragraph says
3 that they were. If one focuses on the OneBox paragraph, the third paragraph, saying
4 that:

5 "The OneBoxes weren't subject to the algorithms which apply to general search
6 results, including Algorithm A." [as read]

7 So that's why Google results weren't subject to Algorithm A.

8 Can I just deal with the second paragraph briefly? That's the one that suggests that
9 Google's comparison shopping service results were subject to Algorithm A, so far as
10 the general, organic search results are concerned. It refers to paragraph 60 of the
11 Defence, 60.1. Could we look at that? So that's AB 1, tab 10, page 397.

12 MS ROSE: So page --

13 MR WEST: 397 of Bundle 1. This note confirms that what is said in the second
14 paragraph of that letter is wrong.

15 MS ROSE: Sorry. Where are you looking? Which paragraph?

16 MR WEST: 60.1, page 397:

17 "... It's admitted that Google did not apply Algorithm A, Panda or the AdWords quality
18 score to its own "vertical search offering", it did apply quality and relevance standards
19 to its own "vertical search offerings". At the stage of deciding whether and where to
20 show specialised results, Google compares the relevance of its specialised result sets
21 against the generic results. It shows specialised results ... if they are relevant, and
22 places them based on their relevance compared to the generic results. Further, results
23 from Google's own comparison shopping service were never included or ranked in the
24 generic search results". [as read]

25 So it's not the case that they appeared and were demoted by Algorithm A. They simply
26 appeared in the organic results, and that is confirmed elsewhere in the defence

1 onwards at 65.4, on page 401.

2 Final sentence:

3 "Comparison shopping services could still however, be ranked in the general search
4 results, blue link generic results, unlike Google's CSS". [as read]

5 THE CHAIR: Sorry. 65.4 --

6 MR WEST: Final sentence.

7 MS RIEDEL: Page 401.

8 THE CHAIR: The last sentence.

9 MR WEST: There are a number of references I can give you. The first one was 49D,
10 which is page 378.

11 Second sentence:

12 "Algorithm A applied uniformly to all CSSs, as it applied to all sites, as part of the
13 ranking process for general search results (save Google's CSS which was and is not
14 included in the general search results)." [as read]

15 So if one asks, "Well, how were they displayed?", that's at paragraph 21 of the
16 defence. Page 362, beginning of the second sentence:

17 "Google displays, within its web search, results grouped from specialised search
18 algorithms that are optimised for a particular content category. This is done for ease
19 of use for the consumer and for their benefit. From May 2007, these grouped results
20 were referred to as "Universals" because they form part of Google's universal search
21 service. Although Google introduced the term "Universal Search" in May 2007 to refer
22 to these grouped results (and introduced "Product Universals" in the UK and Germany
23 from January 2008), Google had already been displaying grouped results among its
24 search results in different formats for many years prior to that time." [as read]

25 Although Google does not put a name on the grouped results format which it used
26 prior to the introduction of Universal Search, we know from the 14 April 2015 letter that

1 it was the OneBox.

2 MS ROSE: Sorry. What paragraph were you just reading?

3 MR WEST: 21, page 362 to 363. Bundle 1. It begins on 362, just above the first hole
4 punch:

5 "Google had already been displaying grouped results among its search results ... in
6 different formats, [...] many years prior to that time." [as read]

7 This paragraph claims that effectively, Universal -- the introduction of Universal Search
8 was effectively just a different name for what it had been doing for many years.

9 THE CHAIR: It goes on to say, "the grouped results from specialised search
10 algorithms are an integral part of Google's search results". [as read]

11 MR WEST: It does. We can see how Foundem understood this paragraph in the
12 reply. Tab 7, the most recent version, paragraph 15 of reply, which is page 214. We
13 have to go over to 15(c).

14 214 shows you this is a response to paragraph 21 of the Defence. Over at (c), the
15 Claimant notes:

16 "Google's admission in the fifth sentence that it had already been displaying "grouped
17 results" within its general search results for "many years" prior to the introduction of
18 Universal Search and before the formal start date of the infringement established in
19 the Decision. As the Product OneBoxes placed prominent links to Google's Own CSS
20 at or near the top of Google's search results pages and effectively immunised Google's
21 Own CSS from the effects of algorithmic penalties such as Algorithm A, Foundem
22 avers that, for certain countries, including the UK, Google's abusive conduct
23 commenced many years prior to the launch of Product Universals." [as read]

24 In my submission, what that is talking about is the abuse found in the Decision.
25 (Inaudible) talking about infringement established in the Decision.

26 The point that's being made here, in my submission, is that the way in which -- or if

1 | you want to use the word "mechanism", in case it's controversial -- means process --
2 | by which Google's comparison shopping results came to be exempt from algorithm so
3 | that they appeared. They weren't demoted to the bottom, but in fact appeared at the
4 | top. It is because they were put in OneBoxes, to which a different set of algorithms
5 | applied, not including Algorithm A.

6 | In my submission, standing back, it's always been Foundem's case that Google
7 | discriminated against Foundem in the presentation of the search results, in that
8 | Foundem was subject to Algorithm A, and it wasn't. Google has now explained why
9 | its comparison search results were not subject to Algorithm A. It's because Google's
10 | comparison shopping results didn't appear in the organic search results at all, but were
11 | displayed by a separate set of algorithms. After 2008, that was the Product
12 | Universals. Prior to 2008, it was the OneBoxes. That is the plea which Google is
13 | seeking to strike out.

14 | Could I do it by reference to the document my friend took me to. This is tab 5 of
15 | Bundle 1 at page 128, starting at 94C.

16 | This is what Google is trying to strike out by this application:

17 | "Although the Decision found that Google's infringing Conduct commenced in the UK
18 | with the launch of Product Universal in January 2008 the same, [...] materially similar,
19 | conduct applied in the UK (and Germany) from at least 2006 onwards. Foundem [...]
20 | rely on the fact that the relevant Decision findings in relation to the more favourable
21 | positioning of display of Google's CSS as a result of Universal Search [...] [and]
22 | Google's predecessor to Universal Search, the Product OneBox (launched in the UK
23 | and Germany in 2005 [...]. Google's Product OneBox prominently positioned and
24 | displayed Google's own CSS in a highly visible place, and meant that Google's own
25 | CSS was not subject to the same ranking mechanisms as competing CSSs, including
26 | penalty algorithms such as Algorithm A." [as read]

1 Those words "not subject to the same ranking mechanisms as competing CSSs" are
2 the paragraph -- the Decision we were looking at earlier.

3 Then we have reference to the April 2015 letter explaining the position.

4 That is why I say that we are really not pleading a new case of discrimination or a new
5 cause of action of discrimination. It's the same case for cause of action. We were
6 subject to a demoting algorithm called Algorithm A, and Google wasn't, but we now
7 explain how that came about. It's because Algorithm A applied to organic search
8 results. Google wasn't in the organic search results.

9 In my submission, that does not amount to a new claim, because the precise
10 mechanism by which Google came to be exempted from Algorithm A is not, I say, an
11 essential element of the policy of abuse of discrimination. The essential elements
12 were already pleaded. One can compare, by way of example, the Qualcomm case --
13 I won't go to it, but in tab 13 of the authorities -- where there was originally an allegation
14 of dominance and abuse in relation to a fourth generation 4G chipsets. Qualcomm --
15 I believe that's the case which is happening today in the other room.

16 THE CHAIR: Yes.

17 MR WEST: The class representative sought to amend to prove a claim of dominance
18 and abuse concerning 3G chipsets, and of course, that wasn't allowed. It was
19 a completely new claim, a new cause of action.

20 We say this isn't a new claim. It isn't a new cause of action, simply further
21 particularisation of the precise factual process -- to avoid saying a mechanism -- by
22 which the discrimination took place. The facts themselves, as we've seen, are not
23 disputed. They are in fact common ground on the pleadings, and pleaded, in fact, by
24 Google itself in its Defence.

25 In my submission, a practical question arises, if Google's application today were to
26 succeed, which is: how does Google suggest that the Tribunal should approach and

1 decide that Foundem's discrimination claim? Is Google saying that the Tribunal must
2 use some other comparison, not between the demotion of Foundem in the organic
3 results via Algorithm A versus the OneBoxes, but some other state of affairs, in order
4 to evaluate and adjudicate upon the discrimination claim?

5 One possibility is to assume that Google's comparison search results did appear in
6 the organic results, but weren't demoted, and that's one possible mechanism that
7 might have turned out to have been the position, but the trouble is that that isn't actually
8 what happened. It's inconsistent with people's own pleaded case facts, and it's difficult
9 to see, for example, how the experts could prepare an analysis of the discrimination
10 case to see, for example, whether there was a competitive disadvantage, and the
11 evidence that they have about this that will proceed on the basis of a different set of
12 facts. And indeed the decision not to go to it, but at paragraph 23 of the Decision, it
13 says:

14 "Results from Google's specialised services are displayed within the general search
15 results within sets referred to by Google as Universals or OneBoxes". [as read]

16 So the fact that that's how Google's results were displayed is in the Decision and is
17 agreed to be binding, although the Decision only applies from 2008 onwards.

18 As I say, in my submission, it's not realistic to construe this as if it was only ever
19 concerned about presentation within the organic results. It's concerned with
20 presentation on the page. That's what matters commercially, surely.

21 Google appears to be suggesting a different alternative basis today, which is that the
22 relevant counterfactual is one in which Google's results did appear in the organic
23 results and were subject to Algorithm A, so that both Foundem's results and Google's
24 were demoted to the bottom. But Google's results still appear in the OneBox, and they
25 suggested that that was outside the scope of our case to complain about that, as
26 reasonably construed. In my submission, that is not a reasonable interpretation of our

1 | pleaded case.

2 | MS ROSE: What about the opposite, though? What if the right counterfactual is to
3 | say that the demoting effect of Algorithm A is to be disregarded? So you look at where
4 | Foundem's results would have appeared if Algorithm A had been disapplied. Let's say
5 | Foundem's results would have been on the first page. You say, well, since there isn't
6 | a complaint that the -- I mean, obviously the OneBox isn't always triggered. As
7 | I understand what's being said by Google, I don't think Google is saying the OneBox
8 | would always be at the top of the page. It could be lower down the page -- I'm not
9 | sure if that's right, but that seems to be what it's saying -- that they appear in groups
10 | where they're relevant. I don't know, that may have been an earlier iteration, but that
11 | does seem to be what they were saying in 2015.

12 | MR PICKFORD: If it's helpful --

13 | MS ROSE: Yes.

14 | MR PICKFORD: -- the point that I was making was certainly about Universal Search,
15 | when we were able to compare --

16 | MS ROSE: Right.

17 | MR PICKFORD: -- specialist results against generic results. At that point we then
18 | began to vary where they were.

19 | MS ROSE: Yes. (Overspeaking) I see.

20 | MR PICKFORD: I didn't make the submission --

21 | MS ROSE: Okay.

22 | MR PICKFORD: -- in relation to the OneBox, because I don't know whether that is
23 | correct.

24 | MS ROSE: I mean, it does seem to be in some of the earlier documents, but --

25 | MR PICKFORD: I'd have to check that. Well, that wasn't sufficient (overspeaking).

26 | MS ROSE: But leaving that aside for a second, isn't it open to the Tribunal to say,

1 "Well, your complaint was of discrimination in the application of Algorithm A". So you
2 eliminate the application of Algorithm A. You're now in the same position as Google,
3 because Algorithm A doesn't apply to you or to Google. Actually, that might put
4 Foundem in a better relative position to Google, because it might well put Foundem
5 on the first search results page. Then Foundem would say, "Well, Google is still giving
6 itself preference because of the OneBox". At that point, isn't Google entitled to say
7 "Yes, but you didn't plead that". You didn't allege that that in itself was unlawful. What
8 you alleged was that the application of Algorithm A to you, but not Google, was
9 unlawful.

10 MR WEST: Yes.

11 MS ROSE: Do you see what I mean?

12 MR WEST: Yes. I've got an answer. It's at tab 8. This is the most recent amended
13 Particulars of Claim. When we looked at this morning, my friend was very critical of it,
14 but it answers, Ms Rose, your point, if I may say. Bundle 1, tab 8, page 294,
15 paragraph 68AE.

16 THE CHAIR: The 68AE. It's not your accent, it's that AE is above A, which is a bit
17 unusual to have 68AE above 68A, but that's -- I've got it. "For the avoidance of doubt".
18 Yes. "For the avoidance of doubt, it's not --" [as read]

19 MR WEST: "... it's not [the] case that the Product OneBox was, in [...] itself, an abuse."
20 [as read]

21 So if we had been treated fairly and our results had been presented in the generic
22 search results in accordance with their relevance, and Google's have been presented
23 in the organic search results in accordance with their relevance, we do not then say,
24 "Well, nevertheless, because you had the OneBoxes, Google, that is an independent
25 abuse". I can see someone could say, "Well hold, on that is new, and we are here
26 abjuring in such new case". That's not what we're saying.

1 MS ROSE: So you're not saying that -- so you're saying that if the Algorithm A hadn't
2 been applied to demote, you wouldn't have a complaint about this time period.

3 MR WEST: If it hadn't been applied to us and not to Google.

4 MS ROSE: Yes, it hadn't been applied to you or Google, then you wouldn't have
5 a complaint about this period?

6 MR WEST: We accept that that would be a different and a new point, which we're not
7 making.

8 MS ROSE: So --

9 THE CHAIR: Isn't that then the Algorithm A demotion that you're talking about?

10 MS ROSE: Yes, it is.

11 MR WEST: You're talking about the combination of the treatment of Foundem and
12 Google and the fact that it's different.

13 THE CHAIR: But then that is -- I'm still a little --

14 MR WEST: If Algorithm A hadn't been applied to us or to Google --

15 MS ROSE: But Google still had OneBoxes.

16 MR WEST: But they'd chosen to present OneBoxes --

17 MS ROSE: You wouldn't be complaining about that.

18 MR WEST: That's not within our --

19 THE CHAIR: Well, you'd say that you accept that would be a new case.

20 MR WEST: That would be a new case.

21 THE CHAIR: But isn't that then saying your complaint is that, leave aside the OneBox
22 which is there --your counterfactual is a counterfactual where Google's results are
23 within the general search or generic results according to Algorithm A, and the OneBox
24 is still there.

25 MS RIEDEL: Well, I think you're saying, what I hear is that you are saying you are
26 not -- Foundem's case is the discrimination of Foundem versus Google when looking

1 at the general search page and inherent in your case is both the demotion of Foundem
2 and the placing of Google's search result, where Google's placed in the Product
3 OneBox. So I think we're talking slightly at cross-purposes because Mr West is -- he's
4 thinking always of it as having both those elements, whereas I think, Ms Rose is talking
5 more about the fact -- you were talking about a counterfactual world.

6 MR WEST: Yes, the question of a counterfactual is another complication, because
7 my friend's submissions this morning amounted to saying that the OneBox must be in
8 the counterfactual in all circumstances, because it hasn't been challenged. But this
9 Tribunal would set a trial for next summer in which one of the main issues to be
10 decided is precisely the counterfactual is going to be whether the OneBox will be part
11 of that counterfactual, and, in my submission, it is not a matter that the Tribunal can
12 rule upon today by saying, yes, it must definitely be part of it. That's a matter for the
13 trial next summer.

14 But here, as far in terms of the abuse case, I accept it's the combination of the
15 application of the algorithm made to Foundem and its application to Google, resulting
16 in a difference in treatment, which we complain about. And that makes sense because
17 that is the abuse which was found by the Commission in the later period. And that's
18 why we say it's effectively the same. Follow the correspondence through in the
19 explanations that we now have about what the position was granted 2008. It's actually
20 the same.

21 MS ROSE: But the concession at 68AE must mean that you're saying that if
22 Algorithm A hadn't been applied to you or to Google, and Google had appeared in the
23 generic results, you'd have no complaint about this period, even if the OneBox existed.

24 MR WEST: I think that must be right, because that would be a new --

25 MS ROSE: So the counterfactual must include the OneBox because why would -- if
26 you're not saying the OneBox on its own is an abuse of dominance, why would Google

1 voluntarily remove the OneBox in that situation?

2 MR WEST: We do complain about the combination of Algorithm A and the OneBox.

3 So as long as Algorithm A applies, we complain about the OneBox.

4 MS ROSE: Yes, but if the counterfactual is no Algorithm A applied to anybody, then
5 in fact in your counterfactual what you have is Google in the OneBox, and then Google
6 and Foundem both in the generic search results. So Google gets in twice on that
7 basis, it gets more appearances.

8 MR WEST: That may be correct.

9 MS ROSE: But isn't that the inevitable counterfactual based on this concession?

10 MR WEST: I don't think the Tribunal can really rule today as to what the inevitable
11 counterfactual is. For example -- and we'll come to this shortly -- one question the
12 experts are looking at is, if Google is prevented from having a Product Universal after
13 2008, would it ever have had a OneBox? That the predecessor would have invested
14 in something, if one assumes that it came to an end in 2008.

15 THE CHAIR: Well, that's a different point.

16 MR PICKFORD: It's a different point. But (inaudible).

17 THE CHAIR: Yes. Well, you can look at that, but if their answer is yes, they would,
18 then one needs to know can that still find, forgive the expression, a claim for abuse in
19 this earlier period which you advance on the basis of discrimination and what actually
20 then is the discrimination you're complaining about. And that's what we are grappling
21 with.

22 You complain about discrimination, but what we're struggling to understand is exactly
23 what the substance of that discrimination that you're objecting to really is.

24 MR WEST: Well, it's the application of Algorithm A to Foundem and not to Google,
25 which is what happened in the real world. We say that amounts to discrimination. One
26 can then ask what the counterfactual --

1 THE CHAIR: How does that -- and that begs the question when one says "and not to
2 Google", you mean that then the only form of selection of the Google CSS for the
3 purpose of the general search result page would be a form of selection that applies
4 equally to Foundem. And then you bring in the OneBox, because Foundem is not
5 getting a OneBox.

6 MR WEST: The question as to whether it could be said that this amendment
7 introduces something new, which we hadn't pleaded before. My answer to the best of
8 my abilities is to say it isn't, insofar as that might be suggested, we're clear we're not
9 running any such case.

10 To move on to the question of the same fact, would that be an appropriate moment for
11 a short break?

12 THE CHAIR: Just a moment. I mean, I see that you can say you're not bringing a
13 case that the OneBox is an abuse because it has particularly attractive features,
14 although I'm not sure the OneBox actually did. It's really only with the Product
15 Universal that you've got the attractive features like photographs, which made it
16 particularly appealing.

17 But in terms of applying a like form of selection for display on the general page, that
18 seems to me does involve an attack on the OneBox, if that's what you mean. That's
19 why, if one looks at 102B, where you plead out the counterfactual on page 135, where
20 you say:

21 "... The only lawful counterfactual is one in which there is no discrimination in favour
22 of Google's CSS over competing CSSs. As such, in the counterfactual: (a) All CSSs,
23 including Google's own, would compete on the merits for position and display within
24 Google's ... search results [page]". [as read]

25 Very (inaudible) neutral assessment. Well, that means the OneBox would go. And
26 that's why I find that hard to reconcile with the paragraph you just took us to at 68AE.

1 MR WEST: This is a position as a matter of principle. As I say, so far as they would
2 suggest that we were running some new cases, which of only one is discrimination --
3 THE CHAIR: Yes.
4 MR WEST: -- may be objected to a limitation (inaudible). We have to accept that that
5 isn't what we do. (Pause)
6 I was going to move on to the question of the same facts, and briefly, or would this be
7 the appropriate moment for short break?
8 THE CHAIR: Yes. This is the Rule 32 point.
9 MR WEST: Yes. Should I proceed?
10 THE CHAIR: Yes, please.
11 MR WEST: So the legal principle is set out again in the Diamandis case at 549. Yes.
12 I don't think we've looked at that before. I have the reference of Authorities Bundle,
13 page 264.
14 THE CHAIR: Authorities, tab 12. Yes. Diamandis.
15 I'm sorry, Geo-Minerals or -- no, you want to go back to --
16 MR WEST: The reference. I have agreed with you.
17 THE CHAIR: Yes. Is it Diamandis paragraph 49?
18 MR WEST: Yes.
19 THE CHAIR: Yes. Well, I think we did read that, as quoted in the Geo-Minerals case.
20 MS ROSE: 344.
21 THE CHAIR: Page 344, as Ms Rose points out.
22 MR WEST: We can take that as read.
23 THE CHAIR: Yes. Unless there's a bit, I think, that the (inaudible) three dots I think
24 is only where there's reference citing authority which has been omitted.
25 Yes, we've read that.
26 MR WEST: Just one additional point to make clear, (inaudible) page 347 of the

1 Authorities Bundle. There's reference to the Court of Appeal decision, as of
2 (inaudible) of this, called Brickfield Properties, which addresses the question of the
3 extent of the overlap there must be between the original and new facts, and in that
4 case, Lord Justice Cross said there's no objection to amendment.

5 THE CHAIR: Sorry, where's the reference?

6 MS ROSE: To page 352, paragraph 8.

7 MR WEST: 352, paragraph 8.

8 THE CHAIR: Thank you.

9 MR WEST: Quotation after paragraph 8, from Lord Justice Cross:

10 "[There's] no objection to an amendment under Order 20, r.5(5), [the old rule] that
11 some of the facts over which the new cause of action arises are peculiar to [this] and
12 [...] some of the facts out of which the cause of action arises are peculiar to [this] [...]
13 It is enough if the overlap so great that a new cause of action can fairly be said to arise
14 out of substantially the same facts as the old cause of action." [as read]

15 And the starting point here, and my submissions on limb 2, are substantially the same
16 facts. Of course, this assumes that I haven't been successful, and then one which, of
17 course, I say I should be. The starting point under limb 2 is much of the same material
18 which I've already shown the Tribunal, which demonstrates that the question of the
19 OneBoxes has arisen in these proceedings to a substantial extent already.

20 We've seen, for example, Google's letter of 14 April explaining that the OneBox were
21 the means for displaying its results from its comparison shopping service prior to 2008.
22 We've seen -- so I won't go back to it -- Google's pleaded case that results from its
23 comparison shopping service were never displayed in the organic results, but only in
24 the special boxes.

25 And paragraph 21 of Google's Defence, which I showed you, which said that Google
26 had been using equivalents to the Product Universal for many years prior to 2008. It's

1 clear that that means the OneBox, because that's the explanation Google gave in its
2 April 2015 letter.

3 I also showed you Foundem's reply, which took paragraph 21 to be referring to the
4 OneBox and which itself referred to the OneBox.

5 And the history of disclosure in this case, also supports the contention that the facts
6 concerning the OneBox have always been within the scope of the case. Mr Bolster
7 addresses this in his witness statement at tab 3 of Bundle 1. One looks at
8 paragraph 35(a) beginning at page 49.

9 Mr Bolster is addressing a recent CMC where the parties were making disclosure
10 requests and --

11 THE CHAIR: One second. Page 49, Mr Bolster's witness statement.

12 MR WEST: Tab 3, Bundle 1.

13 THE CHAIR: You say paragraph 35.

14 MR WEST: 39(a). That's the bonus of addressing some of the smaller requests at
15 the CMC, which you heard in July, I believe. One of those requests gains zero, as
16 Mr Bolster explains, was request for data on the format of display properties of the
17 Product OneBox, in the various countries in which it was launched, from its
18 introduction. Mr Bolster explains that Google's stated position on that request is that
19 disclosure was not required in circumstances where Foundem pleads the claim, that
20 they applied to, be struck out, that such data was not readily available, and that
21 relevant actions had already been disclosed.

22 Just look at the red firm schedule in Bundle 3. (Pause)

23 Bundle 3, tab 19, page 305. First request, there's this request A0: details of the
24 Product OneBox, and the third substantive column is headed "Summary of Google's
25 Position".

26 If you go over the page heading: "Relevant documents already disclosed", and Google

1 has already disclosed those documents, identified by code, as well as various
2 documents, include screenshots of different iterations of the OneBox design. So its
3 position was, "Well, we've actually already given disclosure about this", and Mr Bolster
4 explains that the Tribunal dealt with this, by indicating that Google should provide
5 a witness statement commenting on how the design of the OneBox changed, or we
6 have commenting on these, disclose the documents. That is in the transcript of that
7 hearing, AB2, tab 10, page 245, I think it's necessary to go to it.

8 Coming back to Mr Bolster, page 50 paragraph 35(b), one of the other requests in July
9 was a request for click data and click through rates on Product OneBox. So this is
10 people clicking on the Product OneBox and going through to the merchant or to
11 Google's comparison shopping site. Mr Bolster explains that Google's stated position
12 was that it had already disclosed all available monthly click data, from the Product
13 OneBox to Google Product Search for the UK and Germany, disaggregated by link
14 type, and in the event the Tribunal declined further disclosure.

15 Then turning to (f) page 51, another of the requests before the Tribunal was a request
16 for documents relating to Google's decision-making on introducing the Product
17 OneBox to Google's SERP, and on this one, the Tribunal granted the request, on the
18 basis that was relevant to the counterfactual.

19 So those are some examples of categories of disclosure requests which have been
20 made -- requested and made in relation to the Product OneBox. In my submission,
21 it's inevitable that the Tribunal would have to consider the position in relation to
22 OneBoxes, in this case, in any event.

23 THE CHAIR: But the fact that it might come into consideration, and that documents
24 about OneBox, some documents have been disclosed -- there may be quite a lot of
25 documents been disclosed -- you see that might be relevant, if it's a question of the
26 discretion to allow the amendment of Mr Pickford's third point. But I'm not sure -- for

1 myself -- it goes to the prior question, which is: does the claim -- which, this is all on
2 the hypothesis -- a new claim arise out of, substantially, the same facts as the existing
3 claim? Because the new claim -- if it is now accepted for purposes of argument, it's
4 a new claim -- is dealing then with a complaint about that aspect of promotion of
5 Google CSS, because it's left out of the algorithm, it's got a higher position on the
6 general page, at a period that is earlier than the period concerning Product Universal.
7 And that means one's looking at a different time period; if it's a different time period,
8 it's not the same facts, you see. (Pause)

9 Well, it might be saying that, the complaint may be the same, but the moment you go
10 into a different time period, it's not the same fact.

11 MR WEST: Well, we do have an authority on this, which is the Chantrey Vellacott
12 authority, and we'll go to that authority, to tab 6, and what happened in that case is
13 that there was an allegation of negligence against a financial adviser. The negligence
14 was the (inaudible) to year two, the application to amend and plead negligence in year
15 one as well. And the Court of Appeal held that that allegation did arise out of the same
16 facts, because it would in any event be necessary to look at what had happened in
17 year one. Look at paragraph 111 in particular.

18 THE CHAIR: Paragraph 111.

19 MR WEST: Yes. (Pause)

20 With or without the new allegations, the nature of the advice throughout, that was the
21 first year, will be under scrutiny at the trial, because it forms the beginning of the
22 process of advice already complained of, so no doubt for that reason the advice itself
23 is already pleaded, although it hadn't previously been pleaded to be negligent, is my
24 interpolations, I'm sorry.

25 Then, reading to the words again:

26 "It's to our minds likely to be artificial to scrutinise the quality of the later advice without

1 any scrutiny of the quality of the earlier advice, which almost certainly formed the basis
2 of the later advice [...] therefore reached the clear conclusion that the allegations of
3 negligence in the first year [...] arise out of substantially the same facts". [as read]

4 So where it's a different period of time covered by the claim, it can nevertheless in my
5 submission -- and as the Court of Appeal holds here -- arise out of the same facts, as
6 long as the court would be looking at the facts in the earlier periods, in any case.

7 Now, in that authority, it was looking at the earlier period simply as part of the general
8 background to what happened later. In the present case, it's looking at the earlier
9 period, 2006 and 2007, because Foundem actually has complete abuse allegations in
10 relation to that period, in any case. (Pause)

11 And it could be said in the (inaudible) case Chandra optics, well, there is a new
12 counterfactual at play, because unless and until negligence is alleged in year one, no
13 one would have to ask themselves the question, well, what would have happened if
14 non-negligent advice had been given in year one, but nevertheless allowed the
15 amendments? And we say here the Tribunal would inevitably have to look at things
16 like Google's strategy concerning OneBoxes, that the effectiveness of that strategy,
17 and indeed the effect of the strategy in terms of driving clicks from Google's search
18 engine results page to its comparison shopping page, and as I showed you, that click
19 data has been disclosed. (Pause)

20 For what it's worth, I should make clear: this is very much my alternative case; my
21 primary case is that this is not a new claim. (Pause)

22 Could I just then, briefly, say something else about the counterfactual? I anticipate my
23 learned friend will take you to the authority of Mastercard, and in my submission, what
24 that authority says and stands for is that it's not enough to show that a claim arises out
25 of the same facts, that the facts at which the claimant wishes to allege to impugn,
26 wishes to amend to impugn were in any event part of the counterfactual, because

1 everything is part of the counterfactual, which is not being specifically impugned. So
2 that can't be enough to say that it arises out of the same facts. One has to go further
3 and ask, well, what role did that particular feature play in the litigation, of what would
4 it have played in the litigation, in any event?

5 But even if it's right, that the need to consider a counterfactual somehow puts the
6 allegations beyond the pale, in my submission, in this case, it will in any event be
7 necessary to consider the counterfactual to the degree of discrimination at the trial,
8 and that is a matter which the Tribunal will be looking at, at the trial next summer.

9 Ms Lawrance has served evidence on the Application, which doesn't suggest that
10 there will be any impact on the expert work, in relation to the counterfactual, if the
11 amendment does stand. We'll have a brief look at what she does say. Just before
12 that, can we just look briefly at what Mr Hunt has said, and that's at AB 3 tab 41.

13 (Pause)

14 Mr Hunt is the Claimant's expert. (Pause)

15 Page 463, paragraph 20. This is Mr Hunt talking about click data. This was before
16 the click --

17 MS ROSE: Sorry, which page are you on?

18 MR WEST: Sorry, 463. This was before the click data application was decided, and
19 Mr Hunt is dealing with the suggestion that whether it's needed or not depends on the
20 outcome of this application today. He says:

21 "This data will also continue to be useful to substantiate the counterfactual in the pre-
22 Decision period." [as read]

23 As explained above, questions two and three were the questions Mr Hunt identifies
24 earlier.

25 "... Consider whether Google's Discriminatory Demotions in the pre-Decision period
26 were abusive. As such, I [...] need to consider whether Google may have designed

1 its SERP and Product OneBox differently, had it not engaged in the Discriminatory
2 Demotions, [...] either benefit at a later period once the Product Universal was
3 introduced or to gain a competitive advantage during the pre-Decision period [...].
4 I [would] consider documentary evidence on how Google made [the] decision [to put]
5 the application through] Discriminatory Demotions and whether its views on traffic to
6 its own CSS [communities was] part of [that] consideration. Therefore, it is important
7 to obtain [this] data to corroborate the relevant information obtained from documentary
8 evidence." [as read]

9 So Mr Hunt is saying, "Well, we need to consider counterfactual in the pre-Decision
10 period in any case".

11 Now just to explain what he means by "Discriminatory Demotions". That was a defined
12 term in Kelkoo's pleading. (Pause)

13 You go back to paragraph 9 of this, page 461. He says:

14 "Even if the OneBox paragraphs are struck out, disallowed or dismissed [...], Kelkoo's
15 pre-Decision period claim, which starts from [...] 2006, justifies these requests". [as
16 read]

17 Now, one of the allegations was Discriminatory Demotions, which was effectively
18 applying the Algorithm A penalty to Kelkoo. Kelkoo, as I understand it, has since come
19 to an agreement with Google, to drop its allegations in relation to that period, but, as
20 I've shown the court, Foundem continues to have an allegation of concern, and
21 continues to impugn the application of penalties in this period. So the point continues
22 to apply.

23 THE CHAIR: I'm just reading the rest of what he says in paragraph 9(ii). (Pause)

24 He says, as I've understood it, in looking at whether Discriminatory Demotions gave
25 the Google site a competitive advantage, it does not specifically require consideration
26 whether the Product OneBox amounted to exclusive promotion of Google's own site,

1 in terms of richness of display.

2 MR WEST: Yes, you may be talking about whether even if it were not coupled with
3 demotion, just promotion, and so on, would it be an abuse?

4 THE CHAIR: Well, I think it's the other way round, isn't it? In order to look at whether
5 demotions are an abuse, I don't have to consider whether the Product OneBox
6 amounts to promotion, by reason of its attractive features.

7 MR WEST: Yes, I actually alluded to that earlier. There is another possible
8 counterfactual in which one assumes that Google simply treated its results, or
9 appearing in the search results, but are not demoted, as another possible counter to
10 that. By using the counterfactual, this doesn't make sense, but as we know, those
11 were not the facts here. (Pause)

12 THE CHAIR: And coupling that with what he says at paragraph 20, he seemed to be
13 accepting that you can consider counterfactual to the Discriminatory Demotions, but
14 still have a OneBox. You can ask whether it might have been designed differently.
15 See that? But he's not saying: counterfactual to Discriminatory Demotions, i.e. no
16 discrimination, is the removal of the OneBox. You see?

17 MR WEST: This is addressed to Foundem's pleading, which was rather different to -
18 -

19 THE CHAIR: Sorry, Kelkoo's pleading.

20 MR WEST: It would be possible to have one without the other. It's the case that
21 Google's results will simply be neutral.

22 MR PICKFORD: Sorry, (inaudible), is it your submission that Mr Hunt's letter in
23 evidence was only advanced on behalf of Kelkoo and not advanced on behalf of all
24 the Claimants? I'd like to clarify whether that's his submission, because that is not
25 what happened.

26 MS ROSE: This is their joint expert.

1 THE CHAIR: Yes.

2 MR WEST: The reference to the motion is from Kelkoo's pleading. That's how it
3 pleaded this case.

4 If we can then look finally at Ms Lawrance's statement. That deals both with discretion
5 and this question of overlap, in particular the question of prejudice.

6 THE CHAIR: Well, it may be how Kelkoo pleaded its case, but I thought you were
7 saying, if you're complaining about discrimination in terms of demotion, any
8 counterfactual has to then look at how Google's results are treated, or how Google
9 treats its comparison site, and therefore impugns the OneBox.

10 MR WEST: It's necessary to compare the treatment of Google with the treatment of
11 Foundem. That's certainly true, and as I showed you, the treatment of Google, as
12 a matter of fact, was that its results appeared in OneBox. If we're not allowed to pursue
13 that, which is the hypothesis of Mr Hunt's letter, one must come up with some other
14 assumption for the basis of treatment of Google's searches.

15 As I submitted earlier, that would be something which is inconsistent with the facts as
16 we know them to be. Ms Lawrance's statement is (several inaudible words). (Pause)
17 Particularly at paragraph 19 to 21. It says at 19:

18 "There has been [...] limited disclosure of material [...] [concerning] the [...] OneBox
19 [date]. [...] However, Google's ability to provide disclosure and evidence in respect of
20 [the] OneBox Claim [...] is now limited by the passage of time. [...] Mr Wisking
21 explained in Google's disclosure statement [...] [that] potentially relevant custodians
22 were placed on legal hold relatively recently [...]. The email retention period for
23 a number of these custodians had therefore already expired before (inaudible)
24 OneBox Claim. [...] We have been able to identify a witness who can speak to some
25 aspects of the development of OneBoxes from a technical perspective, and can
26 provide assistance on the details of how they operated, which should provide context

1 for subsequent developments I understand the Tribunal have had in mind when it
2 made the comments referenced above [...]. [That was the witness statement
3 concerning the development of the OneBox]. However, Google has been unable to
4 identify an available witness ... to speak to the strategy regarding the development of
5 ... OneBox. While my firm [will] continue to investigate this issue [...], it will be very
6 difficult for Google to put [...] necessary evidence at this stage to allow for a proper
7 examination of why it was developed". [as read]

8 So in my submission, this goes to two points. The first is the extent of the overlap,
9 and notably, what Ms Lawrance does not seem to be saying is, if these paragraphs
10 are allowed to stand, there will be a lot more disclosure which will be required. Indeed,
11 the position is that all of the extant disclosure requests that Google refer to in its
12 original application as turning on the outcome of this strike out have already been dealt
13 with, irrespective of the outcome of the strike out, and in relation to the one
14 outstanding or possibly outstanding request concerning click data which in fact
15 Sir Peter Roth (inaudible) resolved on the papers. Froogle -- Foundem have made
16 clear that they are not pursuing any further requests for disclosure under that head.
17 That's at tab 68 of 13, that letter.

18 THE CHAIR: Yes. I didn't -- when you say I resolved it on the papers, I said I wasn't
19 prepared to order it in advance of the outcome of this, so I didn't refuse it as such.
20 I said if I was to be persuaded to order it in advance of determination of the strike out,
21 I'd like to hear oral submissions. Foundem said they're not going to push that, but --

22 MR WEST: We're not intending to bring the request --

23 THE CHAIR: Yes.

24 MR WEST: (Several inaudible words). So this isn't the case now, contrary to the
25 impression one might have got from the application as originally drafted with a lot of
26 disclosure terms on it. In fact, (inaudible). So far as concerns the suggestion of

1 prejudice, in my submission, most of it is a conjecture that there might have been
2 further material available if the amendment had been made at an earlier time. Part of
3 my submission is that that is conjectural, and it seems unlikely that any further
4 documents or evidence would have cast significant light on the purpose of the
5 OneBoxes, because, in my submission, the purpose of the OneBoxes is self-evident.

6 THE CHAIR: So just to be clear on the point you just dealt with: if you're successful
7 in this application, you will not be seeking any further disclosure. You won't seek to
8 revive request A8, is that right?

9 MR WEST: That's correct.

10 THE CHAIR: Yes. Thank you.

11 MR WEST: So in my submission, this is very, very thin material on which to suggest
12 that Google will be genuinely prejudiced, if these paragraphs had been allowed to
13 stand.

14 Unless I can assist you further, those are all the submissions I was (inaudible) to make
15 on this application.

16 THE CHAIR: I think we'll take a break, and then we'll consider whether to ask for any
17 more. Thank you.

18 (3.33 pm)

19 (A short break)

20 (3.54 pm)

21 THE CHAIR: Mr Pickford, we'd like to hear from you on issue 1. We don't need to
22 hear from you on the Rule 32 point, the same facts point.

23
24 Reply submissions by MR PICKFORD

25 MR PICKFORD: So on issue 1, Mr West began by saying, "It doesn't matter if there's
26 a different mechanism when one is answering the question whether there is a different

1 cause of action".

2 We disagree. The pre- and post-amendment pleadings plead very different
3 mechanisms of abuse in this respect, as between, in the former case, a claim which
4 is based on Algorithm A only being abusive, versus in the latter case, a case based
5 on Algorithm A in combination with the OneBox being abusive. What Mr West's
6 submission collapses to is essentially saying, "But if it's still discrimination, that's good
7 enough". I showed you the authorities which make clear that is not good enough. The
8 name that one applies to the cause of action, the shorthand, whether it be
9 discrimination, whether it be abuse of a dominant position, is not what determines
10 whether a matter is a new claim within the meaning of section 35. What matters is
11 whether the facts are different.

12 What Mr West sought to do is attempt to link two different claims of discrimination, by
13 his submission that as a matter of fact, he says, the reason why Google committed
14 discrimination type 1 -- that is, in relation to demotion algorithms -- was because it
15 committed discrimination type 2, namely promoting itself in the OneBox. That was his
16 attempt to bring those things together as one.

17 I have two points to make in response to that. As a preliminary point, we don't actually
18 accept that factually, these were entirely different types of mechanisms, and it wasn't
19 possible to put generic results into specialist results, or vice versa. So it doesn't follow
20 as night follows day that just because you employ algorithms in relation to generic
21 results, that implies that you promote yourself in specialist results. Those are two
22 different things, factually. But in any event, the most important point -- and the one
23 that I say is key to unlocking Mr West's submission -- is that that submission by
24 Mr West, even if it were factually correct, is just not what Foundem pleaded. It's what
25 he says to this court now, but it is not what his pleading said prior to the amendments
26 that they have sought to introduce. A claim that Algorithm A alone is unlawful is

1 a different claim to a claim that Algorithm A, together with OneBox, is unlawful.

2 They make a point by saying, "Well, we don't allege that OneBox on its own is unlawful
3 in our new claim", and that's what he took you to in relation to, I think, 64A(e) or 66A(e).
4 But that's neither here nor there. It doesn't matter if they disclaim a claim of based on
5 pure OneBox. What they have added, and what matters here, is that they seek to
6 bring a claim now that combines issues about demotions under Algorithm A with
7 previously unpleaded issues about what we did in the OneBox.

8 THE CHAIR: What they say is, when you say a claim that Algorithm A alone is
9 unlawful, Algorithm A alone is unlawful because it's applied to us and not to Google's
10 own site.

11 MR PICKFORD: Yes.

12 THE CHAIR: That's why it's unlawful.

13 MR PICKFORD: That's what they said.

14 THE CHAIR: They say that's what they pleaded.

15 MR PICKFORD: Yes.

16 THE CHAIR: If that's right, then they say, "well, what way was it not applied to
17 Google?". Because Google was not treated in the way its comparison site was
18 displayed on the search results page by being ranked somewhere. It was exempted
19 and put right up top. So that's why it wasn't being treated in the same way under --
20 and that's the unlawfulness.

21 MR PICKFORD: Well, that is what they say now. That is not what they pleaded. What
22 they pleaded was a claim that they were discriminated by the fact that we applied
23 Algorithm A to them, but not to ourselves. That alone, as I sought to explain before,
24 what that means can be tested by thinking about some of the responses to that claim
25 and what the counterfactuals necessarily are. For Mr West to be right, he has to be
26 able to demonstrate to you, the Tribunal, that it necessarily follows in all worlds that

1 by putting Algorithm A in issue, he inevitably put the Product OneBox in issue. He
2 fails on that. If I'm able to give you examples, and they need only be examples, of
3 where putting Algorithm A in issue does not inexorably lead to --

4 THE CHAIR: I understand that. What do you say is a potential counterfactual?

5 MR PICKFORD: Well, a potential example is that Google just removes Algorithm A
6 altogether. I'm not saying that is what we're saying our counterfactual was, but one
7 can test whether the Algorithm A claim necessarily always leads to a Product OneBox
8 claim, but by looking at possibilities. One possibility, at least a logical possibility in
9 theory, is that we just removed what was being complained about, so that Foundem
10 found what it describes as its natural position in generic results, quite without the
11 addition of Algorithm A. That has no logical bearing whatsoever on the Product
12 OneBox.

13 So what that illustrates is that merely saying, "Ah well, we put Algorithm A in issue,
14 does not inevitably lead to them saying we put the Product OneBox in issue". Another
15 example is the one that Ms Rose gave, in that we could answer the claim of pure
16 discrimination purely in relation to Algorithm A by saying, "But we did worse to
17 ourselves". You complained that you were poorly treated because you were subject
18 to Algorithm A, and if that were the only thing, an issue, we could say, "Well, actually
19 we exclude ourselves from generic results altogether".

20 THE CHAIR: It's a bit unrealistic, isn't it, when you are actually doing much better in
21 terms of clicks, because you're at the top.

22 MR PICKFORD: Well, it wouldn't be an answer. It wouldn't be an answer, Sir, to
23 a wider claim that in addition to what you're doing on Algorithm A, you're also giving
24 yourself this preference in the OneBox. So I quite accept that in relation to the claim
25 as now put, that wouldn't get us very far. But the point of all of this is not to say "This
26 is our case". These are ways of testing the proposition which Mr West didn't articulate

1 in his terms, but actually has to be at the root of his case, which is that if I plead
2 Algorithm A as a matter of pure logic, I must have attacked the OneBox, because he
3 certainly doesn't ever attack the OneBox with any words.

4 THE CHAIR: No. But if you always stop at that, you plead Algorithm A as being
5 unlawful, but you plead Algorithm A as discriminatory --

6 MR WEST: Mm-hmm.

7 THE CHAIR: -- in differential application of how you treat Google. That has to be part
8 of the existing plea. Indeed it is. Yes. That's where I struggle a bit.

9 MR PICKFORD: Well, Sir, I'd say exactly the same thing as I've just said. That in
10 relation to that plea, a plea that Algorithm A is discriminatory, does not lead one,
11 inexorably, as a matter of logic, to the OneBox; it leads on the facts, as Foundem now
12 appreciate them, to the OneBox, because obviously they are saying, well -- and as the
13 Commission Decision said -- "Look, we've got two things going on here
14 simultaneously", and what the Commission said to us is, "We don't like you doing those
15 two things together". It's the combining of them that has caused the problem.

16 We're not impugning Algorithm A, and indeed we're not impugning your ability to
17 promote yourself on OneBoxes, but what we don't like is you doing the two together.
18 But I can't really put it any differently; that is not what was pleaded by Mr West's clients.
19 Obviously, Mr West is not to blame for the way the case was put previously.

20 MS ROSE: And would it be right to say that the way you put it is that there may be all
21 sorts of differences of treatment, between Google and other consumer shopping
22 services, but the only ones that are an issue are the ones that allege to be
23 discriminatory? In other words, less favourable and unjustified. The only one that was
24 alleged to be both less favourable and unjustified was the application of Algorithm A.

25 MR PICKFORD: Yes.

26 MS ROSE: And that is, as it were, a penal application. It's the application of

1 a detriment.

2 What was not alleged, you would say, was that the application of a benefit to Google
3 of the OneBox was also discriminatory and unjustified. And you can't say, just
4 because you've complained about one detriment being discriminatory, that the fact
5 that in the real world, the other party was giving itself a benefit, is a necessary part of
6 your claim.

7 MR PICKFORD: I do say that, and I say that supported by two aspects of the pleading.
8 The first is the complete silence, as to the advantage, the promotional benefit part of
9 the claim, as regards the period 2006 to 2008. So that's the first point: it's just not
10 there.

11 And the second point is: that it is there from 2008 onwards. That's the critical point.

12 THE CHAIR: In a sense, your Sel-Imperial point. If they were going to say this, if
13 that's what they meant.

14 MS ROSE: They did say it.

15 THE CHAIR: They said it for a later period, they didn't say it for the earlier period.

16 MR PICKFORD: Exactly.

17 MS ROSE: You'd have to take them at face value, because when they wanted to
18 plead exclusion from a benefit, they did.

19 MR PICKFORD: Quite. So those two -- both what they omitted to say and what they
20 did say for a later period -- come together, in my submission, to lead to a very clear
21 construction of what they were talking about, and what they were talking about is: it's
22 both things, from 2008 onwards. And why do they say that? Well, because that
23 reflects what the Commission Decision said. And they just complain about
24 Algorithm A, for the first period.

25 Now, one can sit here with the benefit of hindsight and say --

26 THE CHAIR: Well, they complain in terms of demotions, and so the counterfactual is

1 where you remove the demotions.

2 MR PICKFORD: You deal with demotions.

3 THE CHAIR: And Foundem is higher up, if they succeed. Higher up, and maybe on
4 page 1, instead of page 3, or whatever.

5 MR PICKFORD: But that doesn't necessarily have to tell you anything about what can
6 you do in relation to demotions.

7 THE CHAIR: Can I ask you, what do you say about the pleading in the reply?
8 Paragraph 15(c), which is Bundle 1, tab 7.

9 MR PICKFORD: Can you give me a page?

10 THE CHAIR: Page 215.

11 MR PICKFORD: Thank you. And sorry, you are referring to paragraph (c)?

12 THE CHAIR: Yes. "Foundem notes Google's admission". And then the next
13 sentence:

14 "As the Product OneBox placed prominent links to Google's Own CSS at or near the
15 top of Google's search results pages and effectively immunised Google's Own CSS
16 from the effects of the algorithmic penalties such as Algorithm A, Foundem avers that,
17 [...] Google's abusive conduct commenced many years prior to the launch of Product
18 Universals." [as read]

19 That was said quite a while before this amendment.

20 MR PICKFORD: Well, the first point I'd make is: this is a reply; it's not a Particulars of
21 Claim, and what it is now seeking to do is introduce a new claim. You don't accept
22 your claim-out, your positive claim-out, in a reply. A reply is to meet the defences, and
23 to explain why the defences are wrong. So if you haven't got a claim in the first place,
24 then strictly speaking, all of this is irrelevant, and in my submission, that is answer
25 enough. And indeed, were this sufficient, they wouldn't have needed to make the
26 amendment that they have now sought to make.

1 MS ROSE: And in fact, you could say this shows what they should have pleaded in
2 the first place.

3 MR PICKFORD: Yes, you could. We certainly, at no point, understood Foundem to
4 have pleaded a OneBox claim, and there's plenty of correspondence, that I'm not
5 going to take you to, but we have been saying, since a decade ago, you're asking for
6 things in relation to OneBox; you haven't pleaded that OneBox is abusive. We've been
7 saying that consistently, and it is only last year that Foundem woke up to the fact that
8 we might be right about that.

9 MS ROSE: What's the first time Google said that?

10 MR PICKFORD: So, we said it in correspondence. If you bear with me, I'm going to
11 find what the date of it is. (Pause)

12 We said it in correspondence when there was an initial disclosure application. (Pause)

13 THE CHAIR: It was in objecting to some of the disclosures.

14 MR PICKFORD: It was, yes, and I'm just trying to find my reference. I've got it in my
15 notes.

16 So one time we certainly said it was on 8 August 2014. If you go to the letter, which
17 is in correspondence Bundle 3, tab 21, page 364. (Pause)

18 This is a letter responding to some requests for disclosure, and the important part is,
19 in fact, in the annex, where we go through, or rather my instructing solicitors go
20 through, explaining why Foundem isn't getting some of the disclosure that's requested.
21 That's on page 370.

22 THE CHAIR: 371, isn't it?

23 MR PICKFORD: Well, yes. The annex begins on 370.

24 THE CHAIR: Yes.

25 MR PICKFORD: And then on 371, there's the "documents outside the pleaded case".
26 And the second of those is unpleaded allegations of abuse relating to Google's

1 OneBox results which pre-date the introduction of Universal Search.

2 So that's all the way back in 2014. So that's over a decade ago. And we put Foundem
3 on notice then that our position was, you guys have not pleaded a OneBox case. So
4 insofar as that is a necessary premise for you getting disclosure, we're not going to
5 give it to you. And Foundem responds to that letter, at tab 21(a) -- which is actually
6 some reason earlier on in the Bundle, but in any event -- what they say, at the top of
7 page 372(ii) is:

8 "... Our client is prepared to agree [...] the additional searches suggested in your letter
9 but reserves its rights to apply for further disclosure following review of additional [...] documents disclosed by your clients." [as read]

11 They didn't come back and say, (a) you're wrong about the OneBox claim and (b) they
12 didn't come back and make the amendments, but they have decided ten years later to
13 plead a OneBox claim. So they can't say, "Oh, well, we've been keeping really quiet
14 about this one, but we always went along with the idea that they had a OneBox claim".
15 For over ten years we've made it clear that they haven't, and it's only ten years later
16 that they have purported to amend and --

17 MS ROSE: Can you just give that reference tab. Where was that again?

18 MR PICKFORD: It's tab 20. We're looking in the Correspondence Bundle.

19 MS ROSE: Yes.

20 MR PICKFORD: We're at tab 21(a).

21 MS ROSE: Yes.

22 MR PICKFORD: And at least, in my view I've got it electronically, but I'm looking at
23 something which is lettered, I think, 372(ii)

24 MS ROSE: Yes.

25 MR PICKFORD: And that's, in essence, their response on the disclosure --

26 MS ROSE: Yes.

1 MR PICKFORD: -- and implicitly wrapped up in that is their response on our annex,
2 which says you're not getting disclosure X because you haven't got a claim in relation
3 to the OneBox.

4 MS ROSE: Yes. And what do they say?

5 THE CHAIR: I mean, your point is it's not what the letter says, it's what it doesn't say.

6 MS ROSE: It doesn't mention --

7 MR PICKFORD: So what it says is, we reserve our rights to come back further. They
8 never came back any further, nor did they argue in relation to OneBox --

9 MS ROSE: I couldn't find where they reserve their rights.

10 MR PICKFORD: They say right at the top. The second line says:

11 "Accordingly, our client is prepared to agree to [...] additional searches suggested in
12 your letter --"

13 MS ROSE: I've got you, yes, "reserves its rights".

14 MR PICKFORD: "-- but reserves its rights to apply for further disclosure following
15 review of [...] additional documents disclosed by your clients." [as read]

16 And that's basically where it was left. So they didn't come back and amend. They
17 didn't even argue with us about whether they had a OneBox claim. It just died.

18 And now we are where we are. And I've made the submissions that -- I've given the
19 court the submissions that I really can make, in relation --

20 THE CHAIR: That's very helpful. I think we'll rise for five minutes, thank you.

21 (4.15 pm)

22 (A short break)

23 (4.22 pm)

24 THE CHAIR: We're very grateful to counsel on both sides and those supporting them
25 for the very good submissions we've received.

26 For reasons that we shall set out in a written judgment the application to strike out the

1 relevant passages in the Re-Amended Particulars of Claim succeeds, and we refuse
2 the application to amend, pursuant to Rule 32, to introduce a new claim.

3 MR PICKFORD: Sir, the remaining thing is that I apply for the costs of the Application.

4 THE CHAIR: Yes.

5 Do you want to say anything about that, Mr West?

6 MR WEST: Well, we don't have the reasons yet. It may be useful to see the reasons
7 that are handed down before addressing questions of costs.

8 THE CHAIR: Yes.

9 Well, we wouldn't expect you to address amount today. We will summarily -- if we
10 order costs, summarily assessed costs. I'm ready to adjourn the question of whether
11 there should be an order for costs.

12 But normally, as you know, if an application to strike out succeeds, generally, the
13 successful party will get their costs of that application. So that's what we are minded
14 to order. You can make submissions after you receive the ruling objecting to that.

15 If we do order costs, as I say, we're minded to do, we will summarily assess the costs.

16 But as regards the amount, we've had the schedule -- I think both sides have served
17 schedules of costs -- so what I propose is that within ten days of receipt of the written
18 judgment, Foundem make any submissions that it wishes both as to what order should
19 be made about costs and about the amount of costs for summary assessment.

20 We don't need any further submissions from Google except by way of response, to
21 Foundem, and any response, please, within five days thereafter.

22 I think that concludes this hearing.

23 (4.25 pm)

24 (Hearing concluded)