



Neutral citation [2025] CAT 83

Case Nos: 1589/5/7/23 (T)

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

23 December 2025

Before:

SIR PETER ROTH  
(Chair)  
DINAH ROSE KC  
PAULA RIEDEL

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**INFEDERATION LIMITED**  
**("Foundem")**

Claimant

- v -

**(1) GOOGLE LLC**  
**(2) GOOGLE IRELAND LIMITED**  
**(3) GOOGLE UK LIMITED**

Defendants

Heard at Salisbury Square House on 10 October 2025

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**JUDGMENT (STRIKE OUT)**

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## APPEARANCES

Colin West KC (Instructed by Hausfeld & Co LLP) on behalf of the Claimant

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

## A. INTRODUCTION

1. By an application made on 19 June 2025 (“the Application”), the Defendants applied to strike out, disallow or obtain reverse summary judgment on the portion of Foundem’s amended pleading which alleges unlawful use of Product OneBoxes during the period between 2006 and December 2007. At the conclusion of the hearing on 10 October 2025, we informed the parties that the Application would be allowed, for reasons to be given in writing. This judgment sets out our reasons for that decision.
2. Foundem’s claim against the Defendants arises primarily out of the decision of the EU Commission (the “Commission”) in Case AT.39740 *Google Shopping* (the “Decision”). The Decision found that Google Inc. and its parent company Alphabet Inc. (together, “Google”) had abused a dominant position in 13 national markets (including the UK) for general search services in the EU. Article 1 of the Decision states:

“By positioning and displaying more favourably, in Google Inc.'s general search results pages, Google Inc.'s own comparison shopping service compared to competing comparison shopping services, the undertaking consisting of Google Inc. and also, since 2 October 2015, of Alphabet Inc. has infringed Article 102 of the Treaty and Article 54 of the Agreement on the European Economic Area...”

As regards the UK, the Decision found that the infringement started in January 2008.

3. The present action brought by Foundem is one of four sets of proceedings brought by operators of Comparison Shopping Services (“CSSs”) in one or more of the national markets covered by the Decision seeking damages from companies within the Google group for infringement of Article 102 and, in some of the cases, the parallel domestic provision, the Chapter II prohibition under the Competition Act 1998. As well as seeking damages in respect of the period covered by the Decision, the Claimants seek damages for the post-Decision period, alleging that Google’s infringement did not come to an end following the Decision through the implementation of a remedy. The four actions, referred to as the “UK Shopping Proceedings”, are being jointly case managed by the Tribunal.

4. However, Foundem also alleges that an infringement occurred before the Decision period, beginning in June 2006, when the Foundem CSS was launched. We refer to June 2006 to January 2008 as the “Pre-Decision Period”. No claim is now made in respect of a period prior to January 2008 in the other three actions.

5. The Decision found that Google’s infringement commenced with the launch of “Product Universal”. Product Universal was described in the Decision, in passages of recital (29) which we have previously held to be binding<sup>1</sup>, as follows:

“The Product Universal comprised specialist search results from Google Product Search [i.e. Google’s CSS], accompanied by one or several images and additional information such as the price of the relevant items. ... There was also a header link leading to the main website of Google Product Search.”

As the Decision records at recital (31), Product Universal was later revamped and renamed, first as “Commercial Unit” and then as “Shopping Unit”.

6. By an amendment to its pleading, Foundem introduced the allegation that, prior to the launch of Product Universal, Google used Product OneBoxes prominently to display Google’s CSS. Product OneBoxes were boxes that appeared on Google’s Search Engine Results Page (“SERP”) in response to certain search queries. The links within a Product OneBox would take the user to Google’s CSS, or to merchants featured in Google’s CSS (collectively referred to as “Google’s CSS” hereafter for simplicity).

7. Our decision on the Application means that Foundem is not permitted to take forward its infringement claim in respect of the Product OneBox conduct. However, Foundem continues to be able to claim, as it has done from the outset of its action, that Google committed abuse in the Pre-Decision Period by applying algorithmic demotions (in particular by what has been called Algorithm A), and potentially other search penalties, to the Foundem CSS when Algorithm A and those penalties were not applied to Google’s CSS.

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<sup>1</sup> In the judgment on binding recitals given in the UK Shopping Proceedings: [2025] CAT 39; [2025] WLJK 784.

## **B. SUMMARY OF THE APPLICATION AND ISSUES**

8. By order made on 26 March 2024, the chair allowed Foundem to amend its pleadings once the Court of Justice of the EU (the “CJEU”) handed down judgment on Google’s final appeal regarding the Decision, and for Google then to amend its Defence. That order was accordingly made without seeing a draft amended pleading, and it therefore included a proviso (in para. 6) that this was “without prejudice to the parties’ rights subsequently to contend that aspects of such amendments are illegitimate and should not be permitted to stand.” The CJEU issued its judgment dismissing the appeal on 10 September 2024.
9. On that basis, Foundem served a Re-Re-Re-Amended Particulars of Claim on 14 November 2024 (“PoC no. 5”). Paragraphs 94C – 94F of this pleading are headed: “The Period from 2006-2008 – Product OneBox”. By its Re-Re-Re Amended Defence served in response, Google contended that the claim there raised was time-barred. On 19 June 2025 Google applied to strike out those paragraphs.
10. On 9 July 2025, the Tribunal handed down its judgment on a preliminary issue in all the UK Shopping Proceedings as to the meaning of some of the recitals in the Decision and determination of which are binding: [2025] CAT 39 (“the Recitals Judgment”). By order made on 1 August 2025 (“the 1.8.25 Order”), the chair allowed all parties sequentially to make further amendments to their pleadings. Foundem then served on 20 August 2025 a Re-Re-Re-Re-Amended Particulars of Claim (“PoC no. 6). In addition to various amendments resulting from the Recitals Judgment, in this pleading the passages which had been at paras 94C-94F in PoC no. 5 were moved (with minor alteration) to stand at paras 68AA-AD and a new para 68AE was added. Foundem also inserted a new para 29E which introduced a factual assertion about Google’s introduction of the Product OneBox, with a consequential amendment to the summary of the claim in para 2(b).
11. Accordingly, when the Application came to be heard, it was directed primarily at the relevant paragraphs of PoC no. 5 and/or PoC no. 6. We refer to those paragraphs as the “OneBox allegations”.

12. Google sought to strike out the OneBox allegations (or for permission to make those amendments to be refused) on the basis that:
- (1) they constitute a “new claim” within the meaning of s. 35 of the Limitation Act 1980 (“LA 1980”), for which the limitation period has otherwise expired;
  - (2) the new claim does not arise out of the same or substantially the same facts in respect of which Foundem was already claiming in the proceedings. Accordingly, the Tribunal has no power to allow the amendment and it should be struck out;
  - (3) alternatively, if the new claim does arise out of substantially the same facts, the Tribunal should not in its discretion allow the amendment because of the significant prejudice it would cause to Google in requiring it to investigate conduct which concluded 17 years ago.
13. In response, Foundem submitted that:
- (1) the OneBox allegations do not raise a new claim: they were always in substance a part of Foundem’s complaint of abuse of dominance by Google between 2006 and December 2007, which included a claim of discrimination in the treatment of search results;
  - (2) alternatively, if they do constitute a new claim, they arise out of the same or substantially the same facts as those originally pleaded, and ought to be permitted to proceed;
  - (3) no additional prejudice is caused to Google since it is already giving disclosure and information concerning the OneBox.
14. Foundem had also contended, in the postscript to its updated response to the Application, that in any event, the OneBox allegations were contained in a pleading (PoC no. 6) for which permission to amend had already been granted unconditionally by the 1.8.25 Order. Accordingly, any claim contained in these paragraphs was deemed to have been made at the date on which the original action was commenced. However, in the hearing, Mr West KC very properly recognised that even if that contention were

well founded, the 1.8.25 Order (which included a liberty to apply) could be varied to provide that it did not have this unintended effect, and he accordingly abandoned this point.

15. We concluded that: (1) the OneBox allegations do constitute a new claim; and (2) they do not arise out of substantially the same facts as the previously pleaded allegations. It follows that those allegations cannot be pursued and no question of discretion arises.

### **C. LEGAL FRAMEWORK**

16. The parties were agreed on the relevant legal framework which applies.

17. Section 35 of LA 1980 relevantly states that:

“(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—

(a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and

(b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—

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

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

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following—

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; ...”

18. The first issue was accordingly whether the OneBox allegations gave rise to a “new claim”. The applicable principles for determining what constitutes a new claim are summarised in *Diamandis v Wills* [2015] EWHC 312 (Ch) (“*Diamandis*”) at [48], adopted and applied by the Court of Appeal in *Geo-Minerals GT v Downing* [2023] EWCA Civ 648 (“*Geo-Minerals*”) at [27] (in the judgment of Males LJ with which Nicola Davies and Phillips LJJ agreed):

“(1) The ‘cause of action’ is that combination of facts which gives rise to a legal right; (it is the ‘factual situation’ rather than a form of action used as a convenient description of a particular category of factual situation ...

(2) Where a claim is based on a breach of duty, whether arising in contract or tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended and amended pleading to determine (a) whether a different duty is pleaded (b) whether the breaches pleaded differ substantially and (c) where appropriate the nature and extent of the damage of which complaint is made ... (Where it is the same duty and same breach, new or different loss will not be new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action).

(3) The cause of action is every fact which is material to be proved to entitle the claimant to succeed. Only those facts which are material to be proved are to be taken into account; the pleading of unnecessary allegations or the addition of further instances does not amount to a distinct cause of action. At this stage, the selection of the material facts to define the cause of action must be made at the highest level of abstraction. ...

(4) In identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading ...

(5) The addition or substitution of a new loss is by no means necessarily the addition of a new cause of action ... Nor is the addition of a new remedy, particularly where the amendment does not add to the ‘factual situation’ already pleaded ...”

19. It was common ground, that if the OneBox allegations did constitute a new claim, that would be time barred under the LA 1980. The second issue was therefore whether the Tribunal can permit the amendments pursuant to rule 32(2)(a) of the Tribunal Rules 2015, which reflects section 35(4)-(5) LA 1980:

“(2) Where any relevant period of limitation has expired, the Tribunal may permit an amendment—

(a) to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings;”

20. The test for determining whether a new claim arises out of the same or substantially the same facts already in issue is again summarised in *Diamandis* at [49], as adopted by the Court of Appeal in *Geo-Minerals* at [28]:

“49. As regards Stage 3, (‘arising out of the same or substantially the same facts’) a number of points emerge, particularly from *Ballinger* at [34] to [38]:

(1) "Same or substantially the same" is not synonymous with "similar".

(2) Whilst in borderline cases, the answer to this question is or may be substantially a ‘matter of impression’, in others, it must be a question of analysis ...

(3) The purpose of the requirement at Stage 3 is to avoid placing the defendant in a position where he will be obliged, after the expiration of the limitation period, to investigate facts and obtain evidence of matters *completely outside the ambit of and unrelated to* the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.

(4) It is thus necessary to consider the extent to which the defendants would be required to embark upon an investigation of facts which they would not previously have been concerned to investigate ... At Stage 3 the court is concerned at a much less abstract level than at Stage 2; it is a matter of considering the whole range of facts which are likely to be adduced at trial ...

(5) Finally, in considering what the relevant facts are in the original pleading a material consideration are the factual matters raised in the defence ...”

21. If the new claim arises “out of the same or substantially the same facts”, under rule 32(2)(a), the third issue was whether the Tribunal should exercise its discretion to permit the amendment.

#### **D. THE ONEBOX ALLEGATIONS**

22. As stated above, PoC no. 5 introduced new paras 94C to 94F regarding Product OneBoxes. In PoC no. 6 those paragraphs were moved to become paras 68AA-68AD and a new para 68AE was added. It is appropriate to quote that section of PoC no. 6 (footnotes omitted), which sets out the core of the OneBox allegations:

“i. The period from 2006-2008 – Product OneBox

68AA. Although the Decision found that Google’s infringing Conduct commenced in the UK with the launch of the Product Universal in January 2008, the same, or materially similar, conduct applied in the UK (and Germany) from at least 2006 onwards. That is, while the application of Algorithm A to Foundem’s website between June 2006 and December 2007 did not take place in combination with Product Universals, it did take place in combination with Product OneBoxes.

68AB. Foundem will rely on the fact that the relevant Decision findings in relation to the more favourable positioning and display of Google’s CSS compared to competing CSSs as a result of the combination of discriminatory penalties and Product Universals apply *mutatis mutandis* to Google’s predecessor to Product Universals, the Product OneBox. In particular, Google’s Product OneBox meant that Google’s own CSS was positioned and displayed within Google’s SERPs via a separate mechanism, and was

therefore not subject to the same ranking mechanisms as competing CSSs, including penalty algorithms such as Algorithm A.

68AC. For example, in April 2015, Google confirmed in correspondence that “*As with Universal Search, Product OneBoxes were triggered and placed by different algorithms than those used to rank websites in Google's general results*” and that, as such, its own CSS was not subject to penalty algorithms, such as Algorithm A. In May 2010, Google confirmed to the Commission that it had been positioning results from its own CSS on its first general results page in a highly visible place “*for many years*” and that it “*is not correct that Google started this practice in May 2007*”.

68AD. Given that Google introduced the Algorithm A penalty in June 2004, Foundem avers that all of the factors that rendered Google’s application of Algorithm A to Foundem’s CSS unlawful from January 2008 (as found in the Decision) apply similarly or equally in the UK from at least 2006 onwards. As pleaded above, Algorithm A was applied to Foundem’s website beginning in June 2006.

68AE. For the avoidance of doubt, it is not Foundem’s case that the Product OneBox was, in and of itself, an abuse of Google’s dominant position. Further, if necessary so to contend, it is Foundem’s case that the application of Algorithm A to Foundem’s website between June 2006 and December 2007 was discriminatory and without objective justification, and would have been abusive even if not accompanied by the OneBox conduct (if for any reason the OneBox conduct cannot be invoked).”

## **E. THE PARTIES’ SUBMISSIONS**

23. Google submitted that prior to the service of PoC no. 5, Foundem had not pleaded any case in relation to the allegedly unlawful operation of Product OneBox. Indeed, there was no reference at all to Product OneBox in any of the successive iterations of Foundem’s particulars of claim prior to 14 November 2024:
- a) Foundem’s original claim was that Google had abused its dominance by (a) imposing algorithmic penalties on Foundem’s website without any objective justification, which substantially decreased Foundem’s rankings in Google’s search results, and (b) using Google’s “Universal Search” mechanism to give preferential treatment to Google’s services over those of its competitors, including

Foundem: PoC no 5, para 2. Foundem pleaded (and continues to plead) that the “Universal Search” mechanism had first been applied in the UK in January 2008: para 31.

- b) As regards the algorithmic penalties, in essence, Foundem’s complaint was that from 27 June 2006, Foundem’s CSS was subject to the application by Google of Algorithm A, a site-wide penalty affecting the rankings on Google’s SERP. Foundem pleaded that Algorithm A had the effect of demoting Foundem’s results, and that it did not apply to Google’s CSS. At paragraph 64A(c), Foundem pleaded:

“Comparison shopping services, including Foundem’s, were prone to being demoted by Algorithm A due to the characteristics of those services. By contrast, Google comparison shopping service has never been demoted by Algorithm A, “despite the fact that Google’s own CSS exhibits several of the characteristics that make competing CSSs prone to being demoted by the Algorithm A and Panda algorithms.”

- c) This was a claim of unjustified demotion of Foundem’s search results, and (as Google ultimately accepted during oral submissions) a claim of unjustified discrimination, in that the algorithm being used to effect the demotion was not applied to Google’s own CSS. Foundem made further allegations regarding the application of the “Panda” update, a change to the algorithm which was applied in the UK from 2011, and is alleged to have adversely affected Foundem and other CSSs competing with Google’s CSS.

- d) However, for the period 2006-2007, there was no claim by Foundem that Google had abused its dominance by *promoting* its own CSS. This claim was made only for the period from January 2008 by reference to the introduction of the Universal Search mechanism in the UK. At para 87, Foundem pleaded:

“From at least January 2008,<sup>2</sup> Google treated its own price comparison vertical search product more favourably than Foundem’s, by operation of its Universal

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<sup>2</sup> Originally pleaded as “From around December 2007”, but nothing turns on that distinction.

Search mechanism, which intentionally and systematically favours Google's own offerings.”

24. Google submitted that the amendments in paras 94C–F of PoC no. 5, repeated at paras 68AA-68AD of PoC no. 6, were an attempt by Foundem to introduce for the first time an equivalent claim to that at para 87, but in relation to the earlier period from 2006 – December 2007, by reference to Product OneBox. That was a new claim, first made many years after the expiry of the limitation period.
25. In response, Foundem submitted that its original pleading had always included a general allegation that Google had discriminated against Foundem and other competitors, and in favour of its own CSS. Foundem pointed to para 64A(b) of PoC no 5, which stated “*Algorithm A did not apply to Google's comparison shopping service*”. Foundem submitted that this paragraph inevitably raised the factual question of how Google's CSS was treated by Google's algorithms, and how it appeared in general search results. The answer was that, between 2006 and 2007, Google applied Product OneBox to give unjustified prominence to its own CSS. From January 2008, it applied the Universal Search mechanism, with similar results.
26. Foundem submitted that from the outset, its claim of abuse of dominance had therefore included a discrimination claim which, by implication, necessarily engaged the legality of Product OneBox. The amendments made in the contested paragraphs of PoC no. 5 did no more than spell out the claim which was already implicit, and did not constitute a new claim, still less a claim arising out of different facts to the original claim.

**F. ISSUE 1: IS THIS A NEW CLAIM?**

27. In our judgment, Google's submissions on Issue 1 are correct. The Product OneBox claim was a new claim, first introduced in PoC no. 5. It was not implicit in the general claim of discrimination made at paragraph 64A prior to PoC no.5. It amounted to a new cause of action, based on a different combination of facts said to give rise to a legal right, and on breaches which differed substantially from those on which Foundem originally relied.

28. In its original claim, Foundem made a claim of unjustified demotion of its own results for the whole period from June 2006, via the application of (initially) Algorithm A (and potentially other penalties). It also made a claim that this demotion constituted unjustified discrimination, since Algorithm A was not applied to Google's CSS. However, Foundem only made the claim of discrimination by the unjustified *promotion* of Google's CSS in the period from January 2008 onwards, by reference to the Universal Search mechanism.
29. Foundem's two discrimination claims ((1) discrimination by unjustified demotion of its results, but not Google's; and (2) discrimination by unjustified promotion of Google's results, but not Foundem's) can of course be combined, as they were in the Decision. But they can be advanced as separate and distinct claims, as we found in the Recitals Judgment at [70] (accepting the argument there advanced on behalf of Foundem and the other CSS claimants). Establishment of the two forms of discrimination involves different factual findings. The assessment of damages for each might be different.
30. In order to establish the claim that the application of Algorithm A was discriminatory, Foundem would have to show that Algorithm A applied to Foundem's CSS but not to Google's; that its application caused Foundem's service to appear lower in the search results than would otherwise have been the case; and that Foundem received fewer visitors to its website than it would have done in the absence of Algorithm A (as it applied at the time).
31. This is a different fact-finding exercise from that which would apply to establish the unjustified promotion claim. The establishment of that claim would require Foundem to show that Google's CSS received more favourable display than Foundem's CSS by placing it in a prominent position and highlighted form on the SERP; and that traffic was diverted to Google's CSS from Foundem as a result of this more favourable display.
32. The analysis above shows that these two complaints are not merely two sides of the same coin, as Foundem sought to contend. Google might have been able to disadvantage competitors only by applying to them (but not to its own CSS) an algorithm such as Algorithm A to demote their services in search results, whether or

not at the same time it boosted Google's own CSS with a distinct and prominent form of display.

33. The fact that these are two distinct complaints of abuse of dominance was acknowledged in Foundem's own pleaded case. Thus, for example, at para 2 of PoC no. 5, Foundem summarised its case as being that Google:

“(a) imposed algorithmic penalties on Foundem's website without any objective justification for doing so, which substantially decreased Foundem's rankings in Google's search results irrespective of their relevance to users' queries”,

and

“(b) used Google's “Universal Search” mechanism to give preferential placement to Google's services over those of its competitors, including Foundem's.”

The claim based on the imposition on Foundem of algorithmic penalties was general in nature, and applicable to periods both before and after January 2008; but the claim of preferential placement was made only by reference to the Universal Search mechanism which first applied in the UK in January 2008.

34. Moreover, the way in which Foundem pleaded these two distinct forms of discrimination explicitly relied on the analysis in the Decision. At recital (379) of the Decision, the Commission stated:

“There are two main differences in the way that Google's own comparison shopping service and competition comparison shopping services are positioned in Google's general search results pages, despite Google's comparison shopping service having similar characteristics to competing shopping services.”

35. The Commission identified these two differences as: (i) the fact that Google's CSS was not subject to the ranking mechanisms used in algorithms such as Algorithm A; and (ii) Google positioning its own CSS in a highly visible and prominent position on the first results page. At Recital (380), the Commission found that Google's CSS was not subject to the same ranking mechanisms as competing CSSs, including adjustment

algorithms such as Algorithm A and Panda. At Recital (385) the Commission found that “*since the launch of Product Universal*” Google had positioned results from its own CSS prominently on the first results page.

36. As noted above, para 64A of PoC no. 5 pleaded Foundem’s case of abuse of dominance for the period from 27 June 2006. This was confined to unjustified and discriminatory demotion of its search results, by reference to the application of Algorithm A. At footnote 47 to para 64A(c),<sup>3</sup> Foundem cross-referred to recital (380) of the Decision. In other words, Foundem was relying for this period of time only on the first difference of treatment by Google of competitor CSSs: algorithmic demotion.
37. By the disputed paragraphs 94C–F of PoC no. 5, Foundem for the first time sought to apply the Commission’s findings about the application of Product Universal from January 2008 *mutatis mutandis* to the Product OneBox, launched in the UK and Germany in 2005. This complaint, that the Product OneBox “*prominently positioned and displayed Google’s own CSS in a highly visible place*” was in all the circumstances a new claim.
38. We consider that this analysis is reinforced by Foundem’s new para 68AE in PoC no. 6, as Mr Pickford KC pointed out. That expressly states that Foundem’s discrimination case based on Algorithm A stands independently of the OneBox allegations: see at para 22 above. Accordingly, the OneBox allegations are additional: they were not encompassed by implication in the claim of algorithmic discrimination which Foundem has pursued since the outset of these proceedings.

**G. ISSUE 2: DOES THE NEW CLAIM ARISE OUT OF THE SAME OR SUBSTANTIALLY THE SAME FACTS AS THE CLAIM ORIGINALLY PLEADED?**

39. Mr West acknowledged that this was very much Foundem’s alternative case, and we can address this issue relatively briefly.

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<sup>3</sup> Quoted at para 23.b) above.

40. Mr West argued that here the amendment arose out of “substantially the same facts”, recognising that not all the facts were the same. As regards the extent of the necessary overlap, he referred to the observations of Cross LJ, regarding the equivalent provisions of the former RSC, in *Brickfield Properties v Newton* [1971] 1 WLR 862, cited recently by the Tribunal in *Consumers’ Association v Qualcomm, Inc* [2023] CAT 51; [2023] WLUK 509 at [8]:

“... It is no objection to amendment under Ord. 20, r. 5(5), that some of the facts out of which the new cause of action arises are peculiar to it and that some of the facts out of which the old cause of action arises are peculiar to it. It is enough if the overlap is so great that the new cause of action can fairly be said to arise out of substantially the same facts as the old cause of action. ...”

41. Mr West pointed out that the fact that the amendment related to a different time period did not in itself mean that it did not arise out of substantially the same facts, referring to the decision of the Court of Appeal in *The Convergence Group PLC v Chantrey Vellacott* [2005] EWCA Civ 290. That concerned an application to amend the allegations of professional negligence raised by way of defence against a firm of accountants. The essential negligence allegations concerned a failure to give correct and suitable advice regarding a proposed reorganisation of the claimant group in a tax efficient and effective way, and delays in giving advice. Prior to the proposed amendment, this negligence was alleged to have started in November 1997. The proposed amendment sought to include also the previous year, so that the alleged negligence applied from the start of the accountants’ retainer in November 1996. The Court of Appeal stated, at [111]:

“It seems to us that with or without the new allegations the nature of the advice throughout 1997 will be under scrutiny at the trial because it forms the beginning of the process of advice already complained of. It is no doubt for that reason that the advice itself is already pleaded. It is to our minds likely to be artificial to scrutinise the quality of the later advice without any scrutiny of the quality of the earlier advice, which almost certainly formed the basis of the later advice. We have therefore reached the clear conclusion that the allegations of negligence in the first year, that is from November 1996 to the end of November 1997 arise out of the substantially the same facts as those already pleaded.”

42. However, we note that in that case, as noted in this passage, the pre-November 1997 advice had already been pleaded. The new allegations sought to criticise the quality of that advice, of which the subsequent advice (already alleged to be negligent) was said to be a development. That was the specific context in which the Court held that the

allegations in respect of the earlier advice arose out of substantially the same facts and that quality of the earlier advice would have to be considered in any event.

43. The Court of Appeal has several times emphasised that “substantially the same” is not equivalent to “similar”: see *MasterCard v Deutsche Bahn* [2017] EWCA Civ 272 at [40], quoting *Bollinger v Mercer Ltd* [2014] EWCA Civ 996 at [37] (“*Bollinger*”); *Mulalley v Martlett Homes* [2022] EWCA Civ 32 at [49].
44. Mr West submitted that the Product OneBox was essentially equivalent to the Product Universal which Google introduced in January 2008 and which is covered by Foundem’s earlier pleading. He referred to the statement in Google’s Re-Amended Defence at para 21:

“Although Google introduced the term “Universal Search in May 2007 to refer to these grouped results (and introduced “Product Universals” in the UK and Germany from January 2008), Google had already been displaying grouped results from among its search results in different formats for many years prior to that time.”

45. However, as noted above, there is no reference at all to the Product OneBox in Foundem’s claim prior to the proposed amendments. Google’s Defence, following the passage relied on by Mr West, proceeds to state that, by comparison with the previous format of display, “Product Universal results were presented with richer graphical features”. Although there is no reference to the Product OneBox in the Decision, it is discussed and, indeed, illustrated in the judgment of the General Court on Google’s appeal: Case T-612/17 *Google v Commission* EU:T:2021:763, at paras 8-9. The judgment records, at para 10:

“Google states that, as from 2007, it changed the way it developed product results.”

Even a cursory comparison of the illustrations of the Product OneBox and the Product Universal reproduced in the judgment shows that these were far from being substantially the same, even if they may have had a broadly similar objective. Any effect on competition of the Product OneBox and of the Product Universal may therefore be significantly different.

46. Accordingly, we have no doubt that the effect of introducing the Product OneBox allegations, if allowed, would be to expand the claim to take account of a less sophisticated style and mechanism for promotion of the Google CSS. And in the context of the issues in the present case, the fact that this concerned an earlier period is, in our view, a significant point of distinction. The Product OneBox was introduced in 2003-2005, and the new allegations would therefore focus on Google's internal decision-making, regarding a less-sophisticated form of promotion, in an earlier period.

47. In *Bollinger*, the Court of Appeal cited with approval the observation of Hobhouse LJ in *Lloyd's Bank plc v. Rogers* [1997] TLR 154 regarding section 35 LA 1980:

“The policy of the section was that, if factual issues were in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.”

48. Although the Pre-Decision Period already features in the litigation, the issues arising for that period concern the operation of Algorithm A and the alleged resulting demotion of the link to Foundem's CSS. The OneBox allegations would significantly widen the focus to embrace not only the strategy but also the effect in the Pre-Decision Period of a particular form of promotional mechanism used by Google at that time. Those allegations, in our judgment, do not arise out of substantially the same facts as the existing issues.

## **H. ISSUE 3: DISCRETION**

49. Given the conclusions on Issues 1 and 2, the question of discretion does not arise.

## **I. DISPOSAL**

50. As stated at the conclusion of the hearing, the Application is granted. The relevant paragraphs of PoC no. 6 that are affected are:

2(b) [in its amended form], 29E, 68AA-68AE and 102B(a).

As regards para 102B(a), since it is generally worded, it covers also the period after January 2008. However, we consider that the period after January 2008 when Product

Universals applied is covered by para 102B(d), and para 102B(a) is not required to set out Foundem's position as regards demotion of its CSS in the Pre-Decision period.

51. This judgment is unanimous.

Sir Peter Roth  
Chair

Paula Riedel

Dinah Rose KC

Charles Dhanowa CBE, KC (Hon)  
Registrar

Date: 23 December 2025