

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be
2 placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to
3 be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive
4 record.

5
6 **IN THE COMPETITION**
7 **APPEAL TRIBUNAL**

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

11
12
13 12th January 2026

14
15 Before:

16
17 Sir Peter Roth

18
19
20 (Sitting as a Tribunal in England and Wales)

21
22
23 BETWEEN:

24
25
26 **INFEDERATION LIMITED (“Foundem”)**

27 Claimant

28
29 - and -

30
31 **GOOGLE LLC & OTHERS (“Google”)**

32 Defendants

33
34
35 **A P P E A R A N C E S**

36
37 Colin West KC (instructed by Hausfeld & Co. LLP) on behalf of Foundem
38 Meredith Pickford KC & Julianne Morrison (Instructed by Herbert Smith Freehills
39 Kramer LLP and Bristows LLP) on behalf of Google

40 Digital Transcription by Epiq Europe Ltd
41 Lower Ground, 46 Chancery Lane, London, WC2A 1JE
42 Tel No: 020 7404 1400
43 Email:
44 ukclient@epiqglobal.co.uk

Monday, 12 January 2026

2 (11.00 am)

3 THE CHAIR: Good morning. These proceedings, like all proceedings in this Tribunal,
4 are live streamed. If at any time it becomes necessary to refer to any confidential
5 material, the live stream will be turned off but I hope that won't be necessary. An
6 official transcript of the proceedings is being made and it is strictly prohibited for
7 anyone to make any unauthorised recording or take any visual image of the
8 proceedings, and doing so is punishable as contempt of court.

9 I just mentioned the fact that there is confidential material in the bundles before the
10 court, so I think probably I should make an order under Rule 102, paragraph 5 of the
11 Tribunal Rules, that no one may refer or access that confidential material, even though
12 it is being read by the court, without express permission of the Tribunal. When I say,
13 "court", I mean Tribunal, of course.

14 Yes, Mr Pickford.

15

16 Submissions by MR PICKFORD

17 MR PICKFORD: Thank you, Sir. I appear with Ms Morrison on behalf of Google and
18 Mr West KC appears on behalf of Foundem. As the Tribunal will be aware, this is
19 Google's application by which it asks the Tribunal to require Foundem to serve new
20 statements to replace those served on 23 October 2025, removing what we say are
21 the impermissible parts thereof. There's a draft order in the bundle, in Bundle 1.
22 There's no need to turn that up yet.

23 Sir, I mention bundles, there are -- I have copious bundles. I think there are actually
24 about 15 in volume, but I hope, Sir, the Tribunal has volumes 1 through to 10. It's the
25 sub-volumes of the --

26 THE CHAIR: Yes, that's all I've got. I think the others were online, but --

1 MR PICKFORD: Yes.

2 THE CHAIR: Or not online, I mean --

3 MR PICKFORD: When I say, 15, it is because some of the numbers are actually

4 divided into 9.1, 9.2 --

5 THE CHAIR: Oh, I see. 9A, B, C.

6 MR PICKFORD: Exactly. So the Tribunal will be well aware that any fact witness

7 statement ...

8 (11.04 am)

9 (Transcript delayed due to a technical issue)

10 (11.05 am)

11 MR PICKFORD: ...often overlapping problems with the Raff statements. First, they

12 contain extensive commentary on Foundem's case and/or the documents, and that

13 includes both on Google disclosure documents and other documents. Neither is

14 permissible.

15 Second, they engage in advocacy and submission through seeking to speculate on

16 Google's, or indeed sometimes the Commission's, motives, thoughts or actions, and

17 they present or confirm alleged beliefs or understandings the witnesses claim to have

18 had contemporaneously, when those beliefs are in fact not relevant to any issues,

19 obviously so, for trial, and therefore such confirmation of their beliefs is merely a cloak

20 for providing impermissible evidence.

21 And then the third aspect is that they contain substantial sections of opinion evidence,

22 but they have no permission to adduce that evidence as expert evidence and it also

23 falls outside the very limited exception articulated in particular in the case of Brendon,

24 which allows fact witnesses to gloss their fact evidence with limited opinion evidence

25 informed by their expertise when they are properly able to do so.

26 Just to elaborate a little bit before going into more detailed submissions on this later.

1 The essential problem with the so-called expert evidence is twofold. First, some of it
2 goes to matters which the Tribunal never directed should be the subject of expert
3 evidence -- and I'll show you the Tribunal's Order, which sets out the permissible scope
4 of the expert evidence in this case and it's basically an economic --

5 THE CHAIR: (Inaudible).

6 MR PICKFORD: Sorry?

7 THE CHAIR: This isn't expert evidence.

8 MR PICKFORD: Well, it isn't expert evidence, but -- the submissions that have been
9 made by my learned friend to treat it as expert evidence. I mean, it might be -- I'm
10 very happy.

11 THE CHAIR: That's not the way, I have to say, I read the submission.

12 MR PICKFORD: Right. In which case it may be that we can short circuit some of
13 those points. Our position is -- I actually thought it was common ground between
14 myself and my learned friend that insofar as the Raffs, and in particular Mr Raff, were
15 providing opinion evidence, it was purportedly expert opinion evidence. Not CPR 35
16 expert reports, because we both agreed there is no -- or indeed sorry Rule 55 of the
17 Tribunal's Rules -- not a formal expert report of that sense and the fact that it isn't is
18 important to my submissions, but that it was somehow, nonetheless, expert evidence
19 that they were allowed to slip into their factual evidence.

20 THE CHAIR: I think it's his opinions and analysis based on his expertise. If that's
21 what you call expert evidence, then it is. But expert evidence normally means
22 evidence from an independent expert --

23 MR PICKFORD: Yes, well --

24 THE CHAIR: -- which is restricted and needs permission but this clearly isn't opinion
25 from an independent expert.

26 MR PICKFORD: That's right.

1 THE CHAIR: So in that sense, it's not expert evidence.
2 MR PICKFORD: Yes, but I mean, it may be that not a lot turns on this point of
3 nomenclature but I think I'm going to have to tread quite carefully through this because
4 I think possibly something does and I'll have to consider that as I go through my
5 submissions because certainly the Brendon exception that I was just talking about,
6 that is very much going to the categories, Sir, that you say is all that Mr Raff, in
7 particular, and to some degree Ms Raff, are seeking to advance. It's allegedly, as
8 I understand it, a gloss -- a gloss from their expertise on their factual evidence. And
9 we say --

10 THE CHAIR: It's not just on their factual evidence. It's their opinion based on their
11 expertise through a lifetime of work in this field. Either that's admissible or it's not.

12 MR PICKFORD: Yes, well, I mean, I'll obviously come on to make my submissions to
13 this, but to preview where I'm going, in an example, for example, where the content of
14 that evidence is advancing a numerical analysis of how Google's algorithms work, the
15 Tribunal earlier in these proceedings contemplated a number of different areas of
16 expert evidence, and it contemplated economic expert evidence that we now have and
17 it also contemplated various other types of evidence that were of a more technical
18 nature going to search and vertical search and how those matters work and ultimately
19 Foundem chose not to have expert evidence on those areas.

20 Hausfeld wrote a letter, which I'll show you in due course, which says, we're not
21 interested in categories two and three, we're just going to have economic expert
22 evidence. And so if, as I will seek to show you, in practice, the topic that is being
23 covered by Mr Raff, say, is something that would have been covered in such expert
24 evidence, had there been expert evidence, we say it's not permissible to do that via
25 the back door, via factual expert report, via a factual report.

26 THE CHAIR: Why is it the back door? I don't understand. It's not covered by expert

1 evidence. The Claimant could have chosen to instruct an independent expert and they
2 haven't. That's their choice. It might have had greater weight. You may say what he
3 says is clearly not independent, self-evidently, if they've done it through an
4 independent expert who might have said something different, but the fact they chose
5 not to have an independent expert, why does that make it inadmissible?

6 MR PICKFORD: It makes it contrary -- no, well, it doesn't, say -- what it does, of
7 itself --

8 THE CHAIR: The fact that they haven't, that doesn't make it inadmissible.

9 MR PICKFORD: That of itself does not make it inadmissible but it does cause this
10 problem. If the parties have prepared for trial on the basis they're not going to have
11 expert evidence going to a particular topic, and we haven't instructed an expert on
12 a particular topic, then it is, in my submission, unfair for one party to effectively
13 circumvent what the understanding was that that wasn't going to be the subject of
14 evidence by then popping up with evidence on that topic, but in a factual report instead
15 of in an expert report.

16 THE CHAIR: Well, are you serving an independent expert on this?

17 MR PICKFORD: Sorry?

18 THE CHAIR: Is Google serving?

19 MR PICKFORD: No, we're not because we never understood that these topics were
20 going to be the subject of expert evidence.

21 THE CHAIR: Well, they're not. You're right.

22 MR PICKFORD: Well.

23 THE CHAIR: And you can give and Google's employees can give evidence on these
24 matters based on their own expertise, which is no doubt considerable.

25 MR PICKFORD: But, Sir, in my -- it may be easier to understand this when we go to
26 some of the more concrete examples. But, in my submission, it isn't fair for Google to

1 be expected -- the proper steps that should have been gone through, if we were going
2 to have expertise -- sorry, if we were going to have opinion evidence, non-traditional
3 fact evidence, on a particular topic such as how Google's algorithms operate and their
4 effects, then in fairness, what should have happened is when the Tribunal was
5 considering the topics on which it might want expert evidence, Foundem should have
6 said, "Well, we're not going to put forward an independent expert, but we do advance
7 opinion evidence on these particular areas within certain expertise that we have". And
8 if they'd done that, then we could have decided how we were going to approach those
9 topics.

10 But as it is, that didn't happen and so the first time that we had any idea that they were
11 going to seek to advance some of this type of evidence is in their factual evidence,
12 when there was a very tight timetable for turning it around for reply evidence and it
13 wasn't appropriate or possible for Google to start trying to create counter-analyses to
14 the types of numerical analyses that are conducted by Mr Raff at that point in time.
15 That's the sort of thing that, had it been the subject of proper directions, the parties
16 would have engaged with, with each other first, to understand what sort of data they
17 would be using, how they would be using it, what their methodologies were and
18 then -- because that's why we have those sorts of rules for governing expert reports.
19 But those rules are not there merely because they are important for the formality of
20 expert reports. They're also important whenever a party produces something which
21 is, in effect, purporting to be expert evidence, whether or not it is Rule 55 expert
22 evidence.

23 THE CHAIR: So you're saying that Google has difficulty putting in evidence on how
24 Google's algorithms operate and their effect?

25 MR PICKFORD: No, I'm saying responding to the type of evidence, the type of after
26 the event, numerical reconstructions of that issue. What Google has done is put in

1 fully PD-compliant fact evidence on how Google's algorithms operate. What it hasn't
2 done is sought to create some elaborate mathematical modelling to say, "Here is
3 a hypothetical situation from which I'm going to draw various conclusions". That is the
4 sort of thing that ordinarily an expert does; the sort of thing that one would expect to
5 see in an independent expert report. Now, at the moment, I'm not taking any position
6 on the independence or otherwise of Mr Raff, but it was a surprise to us that we were
7 faced with that kind of evidence amongst others. I mean, this is obviously just one
8 aspect of this PD application.

9 THE CHAIR: If you say that you -- I think you did say your time to respond was very
10 short --

11 MR PICKFORD: Yes.

12 THE CHAIR: -- and hadn't expected this and if you were given some time to put in
13 a further response to those aspects of Mr Raff's -- I think it's mostly Mr Raff rather
14 than --

15 MR PICKFORD: Mr Raff, yes.

16 THE CHAIR: Mr Raff's evidence, then any unfairness would be removed, wouldn't it?
17 Because Google has the expertise, clearly, to deal with this.

18 MR PICKFORD: I'm not sure that any unfairness would be removed, Sir. Obviously
19 one of the core problems of unfairness would be removed. Had we gone back in time
20 and Foundem done what I say Foundem should have done, which is rather than
21 saying, "Oh no, we don't need any expert evidence other than on economics", had it
22 said, "Actually, we think it would be helpful for the Tribunal to have expert evidence on
23 this particular issue and we're going to have some mathematical modelling of the effect
24 of Google's algorithms", at that point, I would have the opportunity to make the
25 submission to the Tribunal, "We don't need to go down this road", for example. "This
26 isn't going to be sufficiently helpful to the Tribunal, and the Tribunal should control it

1 by not permitting this kind of expert evidence. It doesn't matter whether it's from
2 an independent expert or a non-independent expert, it's still evidence of the type that
3 we don't need." But obviously it's now a fait accompli that it's there if it's treated as
4 such by the Tribunal.

5 THE CHAIR: If you say we don't need it because it's irrelevant, then why does it
6 matter? Then you don't need to reply to it. Sometimes experts, even independent
7 experts, do stuff which the other side thinks goes nowhere and they don't bother to
8 therefore engage with it.

9 MR PICKFORD: Well, we can obviously -- if what happens in relation to those aspects
10 of the non-PD compliance -- and I must emphasise we've obviously gone into one
11 particular avenue in relation to that; there are plenty of other points that I would be
12 making, but we're currently just dealing with the expert issue. If the answer is, "Well,
13 Google is given more time to consider those", well, then obviously we can
14 consider -- and I'm not in a position now, because I'm not the witness -- to say which
15 bits we would want to respond to and which bits we wouldn't.

16 But what I do know is that when we saw that information and we saw the analysis, we
17 took the view that it had not been foreshadowed as expert evidence and it was, in
18 effect, the expert evidence being tendered, even if not from an independent expert. It
19 simply wasn't going to be sensible or feasible for us to try and grapple with it in that
20 way in the time allowed for PD-compliant reply fact evidence, which is what we sought
21 to put in.

22 I've obviously anticipated quite a few of the arguments we're going to be coming on
23 to, but in terms of the scale of non-compliance with other aspects of the PD, in
24 particular just advancing argument by reference to documents, we say that this is
25 a case -- even if, Sir, you're not with me on the -- what I'm going to call the "quasi-
26 expert evidence" to try to differentiate it from Rule 55 expert evidence. Even, Sir, if

1 you're not with me on the quasi-expert evidence issue in terms of striking it out, but
2 you are willing to allow us some more time to consider it, there are very, very large
3 parts of these statements that are, in essence, simply making submissions that are
4 advocacy. The technique that is adopted is to say things like, "I've always thought this
5 and I said this at the time, that ...", and then we have a quote from something that's
6 a previous Foundem submission.

7 All it is, is advocacy. It's not an area where there is any question of fact about whether
8 Foundem did or didn't say those things; that's not in dispute. So it's just a technique
9 to introduce huge amounts of non-PD-compliant advocacy into the statements. In the
10 light of that, we say we've had no alternative but to bring this application. We obviously
11 would not seek to just strike out little bits of statements if we thought there was a little
12 bit here that was non-compliant, because we actually think there are problems with all
13 of the Claimants' statements. But the scale of the problem, in our submission, in
14 relation to Foundem, is wholly different. That's why we've brought the application here,
15 whereas we simply reserved our rights in relation to the other Claimants.

16 THE CHAIR: If it helps you, Mr Pickford, I've more sympathy on that ground,
17 particularly regarding, I think, more of a problem with Ms Raff's statement in terms of,
18 sort of, advocacy. But that's a separate point from --

19 MR PICKFORD: There are, in fact, particularly towards the end, similar problems in
20 Mr Raff's evidence. The principal attack in relation to Ms Raff's statement, is just that;
21 the one that I made.

22 In relation to Mr Raff's it's two parts. There's the expert issue, and I'll obviously have
23 to tailor my submissions accordingly in the light of the very helpful indication that the
24 Tribunal has given. But then there is also the same advocacy, simply regurgitating
25 bits of documents problem as well for him.

26 Sir, if I then consider the framework in terms of the applicable legal principles, we set

1 out the background to the introduction of both the Tribunal's Practice Direction and
2 also the equivalent one, PD 57AC, in the CPR. I don't need to worry the Tribunal with
3 those, so you'll --

4 THE CHAIR: (Overspeaking), of course. They are different.

5 MR PICKFORD: Well, in my submission, they are aimed at the same essential
6 mischief.

7 THE CHAIR: Well, in broad terms, yes, of course, but the detailed requirements and
8 the conditions are different (audio distortion).

9 MR PICKFORD: That is understood. I'll come on to that issue in a moment.

10 In my submission, they in fact codify, broadly, what was already practised, or is already
11 at least the law. But in practical terms, they in fact tighten the approach of the Tribunal
12 and the courts because they draw particular attention to making sure that there is
13 rigorous compliance with what were previously broadly understood rules about not
14 going into submissions and advocacy, et cetera, but has perhaps not adhered to the
15 letter prior to the Practice Direction in the way that they should have been.

16 So if I could go, please, to the authority of Mansion Place, which shows the purpose
17 of the equivalent CPR PD, which I say is equivalent in purpose to that in this Tribunal.

18 That's to be found in the Authorities Bundle, 9B.2, at tab 12, page 251. So the
19 background isn't particularly important. There were cross-applications by the parties
20 in respect of the witness statements that have been served. If we go, please, to
21 paragraph 37, which is a couple of pages on at 259. Could I ask --

22 THE CHAIR: 37?

23 MR PICKFORD: I'm going to ask, Sir, you to read paragraph 37 and 38, beginning on
24 page 258. (Pause)

25 THE CHAIR: Yes.

26 MR PICKFORD: Thank you. Then, if we could go in the same bundle to tab 14, which

1 is on page 296. This is the case of Greencastle, and I'm going to page 302.

2 THE CHAIR: Sorry, which tab is that?

3 MR PICKFORD: So it's tab 14, and it's page 302. Can I say, are you using the

4 hard-copy bundles or electronic authorities?

5 THE CHAIR: I'm using the hard copy now, yes.

6 MR PICKFORD: Thank you. In which case, I will give you -- if it's helpful,

7 generally -- the tab references rather than just the (inaudible).

8 Then one sees there at paragraph 22 -- if I could ask you, Sir, please, to read

9 paragraph 22 on page 302 again as to the purpose of Practice Direction 57AC.

10 (Pause)

11 THE CHAIR: Just paragraph 22?

12 MR PICKFORD: Just paragraph 22. (Pause)

13 THE CHAIR: Yes.

14 MR PICKFORD: In my submission, those general statements, though they do refer to

15 PD 57AC, equally apply to the thrust and the purpose of the Tribunal's

16 Practice Direction, because they reflect common law which the Tribunal seeks to

17 follow, in any event. If we in fact go now to the Tribunal's PD, which is to be found in

18 Bundle 9A at tab 7.

19 THE CHAIR: Yes. (Pause)

20 MR PICKFORD: 3.1 sets out the core obligation that:

21 "A trial/appeal witness statement must contain only --

22 "(1) evidence as to matters of fact that need to be proved at trial or the hearing of the

23 appeal by the evidence of witnesses in relation to one or more of the issues of fact to

24 be decided at trial or on the appeal, and

25 "(2) the evidence as to such matters that the witness would be asked by the relevant

26 party to give, and the witness would be allowed to give, in evidence in chief if they

1 were called to give oral evidence.

2 "3.2. A trial/appeal witness statement must set out only matters of fact of which the
3 witness has personal knowledge that are relevant to the case ..."

4 Then, we have confirmations of compliance at 4.1. One of those contains a helpful
5 elucidation of what is not allowed, which is the second:

6 "I understand that it is not my function to argue the case, either generally or on
7 particular points, or to take the Tribunal through the documents in the case."

8 That is something that should not be done.

9 Then, at 4.2 -- and this is important here. In my submission, it's actually important to
10 the opinion evidence that is given based on expertise, which is:

11 "Any application for permission to vary or depart from the requirement to include the
12 statement set out in paragraph 4.1 above may be made, and generally should be
13 made, without notice, for determination without a hearing."

14 So I say, what should in fact happen is there should be rigorous compliance with the
15 PD, unless a party makes an application for some part of it to depart. That means that
16 the PD, the compliant evidence, has to be evidence purely of fact. It's not supposed
17 to be opinion evidence based on expertise. That's not something that is contemplated
18 by the Practice Direction. And that insofar as that is what a witness wants to advance,
19 the proper way of doing that is to say, "Well, here's my witness statement, and
20 section X is all standard PD-compliant, and section Y is a part where I've engaged in
21 this numerical analysis of these various things. I say that I should be permitted to do
22 that, it's useful for the Tribunal. I understand that it isn't, strictly speaking, points of
23 fact, but nonetheless, because of my expertise and because I think it's helpful for the
24 Tribunal to have my opinion, here it is".

25 That's, in my submission, what should be done procedurally.

26 THE CHAIR: And that's done without notice?

1 MR PICKFORD: Yes.

2 THE CHAIR: So, I think -- is this right: you accept Foundem could have asked for that
3 and if the Tribunal -- and that's done without notice, so it's done on what used to be
4 called an ex parte basis. And if the Tribunal would have said, "Yes, that's fine in this
5 case, because we're satisfied that Mr Raff has got expertise", that could have been
6 allowed.

7 MR PICKFORD: Yes, subject to the following. As, Sir, you'll know, ex parte
8 applications have to be done on the basis of full and frank disclosure of arguments
9 that might be made against you. Also, what the practice of the courts and the Tribunal
10 is, is that if an ex parte application is made and the application is granted, there is
11 ordinarily liberty for that to be challenged if the would-be respondent then discovers
12 about it afterwards and says, "Aha, there's a problem here. You should set this aside
13 because, in fact, you didn't consider argument X, and had you considered argument X,
14 you wouldn't have made that order".

15 So I don't accept that it would have been an automatic and guaranteed route through
16 to having this evidence without any challenge or involvement from Google.

17 THE CHAIR: What would the challenge be?

18 MR PICKFORD: Well, the challenge might be -- what I understand -- I think where
19 we're coming to is -- is insofar as there is evidence being adduced by Foundem from
20 Mr Raff that lends his expertise on, we're in the territory of Brendon. I'll come on to
21 that authority in due course. But what Brendon says is a fact witness can provide
22 a gloss on their fact evidence, but it's subject to at least two conditions: one is that it
23 is reasonably and properly connected with the fact evidence; and secondly, that it is,
24 in fact, still sufficiently independent. So it is permissible, in a Brendon context, for
25 a respondent to say, "That evidence that you seek to advance just isn't independent,
26 and it's therefore not something ..."

1 THE CHAIR: Well, it's never independent when it's from a party --

2 MR PICKFORD: Well --

3 THE CHAIR: -- witness. Obviously, it's not independent. Then, in Brendon, I think it
4 was an employee.

5 MR PICKFORD: Well, there is a scale, Sir, and it is ultimately for the Tribunal to work
6 out where it draws the line. You are right that it is never purely -- it is never
7 independent in the Rule 55 and Part 35 sense, but it is still possible that the person
8 tendering that evidence is so far from being objective and impartial that the court or
9 Tribunal doesn't allow that evidence in as useful. That is something that we would be
10 permitted --

11 THE CHAIR: So you'll have to take me to that. It seems to me there's a confusion, if
12 I may say so, Mr Pickford, in your submission; two quite different things: one is what
13 is admissible as a matter of law; and the other is what this Tribunal has set out as
14 a practice to be followed, and therefore to be enforced, through a Practice Direction.
15 The Practice Direction, which as you've pointed out, does allow an application for
16 permission to depart from it. Those are two quite different things and a Practice
17 Direction can be changed. You know, it didn't exist before it was made in 2021, but it
18 can't change admissibility. That's a matter of law.

19 MR PICKFORD: Indeed, Sir, but I may --

20 THE CHAIR: So there are two quite different things: one is, is this evidence admissible
21 as a matter of law; and secondly, does it comply with the Practice Direction? If it isn't --

22 MR PICKFORD: Yes, and I beg your pardon because I obviously haven't been clear.
23 My position is that admissibility is not ultimately the question. It may be that the
24 evidence is admissible in the sense that it could be permitted under section 3 of the
25 1972 Act, but it still may not comply with the Practice Direction, and that can still be
26 a problem. The mere fact that you would otherwise be able to, but for the Practice

1 Direction, provide such evidence at trial does not mean that the Practice Direction is
2 then a dead letter just because we are within the scope of section 3. That's my
3 submission.

4 THE CHAIR: No, I understand that. That's why I asked you on what basis, if that
5 application, the paragraph 4.2 application, were made, Google would seek to set aside
6 an Order or a Direction that Mr Raff can give opinion evidence.

7 MR PICKFORD: Because in my submission it has to meet both tests. So in this
8 sense, this is fact evidence and there is a statement at the end of each of the witness
9 statements which purports to have full compliance with the relevant Practice Direction.
10 In my submission, the relevant Practice Direction requires the witnesses to confine
11 themselves to questions of fact, not of opinion evidence.

12 Ordinarily, opinion evidence is the subject of something totally different -- a fully
13 compliant, independent report. There may be exceptions where opinion evidence is
14 permitted; in that case, the evidence has to be admissible first as proper opinion
15 evidence. That is, it has to satisfy the Brendon test.

16 If it satisfies admissibility, then it may be that, effectively, what one then says is, "Okay,
17 we don't have to satisfy the Practice Direction in respect of this quasi-expert evidence;
18 we can have a Practice Direction paragraph 4.2 carve-out for this opinion evidence
19 based on expertise".

20 What happens then is: step one, it needs to be admissible properly in common
21 law -- I say that in order to even have an exemption from the Practice Direction under
22 4.2, the first thing you need to do is comply with admissibility. Secondly, then you
23 would need to consider, "Well, is it now appropriate to have a carve-out for it?"

24 That's, in my submission, how the structure of the system works. So admissibility is
25 in play, practice compliance with Practice Direction is in play, but the way in which they
26 interrelate to each other is as I've just explained.

1 Is that sufficiently clear, Sir, in terms --

2 THE CHAIR: Yes.

3 MR PICKFORD: Because I realise I obviously wasn't clear before, but I hope that sets
4 out what my position is on, on the scheme and the interaction between the two.

5 THE CHAIR: Yes, well, that seems to me to be correct. That's the point I'm making:
6 they are two different things.

7 MR PICKFORD: They are. They are indeed, and I didn't mean to indicate that the
8 other --

9 THE CHAIR: Yes.

10 MR PICKFORD: But the reason why I said that one might raise admissibility issues
11 after a 4.2 application is because it's a precursor for giving the carve-out that there has
12 to be a justification for it. If it's not properly admissible, the Tribunal shouldn't give the
13 carve-out in the first place.

14 THE CHAIR: Okay.

15 MR PICKFORD: So it is legitimate to consider admissibility points within that context.

16 THE CHAIR: Yes. So admissibility is governed by statute and then considered in
17 case law?

18 MR PICKFORD: Indeed.

19 THE CHAIR: So isn't that the starting point on the scheme you've just outlined?

20 MR PICKFORD: Well, I'm starting with the Practice Direction because, obviously,
21 we're not just concerned with the expert evidence.

22 THE CHAIR: Correct, but --

23 MR PICKFORD: We're actually concerned with, as I say, a host of other paragraphs.

24 THE CHAIR: Yes.

25 MR PICKFORD: So in my respectful submission, actually, the Practice Direction is
26 the starting point. One then bifurcates.

1 THE CHAIR: Yes.

2 MR PICKFORD: And when one goes into the: "Well, don't worry, we didn't have to

3 comply with the Practice Direction because this is quasi-expert evidence". Then that's

4 when one gets drawn into admissibility issues.

5 For the other part, which is the: "Making arguments by reference to previous

6 submissions, et cetera" part, that's separate. In my submission, the correct place to

7 start is in fact the Practice Direction.

8 I've shown you three, and extracts from four, and obviously the Tribunal will be familiar

9 with the sanctions. We're not asking for anything other than to put in new Practice

10 Direction-compliant statements. We're not saying that Raff shouldn't be allowed to put

11 in evidence; we just like it to be properly confined.

12 THE CHAIR: You're only objecting to certain paragraphs.

13 MR PICKFORD: We're objecting to certain paragraphs, exactly.

14 THE CHAIR: It's effectively the same thing. Striking out those paragraphs, or putting

15 in a new one without them; it's the same thing, isn't it?

16 MR PICKFORD: Continuing with the PD aspect for now, the Tribunal's Guide, which

17 is to be found earlier in this bundle at tab 3. We're in Bundle 9A, tab 3, and I'm on

18 page 88.

19 THE CHAIR: Yes.

20 MR PICKFORD: If I could ask the Tribunal please to read paragraph 7.61. (Pause)

21 That's an elaboration, in effect, of the requirements in Rule 3 of the Practice

22 Direction -- paragraph 3.

23 THE CHAIR: Yes.

24 MR PICKFORD: And it effectively forms the basis for the statement of compliance

25 that the witness is required to give.

26 THE CHAIR: Yes.

1 MR PICKFORD: Now, I foresee, in the light of the indications, Sir, that you gave
2 earlier, that you may be resistant to the next submission I'm going to make. I was
3 going to take you to the Statement of Best Practice that accompanied the Practice
4 Direction in the CPR, because in my submission it covers the same ideas -- the same
5 principles -- and effectively elaborates what is meant in one case by not arguing the
6 case.

7 THE CHAIR: Well, I accept that --

8 MR PICKFORD: So --

9 THE CHAIR: -- it's not a function of the witness statement to answer the case.

10 MR PICKFORD: It provides some further explanation around that. So if you just go
11 very briefly -- that's also in 9A, but we're now in tab 9. If you go please to page 136 of
12 the bundle. (Pause)

13 THE CHAIR: Yes.

14 MR PICKFORD: If I could ask the Tribunal, please, to read 3.4 and 3.6.

15 THE CHAIR: Sorry, 3.4 and 4.6?

16 MR PICKFORD: 3.4, so it begins right at the end. It's a little hard to see. Right at the
17 bottom of page 136, under subheading 3, "Practice". The final paragraph on
18 page 136; do you see a little 3.4?

19 THE CHAIR: Ah yes, 3.4.

20 MR PICKFORD: So this is paragraph 3.4 in the Statement of Best Practice. (Pause)

21 THE CHAIR: 3.6.

22 MR PICKFORD: And then 3.6, which effectively goes with it. (Pause)

23 THE CHAIR: Yes.

24 MR PICKFORD: In my submission, those statements elucidate points that are already
25 made, for example, in the Tribunal's Practice Direction, and explain what it would
26 mean, for example, to provide commentary on other evidence in the case.

1 Under 3.6(4):

2 "... that is to say to set out matters of belief, opinion or argument about the meaning,

3 effect, relevance or significance of that other evidence."

4 So those are examples of things that you are not supposed to do, in compliance with

5 either Practice Direction, in my submission.

6 THE CHAIR: Yes, it's that statement about best practice is part of the BPC Practice

7 Direction 57AC --

8 MR PICKFORD: Yes.

9 THE CHAIR: -- under 3.4 of the Practice Direction.

10 MR PICKFORD: Yes. In my submission, it does not bind --

11 THE CHAIR: No.

12 MR PICKFORD: But it does provide insight into when the -- in just the way, Sir, that

13 we very often in this Tribunal rely on authorities and jurisprudence in relation to a rule

14 under the CPR, we say that often it is very helpful in understanding and elaborating

15 on an equivalent rule in the Tribunal. It's obviously commonplace that the Tribunal

16 approaches its rules in that way.

17 The core point that I'm making is that both sets of rules prevent including commentary

18 on the case. 3.6(4), in particular, goes into a little more detail to explain "What does

19 that mean in practice?" That's all it's doing. In my submission, that's equally applicable

20 in terms of what one should understand by the equivalent rule in the Tribunal's Practice

21 Direction.

22 THE CHAIR: Yes. Well, I said to you, I have sympathy for the point that they should

23 not be arguing the case, and commenting, which is quite different from the point about

24 opinion evidence based on expertise.

25 MR PICKFORD: That's a very helpful indication, Sir. I'll obviously take account of that

26 as I go. I mean --

1 THE CHAIR: Yes. So you don't have to labour that point, is what I'm saying.

2 MR PICKFORD: Thank you. I apologise. The reason why I took you there is because

3 I apprehended that there might have been a difficulty for me in referring to the

4 guidance that goes with PD 57AC from what, Sir, you said earlier on. I just wanted to

5 make sure that it's --

6 THE CHAIR: I don't think it is relevant to this Tribunal, but I think the point's made in

7 the Tribunal's Practice Direction. Yes.

8 MR PICKFORD: Very good.

9 So Foundem has three main strands of argument by which it seeks to justify the

10 approach that it's taken:

11 One, as I understand it -- and obviously in his responsive submissions later on,

12 Mr West can address it -- is that PD 2/21 is effectively irrelevant, insofar as the Raff

13 statements cover what I'm going to call "quasi-expert" evidence, because the expert

14 evidence is admissible under section 3 of the Civil Evidence Act 1972, and Foundem

15 says that that provides a complete answer to this aspect of the application.

16 You'll have heard what I say structurally about that, which is: it doesn't. If what you

17 want to do is say, "Aha, well, there's an exception here, because I've got this particular

18 category of evidence that doesn't strictly comply with the PD, but don't worry, it doesn't

19 matter", is you make the application under 4.2. He hasn't done that.

20 Secondly, there's the set of arguments that effectively there's some sort of

21 dispensation not to apply PD 2/21 because of the length of time and the vigour with

22 which the Raffs have been involved. That's the point that, in particular, applies to

23 Ms Raff's statement; that effectively they've been in this so deep for so long, we should

24 allow them to make submissions and refer to documents effectively.

25 THE CHAIR: Is that one of their arguments?

26 MR PICKFORD: Well, in my submission that's the gist of it. Because when one goes

1 through the table at the end that we produced for Annex A and Annex B, we say, "Here
2 is Ms Raff quoting from previous submissions, providing advocacy, et cetera", and the
3 response that is typically given is, "Ms Raff has been very heavily involved in this case
4 since the very beginning; she's entitled to explain her dealings with this case and
5 submissions that she made over its history".

6 That's sort of the essence of it. So that seems -- obviously Mr West can put his point
7 differently if he says --

8 THE CHAIR: I don't think it's being said the PD doesn't apply; is it, Mr West?

9 MR WEST: No.

10 THE CHAIR: No, I don't think so. I think that what is said is that this is factual history
11 of the proceedings.

12 MR PICKFORD: Well --

13 THE CHAIR: That's their point. You may say it's wrong, but I don't think there's any
14 submission that the PD does not apply.

15 MR PICKFORD: Well, the answer to that will be this: the PD makes clear you are only
16 allowed to provide evidence going to matters of fact that are properly in issue. You
17 can't say, "Oh, well, as a matter of fact, I wrote this submission to the Commission,
18 et cetera", if that matter of fact is not an issue, because --

19 THE CHAIR: It's true of so many witness statements we get that there is stuff in it
20 that's not strictly relevant. One doesn't waste time with trying to pencil stuff like that
21 out, because you have an expensive interim hearing like this. It just gets largely
22 ignored at trial if it's not relevant.

23 MR PICKFORD: Well, Sir, obviously, we have to draw the line, and as I said, we see
24 that as examples in the other Claimants' statements.

25 THE CHAIR: Yes.

26 MR PICKFORD: We've taken a pragmatic view, but we're not going to worry about

1 those things, because they're relatively small. The problem is: at a certain scale, it
2 becomes, in our submission, incumbent on us to put up or shut up in relation to
3 a substantial problem that we see with the Claimant's evidence.

4 THE CHAIR: That's not really a problem. Objecting to argument in a witness
5 statement in advocacy is one thing, because then there's a question: do you respond
6 to it; and does it influence the Tribunal; and so on. But if there's factual material there
7 which isn't terribly helpful or relevant, so what?

8 MR PICKFORD: Sir, I haven't made myself clear.

9 THE CHAIR: Yes.

10 MR PICKFORD: Sir, I haven't made myself clear. This is a very important point, and
11 I apologise.

12 THE CHAIR: Yes.

13 MR PICKFORD: The point is this: very large amounts of the evidence of both Ms Raff
14 and Mr Raff are, in reality, advocacy: they are submissions; they are narratives formed
15 from the documents; and they are impermissible.

16 Now, the answer that is given by Mr West to say, "We're not seeking an exemption
17 from PD 2/21, we simply say that within it is", they say, "as a matter of fact, we made
18 these submissions to the Commission. And as a matter of fact, this is what Google
19 said in response. And as a matter of fact, this is what I believed at the time".

20 My submission is that you cannot get around -- you can't circumvent the PD prohibition
21 on argument, et cetera, by framing your arguments by reference to things you said in
22 the past. Because if those things that you said in the past -- if the fact of whether you
23 said them in the past or not is not remotely in dispute, that is just a device for avoiding
24 the Practice Direction.

25 THE CHAIR: But those documents are all admissible at trial?

26 MR PICKFORD: Yes.

1 THE CHAIR: We've got them.

2 MR PICKFORD: Yes.

3 THE CHAIR: So whether they say, "This is what we said at the time", and obviously

4 they believed it; they said it. It's in the documents. You can say, "Well, it's not

5 appropriate to repeat it in your witness statement", but it doesn't actually make any

6 difference, does it? Because it's there anyway. We've got those arguments. It just

7 seems to be a bit of a waste of time.

8 MR PICKFORD: Well, Sir, it shouldn't be in the -- I mean, for a start, it is important

9 that, as I understand it, certainly, we tried properly to comply with the Practice

10 Direction.

11 THE CHAIR: Yes.

12 MR PICKFORD: In my submission, it's not an answer for another party to come along

13 and not apply the Practice Direction at all.

14 THE CHAIR: Yes.

15 MR PICKFORD: And then just afterwards to say, "Well, we can say it all at trial". That

16 is not the point. I mean, they should be complying with the Practice Direction. That is

17 what the authorities make clear. It does cause potential problems for a witness

18 statement to be littered with these sorts of points that are not Practice

19 Direction-compliant, particularly when it comes to issues about cross-examination.

20 Because if there are points that we say really are just submission, and therefore they

21 are matters that can be dealt with in submission, but they have been advanced as

22 PD-compliant statements of fact, there's then a question about, "Well, are we

23 supposed to be cross-examining on some of these points of argument, or are we not

24 supposed to be cross-examining on them?"

25 There are practical implications of allowing a witness statement that, wholesale,

26 doesn't really bother to properly comply with the Practice Direction. It's not I mean,

1 obviously we would like to avoid this application. We say it's not really our fault that
2 we've needed to bring it.

3 THE CHAIR: That's the second strand?

4 MR PICKFORD: That's the second strand. Then the third strand, I think to some
5 degree, we sort of covered already. It's the idea that, well, they say, "Well, you've
6 responded to some of these statements", and we say, "Well, we haven't responded in
7 the way that we might have done".

8 That brings us back to the expert point that we discussed before. In any event, we
9 responded in a PD-compliant way.

10 The first issue then is the point about expert opinion evidence. I will seek to go through
11 this relatively quickly, because I obviously canvassed quite a lot of this with the
12 Tribunal already. But I think it is helpful, Sir, to explain why we say parts of this
13 evidence are not compliant with the Orders that the Tribunal made in relation to expert
14 evidence.

15 There is jurisprudence on the following point that I'm going to explain. If the Tribunal
16 makes certain Orders as to the expert evidence it's going to hear, anticipating from
17 independent experts, you can't use the Brendon jurisprudence to circumvent those;
18 you can't come along and say, "Aha, well, this fact witness is now going to provide fact
19 evidence combined with some evidence that's within their expertise on an area that
20 the court never anticipated it was going to have that kind of evidence on".

21 Because effectively, you have circumvented what the court's prior view was on
22 whether it was going to have such evidence. Likewise -- and this is, in fact, the
23 example in the case that's given in one of the cases in Brendon -- equally, what can't
24 happen is you can't permit a fact witness statement to come along and start providing
25 analysis which is already covered by another part of the expert evidence that has been
26 allowed.

1 So in this case, the economic experts are supposed to be dealing with traffic analyses.
2 That's what they are doing. But we've now also got Mr Raff's traffic analysis. The
3 point I'm going to make in relation to that is that that is also impermissible. It's not
4 sufficient just to say, "Oh, don't worry; it's quasi-expert, it could be admissible".

5 It could be, but it's avoiding the Orders, in effect, that have already been made that
6 constrain the way in which such evidence should be produced in the Tribunal. (Pause)

7 Sir, I anticipate I don't need to take you through Rules 54 and 55, which govern the
8 Tribunal's control of evidence, including expert evidence. Or indeed the paragraph of
9 the Guide which says similar things about the Tribunal controlling those.

10 So if I could then start with paragraph 10 of the Tribunal's Order from March 2024,
11 which you'll find in Bundle 6, tab 5, page 34.

12 THE CHAIR: The Order of --

13 MR PICKFORD: This is the Order of 26 March 2024.

14 THE CHAIR: Yes. (Pause)

15 Yes.

16 MR PICKFORD: You'll see if you go, please, to page 34 of that, the provision that the
17 Tribunal originally made for experts at paragraph 10. It contemplated three different
18 areas of expertise.

19 THE CHAIR: Yes.

20 MR PICKFORD: Then what happened is -- if we go to Hausfeld's letter of
21 17 September, some months later in that year, which you'll find in Bundle 3, tab 19,
22 page 76. I beg your pardon, sorry.

23 THE CHAIR: Just a minute, my bundle's just exploded. (Pause)

24 Yes, I've got it. Thank you.

25 MR PICKFORD: Thank you. Do you have page 76?

26 THE CHAIR: Yes.

1 MR PICKFORD: You see paragraph 2, Hausfeld says that:
2 "Our client does not presently envisage engaging an expert on comparison shopping
3 services / vertical internet search markets; and search engine optimisation [...]
4 pursuant to paragraphs 10(b) and 10(c) of the Directions Order. [They don't consider]
5 that such evidence will be necessary for the purposes of the First Trial."

6 That was as far as categories (b) and (c) went.

7 THE CHAIR: Just a second. (Pause)

8 Yes.

9 MR PICKFORD: Thank you. I don't think I need to take you to it, because the Tribunal
10 will know then what happened. In the next Order it made, which was
11 20 December 2024, permission was granted for expert evidence. The only field which
12 it was granted was competition economics.

13 THE CHAIR: Yes.

14 MR PICKFORD: We say that the problem with Mr Raff's evidence is that, effectively,
15 it's going back on the promise that we weren't going to have anything other than
16 competition economics. We weren't going to have anything about search engine
17 optimisation or vertical search, et cetera, because we now have what is quasi-expert
18 evidence.

19 Just to give you a taste of why I say it's effectively an expert report, just not by an
20 independent expert, if we go to tab 4, page 45.

21 THE CHAIR: Tab 4 of which bundle?

22 MR PICKFORD: I beg your pardon, I misspoke. Bundle 4, tab 1.

23 THE CHAIR: Can I put away the correspondence?

24 MR PICKFORD: You certainly can for now. We won't be coming back to it for a while.

25 THE CHAIR: Yes. I've found tab 4, which is an exhibit. Tab 4 of Bundle 4?

26 MR PICKFORD: No, sorry. Tab 1 of Bundle 4.

1 THE CHAIR: Right, which is Mr Raff's statement, AR3, yes?

2 MR PICKFORD: That's right. If you go to [page] 45 and section 3.2.3.

3 THE CHAIR: Yes, the modelling.

4 MR PICKFORD: We have "Modelling and simulation". Modelling and simulation is

5 exactly the type of thing that one expects experts to carry out; it is not the type of thing

6 that one expects to see in a statement of fact about the facts that a witness recollects.

7 It's my submission that this could never be PD-compliant. This would have to be

8 something that might perfectly be admissible if it satisfied the test for admissibility.

9 That's a hurdle that has to be overcome. But if that is the way it's being presented,

10 there has to be an application under 4.2 for it to be an exception to the requirements

11 of the Practice Direction. It's not compatible with the Practice Direction.

12 If I could ask you, Sir, please -- it's all marked "confidential". I don't think all of it

13 actually is confidential; a particularly conservative view has been taken here. But if

14 I could just ask you to flick through the next sort of eight pages just to see the nature

15 of the --

16 THE CHAIR: Yes, well, I have read it.

17 MR PICKFORD: Thank you.

18 MR WEST: Sorry to interrupt. I understand that this grey marking means that this is

19 material which Google is trying to strike out, rather than it --

20 MR PICKFORD: Oh, I beg your pardon. I misunderstood.

21 THE CHAIR: I think the confidential is in yellow; is that right?

22 MR PICKFORD: Right, okay. That's --

23 THE CHAIR: And the grey is just, helpfully, for the Tribunal.

24 MR PICKFORD: Thank you. Yes, I was a little -- yes. Okay. Well, that explains it.

25 In which case, there is correspondence then with the evidence. That is an example of

26 the nature of the evidence.

1 THE CHAIR: Yes.

2 MR PICKFORD: And you have my submission on what needs to happen in relation

3 to that kind of evidence.

4 THE CHAIR: Yes.

5 MR PICKFORD: By definition, it can't satisfy the statement that has been given of

6 compliance with the PD, because inherently it can never satisfy the PD.

7 THE CHAIR: Yes.

8 MR PICKFORD: The second point is: there is an argument that is raised by Mr West

9 where they say that they have a "complete answer" to our application by reference to

10 the fact that the evidence itself is admissible. I've made my submission on that, I think

11 you have it already. We say admissibility is just the first step; you've got to show,

12 firstly, it's admissible, in order to even get off the ground, to make an exception

13 application under 4.2. It's not the answer in and of itself, because you can have

14 something that's admissible, but you still shouldn't be allowed.

15 Indeed, the key point, probably, to make here is that it is argued by Mr West, or at

16 least suggested, that because section 3(1) of the 1972 Act says that it is "subject to

17 any rules of court made in pursuance of this Act", his argument is, "Aha, well, the PD

18 isn't made 'under' the 1972 Act, therefore it's not relevant".

19 We say that that is wrong. We agree, of course, that it's not made under the Act; no

20 one is suggesting otherwise. But the admissibility of evidence under section 3(1) is

21 subject to any rules of court that themselves deal with evidence, including, we say, the

22 CPR and the Tribunal's Rules. The authority for that is the case of Brendon, which

23 you'll find --

24 THE CHAIR: (Inaudible) not clear what you're saying. I understand you're saying it's

25 not PD-compliant.

26 MR PICKFORD: Yes.

1 THE CHAIR: Got that point.

2 MR PICKFORD: Yes.

3 THE CHAIR: So, need an application under 4.2.

4 MR PICKFORD: That's right.

5 THE CHAIR: And none was made. Got that point.

6 MR PICKFORD: Yes.

7 THE CHAIR: In terms of is it admissible which is, in a sense, the antecedent point, I'm

8 not clear what you're saying.

9 MR PICKFORD: Let me (inaudible) and I apologise --

10 THE CHAIR: Leaving aside the PD and suppose I accept that it's not PD-compliant,

11 is it admissible or not?

12 MR PICKFORD: I'm going to come to that in a moment. The point that I'm making is

13 a response to Foundem's response to the point that I have just made that you need to

14 make an application. What they say is admissibility under section 3(1) is effectively

15 a trump card.

16 THE CHAIR: Well, don't waste time on that. Can we get on to admissibility because

17 you keep saying you're about to get to it, but it's pretty fundamental.

18 MR PICKFORD: Certainly, so let's go then, please, to Brendon.

19 THE CHAIR: Well, one starts with the statute, I think.

20 MR PICKFORD: Okay. I'm happy to start with -- well, to start with the statute. So the

21 statute is at Bundle 9A, tab 1, page 4. I think it's page 4.

22 THE CHAIR: Yes, I think it is.

23 MR PICKFORD: Yes. And we have section 3 of the 1972 Act at the top and 3(1)

24 provides:

25 "Subject to ... rules of court made in pursuance of this Act, where a person is called

26 as a witness in any civil proceedings, his opinion on any relevant matter on which he

1 is qualified to give expert evidence shall be admissible in evidence."

2 Sir --

3 THE CHAIR: Yes.

4 MR PICKFORD: This is why I've been calling it expert evidence, because that's how
5 it's referred to --

6 THE CHAIR: Yes.

7 MR PICKFORD: That's, as I understand it, the relevant limb that's being relied on. It's
8 not 3(2) because 3(2) is opinions by him on a relevant matter by "way of conveying
9 relevant facts personally perceived by him". So that, for instance, would allow
10 hearsay. But that's not what we're concerned with when we're dealing with all of
11 Mr Raff's evidence, for instance, his modelling, et cetera, what's being relied on is 3(1).

12 THE CHAIR: Yes.

13 MR PICKFORD: And 3(1) is expressly subject to rules of court. We will see, when
14 we get to Brendon, what the implications of that are for interaction with the Practice
15 Direction. So if I could then go to Brendon, with the court's permission, and that's at
16 9B.3, tab 2.

17 This is a case, it's a restitution reclaim in relation to sewage services and
18 Lord Justice Snowden gives the leading judgment. If I could take the Tribunal, please,
19 to page 33 of the bundle, we see at paragraph 85, we begin there:

20 "Section 3(1) of the 1972 Act has effect 'subject to any rules of court' and there is no
21 doubt that CPR 35 is such a rule of court."

22 So the first point, Sir, then, is that section 3(1) isn't a trump card. It's still subject to
23 both the CPR and, in my submission, by extension, the Tribunal's Rules: 55 and the
24 Practice Direction.

25 THE CHAIR: Well, the Practice Direction is not (inaudible) a Practice Direction.

26 MR PICKFORD: Well, the rules require that the parties are required to provide the

1 witness statements that they be entitled to give as evidence-in-chief. The Practice
2 Direction is, in my submission, part and parcel of the rules that cover the evidence that
3 the parties are permitted to give.

4 THE CHAIR: It's not a rule. You know, were it otherwise, you'd have different
5 admissibility in the TCC and the King's Bench Division. The law on admissible
6 evidence is not different.

7 MR PICKFORD: Sir --

8 THE CHAIR: The practice is different and the court or Tribunal can enforce its Practice
9 Direction by refusing to admit the statement that doesn't comply with it. But it's not, as
10 a matter of law, a change in admissibility. What this means, for example, an
11 independent expert putting in a report, it's not admissible where the Tribunal or the
12 court has not given permission for that. So that's a rule.

13 MR PICKFORD: Sir, I haven't been clear. I am not saying that the rules on
14 admissibility depend on which court you're in. I'm saying that the rules on admissibility
15 are not trump cards, so you can't come along as Foundem -- if one reads paragraphs 9
16 to 13 of their Response, I'm not going to do it now, but if you read that, it effectively
17 makes the argument this is admissible. That's a complete answer to your point. And
18 my submission is, no, it isn't. Even if it is admissible, these rules on admissibility still
19 need to be read subject to other rules and therefore you can't waive your admissibility
20 around as a trump card. You've still got to, as I explained, in this case, adhere to and
21 make an application under 4.2 if you want to have such evidence admitted in this court,
22 this Tribunal. I hope I'm clear there.

23 I am not saying that the rules on admissibility vary. I'm saying that once you have
24 demonstrated something is admissible, you still have to satisfy other relevant rules
25 relating to evidence. You can't just hold up admissibility.

26 THE CHAIR: I understand that, and we're on the first point. Namely, is it admissible

1 because you submitted, I think rightly, that if it's not admissible, there could never be
2 a Direction under paragraph 4.2.

3 MR PICKFORD: Yes.

4 THE CHAIR: So we're now dealing with the question, is it admissible, not the Practice
5 Direction, but is it admissible as a matter of law?

6 MR PICKFORD: Yes. And that's where we come -- that's where paragraph 86 comes
7 in. So, in my submission, it's helpful to show you 85 because it shows you the
8 interaction. And it is directly contrary that there is a point between me and my learned
9 friend on this. He says we're wrong about whether admissibility is a trump card and
10 I say, no, he's wrong, look at 85.

11 THE CHAIR: 85 goes on to say, the rules on expert evidence, Part 35, are not relevant
12 to that case, before the Court of Appeal, because it wasn't being given as the evidence
13 of an independent expert.

14 MR PICKFORD: Exactly.

15 THE CHAIR: Which is exactly the case with Mr Raff.

16 MR PICKFORD: Exactly, but what it is being given as is a PD-compliant fact witness
17 statement, and that's --

18 THE CHAIR: Yes, and we've covered that.

19 MR PICKFORD: Yes.

20 THE CHAIR: So let's get on with admissibility, please.

21 MR PICKFORD: If I could ask, please, the Tribunal to read paragraph 86 down to the
22 end of the quoted paragraph from Multiplex Constructions 669. So it's the introduction
23 and the first three quoted paragraphs. (Pause)

24 Sir, you've got beyond that.

25 THE CHAIR: Yes. I'm just reading the end of the quote down to the end of
26 paragraph 86. (Pause)

1 Yes.

2 MR PICKFORD: And then if I could ask, please -- I don't know whether you've

3 got -- did that include paragraph 672 of the quote?

4 THE CHAIR: Yes.

5 MR PICKFORD: Thank you. So that summarises where the judge in that case got to

6 and is approved by Lord Justice Snowden. What we say is that you can gloss your

7 fact evidence when the opinion is reasonably related to facts within your knowledge

8 and the --

9 THE CHAIR: It doesn't say "gloss", does it?

10 MR PICKFORD: The "gloss" is back in 669.

11 THE CHAIR: Yes.

12 MR PICKFORD: That's the question that's being considered: when can you gloss your

13 evidence with some expert comment? And the answer is you can but it's got to be

14 reasonably related to the facts -- that is the factual part of your statement -- and you

15 have to have relevant expertise.

16 On the question of the expertise that is addressed earlier in this case by

17 Lord Justice Snowden at paragraph 76 and there he quotes Lord Russell's judgment

18 in R v Silverlock and if I could ask you, Sir, please, just to read that quoted judgment

19 from Silverlock. (Pause)

20 THE CHAIR: Yes. You've not made any submission, as I recall from reading your

21 written submissions, that Mr Raff doesn't have skill and expertise.

22 MR PICKFORD: Depends what in. We have made this submission -- I'll find it -- that

23 he doesn't have any expertise in the workings of Google and Google's general search

24 algorithms. We certainly do make that submission. My learned junior will give me the

25 reference, but --

26 THE CHAIR: Would anyone, apart from Google, have expertise in that, given that

1 | they're kept secret?

2 | MR PICKFORD: Well, possibly. People that might have some relevant

3 | expertise -- we'll start with an ex-Google employee. Potentially there might be an

4 | argument about, for example, someone who worked for Microsoft, in relation to Bing.

5 | THE CHAIR: (Inaudible) an ex-Google employee would have factual knowledge of

6 | how it works --

7 | MR PICKFORD: Yes.

8 | THE CHAIR: But not expertise skill in analysing the outcome and drawing conclusions

9 | from that, as a matter of opinion.

10 | MR PICKFORD: Quite. Well, therefore, Sir, that I say is supportive of my position.

11 | This isn't really an area where one would expect to have expert evidence at all. You

12 | wouldn't really expect there to be opinion evidence about how the impact of Google's

13 | algorithms, which is the sort of thing that Mr Raff purports to give because he's not

14 | really in a place to do that.

15 | THE CHAIR: You can see the impact, as he sees it, on Foundem and give an opinion

16 | of --

17 | MR PICKFORD: Yes.

18 | THE CHAIR: -- how that arises.

19 | MR PICKFORD: So he can do that. He can give purely factual evidence.

20 | THE CHAIR: Well, that's an opinion of how that's being called.

21 | MR PICKFORD: Well, that's, in my submission, where actually much of his statement

22 | goes too far because it's straying into something which is an area in which he simply

23 | does not have the relevant expertise. The fact that there might be only a limited

24 | number of people who have such expertise doesn't mean that Mr Raff has the

25 | expertise. That's a non-sequitur.

26 | THE CHAIR: Where is it you've submitted -- doesn't have --

1 MR PICKFORD: I've asked my learned junior to find me the reference, but I believe
2 that we have said that.

3 The final point, Sir, is later on in the judgment, if we go back to paragraph 91, which is
4 following the section that we were looking at before.

5 THE CHAIR: Yes.

6 MR PICKFORD: The judgment makes the point that the limited power to admit
7 evidence which glosses factual evidence, can't be used as a means of circumventing
8 the restrictions on the provision of expert evidence under, in that case, CPR 35. Can
9 I ask you, please, to read paragraph 91.

10 THE CHAIR: Yes. (Pause)

11 MR PICKFORD: And so --

12 THE CHAIR: Just a minute, need to read it. Yes.

13 MR PICKFORD: So that gives one example, which would be a circumvention and
14 I say that that is a circumvention that arises in this very case, which is, it is the expert
15 economists that are dealing with the question of analysis of traffic data.

16 THE CHAIR: That's agreed, is it?

17 MR PICKFORD: That has been the case, yes, since -- well, for a long time, but
18 including since the joint expert statement on data disclosure. That's not in the bundle.

19 MR WEST: This is a completely new point. I was handed this joint expert statement
20 about a minute before the hearing started.

21 MR PICKFORD: I can make the general point and then I can, if necessary, refer to
22 the joint expert statement.

23 Sir, I had anticipated you would recall that last summer we had a hearing about expert
24 evidence and data disclosure and other disclosure for that. One of the areas that the
25 economists said that they needed evidence on was for analysis of traffic and there
26 was a joint statement that was provided for that hearing, which set out the economists'

1 views on the fact that they needed to do analysis of traffic data. I thought that was --

2 THE CHAIR: Yes, I don't know what they're doing now in their report. Have they
3 produced the report?

4 MR PICKFORD: No. The first report is due in early February. That's from the
5 Claimants.

6 THE CHAIR: Yes, but you say your economist is doing an analysis of traffic data. Is
7 that what you're saying?

8 MR PICKFORD: I say that both economists are doing the analysis of traffic data.

9 THE CHAIR: That's part of the (inaudible). (Pause)

10 MR PICKFORD: So that's directly analogous to the problem that's indicated in
11 paragraph 91 that might arise. I say, equally, it would be a problem if the parties
12 agreed that the areas of expert evidence were going to be A and not B and C, and
13 then effectively, one party, through its fact evidence, revisited that and introduced
14 something that really fell into the scope of B. But I've made that point, Sir; I don't think
15 I need to push that point any further.

16 There is also a further helpful authority on the issue of the importance of not allowing
17 the Brendon jurisprudence to circumvent decisions in relation to what the scope of
18 expert evidence should be, and that's the Wetherspoon judgment. I'll just go to that
19 very briefly. It's at 9B.2. That's Bundle 9B.2, tab 3, page 49.

20 THE CHAIR: Yes, which paragraph?

21 MR PICKFORD: So it's paragraph 32 on page 56. It's the section beginning,
22 "Mr Goldberger's witness statement". If I could ask you, please, to read paragraphs 33
23 and 34. (Pause)

24 Then, once you've finished paragraph 34, if I could ask you, please, to read the
25 conclusions of the Chancellor at 37, through to the end of 40. (Pause)

26 THE CHAIR: Yes.

1 MR PICKFORD: Thank you. In particular, I draw attention to the comments of the
2 Chancellor in paragraph 40, where he says that:

3 "A witness of fact may sometimes be able to give opinion evidence as part of his or
4 her account of admissible factual evidence in order to provide a full and coherent
5 explanation and account."

6 So an example, of course, in Brendon is, say, a structural engineer who explains the
7 facts of how he or she designed a foundation system, and as part of that, says, "and
8 here's why I thought that was going to be good enough". That's what Brendon is
9 about. It's not an excuse to basically bring in whole tranches of what would otherwise
10 have to be proper expert evidence through the back door. In my respectful
11 submission, that is what Mr Raff's report, in essence, does.

12 The fourth point -- is it okay, Sir, if I continue to 1.00? (Pause)

13 THE CHAIR: We're just checking whether the transcriber needs a (audio distortion).

14 MR PICKFORD: So, should I continue?

15 THE CHAIR: I suggest you continue. What we might do is perhaps take a slightly
16 earlier lunch adjournment and --

17 MR PICKFORD: Very good.

18 THE CHAIR: If, say, you go to 12.50, I'm sure that'll be all right.

19 MR PICKFORD: Thank you.

20 THE CHAIR: Because we've started only at 11.00.

21 MR PICKFORD: So the fourth point that's taken against us in relation to our objections
22 to this quasi-expert evidence is the Raffs' appeal to inequality of arms and unfairness.
23 They say, "Well, if we've provided evidence about the operation of algorithms, it follows
24 that they should be allowed to do the same".

25 We say that is wrong. This trial is concerned with whether Google abused its dominant
26 position and what Google would have done differently in a counterfactual. In that

1 context, it is highly likely that there will be subjects which Google can legitimately cover
2 in its fact evidence, but which Foundem can't. We have adduced factual evidence
3 from witnesses, for example, Mr Kim and Mr Cutts, who have a relevant understanding
4 of how Google's algorithms work.

5 That simply isn't true of Mr and Ms Raff. Therefore, given that they chose not to try to
6 address that issue by saying, "Well, we want an expert instead. We're going to have
7 our own expert" -- they didn't go down that route -- we say the legitimate approach for
8 them is to address those issues through cross-examination through use of the
9 disclosure in the documents and submission by counsel. But it's not to have
10 a quasi-expert report through the back door.

11 There's then a next point, which I can deal with very briefly, is it says challenges to
12 expert reports are best left to trial. That's effectively the essence of one of the points
13 they make in their skeleton.

14 THE CHAIR: Challenges to the admissibility?

15 MR PICKFORD: Yes, challenges to the admissibility of expert reports.

16 THE CHAIR: Well, it's admissibility of anything, I think.

17 MR PICKFORD: Well, no, Sir. In particular, what they rely on in their skeleton, which
18 is the last document they served, is a series of authorities that are all about
19 CPR-compliant -- or rather, expert reports that have been adduced under the CPR
20 and Part 35. There are statements that where the court has made provision for expert
21 evidence on a particular subject and there are independent experts who have put
22 forward those reports, what you don't do in relation to such expert reports is go through
23 in a fine-tuned way, trying to work out precisely which bits are and which bits aren't
24 admissible.

25 We agree with that, but that is not our application because this is not an expert report
26 under Rule 55; it's supposed to be a PD-compliant fact statement. You've heard the

1 submissions that I make in relation to that.
2 I was then going to provide you with some examples of the parts of the statements
3 that we say are expert evidence. So I was going to go through some of the lines of
4 the Annex, Annex B, of Mr Raff's statement that deal with expert evidence. It might
5 be more convenient --

6 THE CHAIR: It's fairly obvious, I think, which part --

7 MR PICKFORD: Yes, so what I was going to suggest, given the time, is actually I was
8 going to seek to deal with the general high principles, as it were, that arise in relation
9 to the other side of the matter, which is submission and advocacy and the points that
10 arise particularly in Ms Raff's statement, but also -- and I think if I deal with that in
11 general terms, then after lunch, I can then look at some of the examples themselves
12 in the --

13 THE CHAIR: Well, looking at examples, I don't know how far that will help, because
14 there are a lot of paragraphs.

15 MR PICKFORD: Yes.

16 THE CHAIR: You can pick some examples; Mr West can pick some examples. Either
17 we go through them all, which will take two days, which we haven't got, or -- which in
18 a way, would be more helpful, would be if -- and it probably can't be done today -- you
19 would serve a list by reference to the disputed paragraphs which you object to as
20 being, as you put it, matters which could only be done by an expert and matters which
21 you say are advocacy and matters which you say are just unnecessary recitation of
22 documents.

23 MR PICKFORD: Yes.

24 THE CHAIR: Which I think are three categories. There may be some overlap, but just
25 so I'd know which comes (audio distortion) in your view under each of those distinct
26 heads.

1 MR PICKFORD: The first point is we're very happy to do that. The second point is
2 I think in essence we do do that in the first column of the Annex.

3 THE CHAIR: Yes, but just as a list. Not --

4 MR PICKFORD: But just as a list. Yes, exactly. It can be very clearly category A,
5 category B, and we can provide that list and then there's no ambiguity.

6 THE CHAIR: Yes, and I think that would -- and then equally Mr West can respond to
7 that in due course. But without elaborate -- just so I know what we're dealing with.

8 MR PICKFORD: Yes. Sir, if I may respectfully say so, that that is an excellent way
9 through, because you're quite right. It's going to be -- I think, certainly given the time
10 it's taken to get here -- unmanageable to then go through every line in the Annex. In
11 my submission, this debate that -- well, submissions I'm making and the debate that
12 to some degree I've engaged in sets out all the points of principle so that once you've
13 heard me on these and you've heard Mr West and you've heard my reply, you will
14 decide what the answers are to those questions, and then there will then be a template
15 to then effectively go through the Annexes.

16 Okay, in which case --

17 THE CHAIR: (Inaudible) be done pretty quickly.

18 MR PICKFORD: We can do that by tomorrow. I mean, I say tomorrow; I've obviously
19 got another hearing in this matter tomorrow. Maybe if we did it by --

20 THE CHAIR: (Overspeaking), but in any event, by the end of Wednesday.

21 MR PICKFORD: By the end of Wednesday, Sir. Okay, so --

22 THE CHAIR: Yes, submission and advocacy, you wanted to say something about.

23 MR PICKFORD: Yes. So this is the second strand. We'll put expert evidence to bed
24 for the moment. We have some difficulty, I have to say, in understanding precisely
25 what it is that is said to give the entitlement to the Raffs to engage in what we say is
26 simply commentary on the documents and argument. What one derives from what

1 Foundem have said, is it's in some sense bound up with the fact that they have been
2 involved in this litigation themselves against Google for a long time, that they have
3 seen much of the disclosure already, and that they have made lots of submissions to,
4 for instance, the Commission and then thereafter the European courts on these
5 issues. So those are the points that crop up --

6 THE CHAIR: I don't mean to interrupt you. I hope this might, rather than delaying,
7 short circuit it. I'm, as I've said earlier, of some sympathy with your point that there are
8 sections of, in particular Ms Raff and I think are much more limited except Mr Raff's
9 statement that really are advocacy and submissions and shouldn't properly be there.

10 There might be then argument whether this paragraph or that paragraph falls within
11 that category or not. That's a matter I can take up in the first instance with Mr West.
12 Then, helped by your list, you'll provide -- and I don't think we need further
13 submissions; I think we can just leave it then for me to take a view.

14 But I don't consider Mr West persuades me otherwise; that the fact that they've been
15 involved for a long time entitles them to engage in advocacy in their witness
16 statements. There are certain paragraphs which, it seems to me, clearly seek to do
17 that. Whether that encompasses all the paragraphs that you would put under that
18 head, I don't know. But the general point, it seems to me, is a valid one that you're
19 making.

20 In terms of some stuff that may be not strictly relevant, I'm really less concerned about.
21 Because it's not strictly relevant, it really doesn't matter too much. People can take
22 different views on what may be relevant, but ... (Pause)

23 MR PICKFORD: Well, maybe I can just make some very short remarks, then, for
24 five minutes and then it might be that I can then sit down and Mr West can come in
25 after lunch on that.

26 It seemed to me that there were five points to make responsively to the general

1 argument that the Raffs were permitted to provide the kind of evidence that they have
2 that's on this topic. The first of those was they have removed, at least some of, now,
3 the paragraphs -- or proposed to remove some of the paragraphs that deal with
4 Google disclosure.

5 So you'll have seen that. The problems we say with that are -- firstly, one is that there
6 isn't actually an application to substitute, so at some point we're going to need to know
7 which witness statement we're dealing with. It's a small point. The bigger one, we
8 say, is that once one applies that logic, if they've conceded that they really shouldn't
9 be covering Google's disclosure, well, then there are other paragraphs that they
10 haven't covered off yet as well. So that's the first point to make about that.

11 Secondly, there is argument made that because they've seen all these documents
12 previously, the rationale for the PD about subconsciously influencing the witness
13 doesn't apply here. I have two answers to that. Firstly, I say, actually, it applies very
14 strongly here and that it's very hard to imagine that the Raffs haven't been influenced
15 by their deep involvement in this case and in pursuing it and all of the documents that
16 they've seen. But more importantly, it's not an answer to the Practice Direction. The
17 Practice Direction doesn't require us to inquire into whether there has or hasn't been
18 subconscious influence; it just says, "You're not supposed to be including lots of
19 advocacy and you're not supposed to be including lots of references to documents, so
20 get rid of it".

21 THE CHAIR: Well, you can give references to documents.

22 MR PICKFORD: Well, what -- you're not supposed to -- sorry, I beg your pardon.
23 I spoke too quickly.

24 THE CHAIR: Those are quite different things. In every witness statement on matters
25 that happened long ago, the witness will say, "I then wrote a letter, I got no reply".
26 They won't remember all of that; they've obviously had to look at the documents to

1 refresh their memory. That's absolutely normal. Otherwise, witnesses could give very
2 little evidence, then will be shown the documents at trial and then will remember.
3 That's perfectly normal. There's complete difference, it seems to me, between
4 advocacy --

5 MR PICKFORD: Yes.

6 THE CHAIR: -- making arguments which can be made by your legal representative,
7 and saying, "I then wrote this letter, in which I asked this question, I got no answer".
8 Perfectly proper to say that. "And then I wrote again, and again, I got no answer".

9 MR PICKFORD: That that's very helpful, Sir, because I think that enables me to
10 pinpoint the point I do need to make in submission, then, which is that with respect,
11 we wouldn't accept that in all cases it necessarily is okay to create a narrative by
12 reference to the documents. Indeed, there's reference to not creating narratives by
13 reference to documents.

14 It depends Sir, on the context. If there is a matter that is in issue -- so if it actually
15 mattered, precisely, when Google did or didn't say something or when Foundem did
16 or didn't say something, then you might well have evidence on that issue which
17 combined both the witness's recollection, and then they say, "And also I've now been
18 reminded by refreshing my memory with the documents that I think this happened
19 around date X".

20 THE CHAIR: Yes.

21 MR PICKFORD: Where it's relevant. My point is the one that I made at the outset,
22 which I would come back to, which is that what isn't permissible is to dress up what is
23 in fact, basically, just a narrative of whole swathes of points that could be made by
24 counsel which aren't, strictly speaking, the subject of anything which you need to give
25 factual evidence on, to create a chronology. In my submission, that isn't what post-PD
26 statements are supposed to do.

1 Certainly, we have avoided doing that in our witness statements, because of our
2 understanding that we're not supposed to approach our witness evidence in that way.
3 So in my submission, the context matters. If it's a relevant issue, that's one thing. If
4 it's basically just doing -- to which you can provide genuine factual assistance through
5 your recollection, then I would accept it would be perhaps nitpicking to seek to take
6 points about that.

7 THE CHAIR: Well, I gave you an example. "I wrote this letter. We did not get
8 a response". That's something that only the witness can say.

9 MR PICKFORD: Yes.

10 THE CHAIR: Looking at the bundle of documents, there's no response in the bundle,
11 it doesn't prove there's no response.

12 MR PICKFORD: If it's just that -- that's a --

13 THE CHAIR: And I noticed some of those paragraphs, you took objection to.

14 MR PICKFORD: Well, I think we took objection -- I think our understanding is that
15 there were -- it's possible that that discrete issue, one might revisit. But there are many
16 where there are simply narrative accounts of whole swathes of things that equally
17 could be made by an advocate. My test is this, Sir ...

18 THE CHAIR: Yes.

19 MR PICKFORD: I say, by reference to the authorities that I showed you at the outset
20 about what factual evidence was supposed to comprise of and what it wasn't --

21 THE CHAIR: Yes.

22 MR PICKFORD: -- that the whole essence of the Practice Direction, both 57AC and
23 2/21, is to keep witnesses focused on the facts that they can actually recall and speak
24 to, rather than jumbling it up with references to the documents. That is a core purpose
25 of the Practice Direction.

26 One can test whether it has been adhered to in this way. If you look at a passage and

1 say, "Is this something that an advocate could say by reference to anything other than
2 the witness evidence -- the documents, other argument?" Then it shouldn't be in the
3 witness statement.

4 "Is this something that only the witness can say?" Then it should be in the witness
5 statement. So to give you an example, if only the witness can simply say, "We never
6 received a response", then I accept they can say that. In so far as we seek to strike
7 that out, then I would say, well, that one went too far. But if it is not in that category,
8 as something that only the witness could say, and actually, equally, Mr West could say
9 that in written or oral submissions, then the witness shouldn't be saying it. That's the
10 essence of the test.

11 I think I should probably stop speaking because I've exceeded.

12 THE CHAIR: We will start again at 1.50 pm.

13 (12.52 pm)

14 (The short adjournment)

15 (1.50 pm)

16 MR PICKFORD: Sir.

17 THE CHAIR: Yes, Mr Pickford.

18 MR PICKFORD: Thank you. You indicated you were going to hear from Mr West,
19 and I'm not intending to detain you very long at all, but there were two loose ends
20 hanging over from this morning that I thought it might be helpful to address you on
21 before Mr West gets up, because then he can, if he wants to make submissions on
22 them, respond to them.

23 THE CHAIR: Yes.

24 MR PICKFORD: The first was that the Tribunal asked me where we referred to
25 Mr Raff's expertise, or lack of it. It's in our Reply, paragraph 8. You'll find that in
26 Bundle 1, tab 4 on page 50. (Pause)

1 What we said was what we didn't accept, which is in the second part of the sentence,
2 that because Mr Raff's comparison shopping service had interacted with Google, and
3 he's been pursuing proceedings against Google for well over a decade, this renders
4 him an expert in the "operation of Google's algorithmic search penalties and Universal
5 Search", which is what they referred to him being "expert" in. We're quoting from the
6 Response there. So we said we didn't accept that.

7 THE CHAIR: Yes.

8 MR PICKFORD: Then the other loose end was I handed up a document which, with
9 fairness to Mr West, he hadn't seen in this hearing -- he would have seen it many times
10 before -- which was the joint expert statement for the purposes of disclosure. The
11 reason for that was to show that it's very, very clear that traffic analysis forms part of
12 what the economic experts are going to be considering, in particular, Mr Hunt.

13 THE CHAIR: Have I got it?

14 MR PICKFORD: If you haven't, please let me hand it up. (Pause)

15 Again, I can be very short.

16 THE CHAIR: Yes.

17 MR PICKFORD: The document is the joint expert statement on data disclosure --

18 THE CHAIR: Yes.

19 MR PICKFORD: -- which we relied upon for the hearing. It doesn't seem to be
20 numbered, unfortunately, but if you go to the third sheet, there's a diagram.

21 THE CHAIR: There are page numbers in the bottom right.

22 MR PICKFORD: Oh, is it ...

23 THE CHAIR: A bit faint, but ...

24 MR PICKFORD: Oh gosh, yes, you're right. Okay, so it's page 5. Thank you very
25 much, Sir. On page 5, there are statements, at paragraph 1.13 to 1.14, which if I could
26 ask the Tribunal to read, they refer to Mr Hunt's plans to test various matters by

1 reference to traffic data. And then there's one other bit I'd like to show you after that.

2 (Pause)

3 THE CHAIR: Yes.

4 MR PICKFORD: Then if you then turn to page 12, you see "Mr Hunt's abuse data
5 requests by topic", section 3.

6 THE CHAIR: Yes.

7 MR PICKFORD: Thank you. Then under section 3, table 2. Table 2 is to be found
8 on page 17.

9 THE CHAIR: Yes.

10 MR PICKFORD: There is a table 2, "Traffic data and CTR data", and then there's
11 a whole host of requests and explanations for why traffic data and CTR data is
12 requested and appropriate.

13 Indeed, for what it's worth, if you go to page 19 of the table, issue 5.1, there's some
14 agreement, from Mr Noble about the need for clicks data and the need to understand
15 traffic to CSSs and merchants from the SERP.

16 THE CHAIR: Yes.

17 MR PICKFORD: It has always been in contemplation that the economists, seeing as
18 they are expert in dealing with numbers, if I can put it that way, were, as part of their
19 analysis, going to be analysing the traffic data.

20 THE CHAIR: Yes.

21 MR PICKFORD: The basic problem is, as I could show you but I don't want to try the
22 Tribunal's patience by going to specific rows, but for your note, it's rows 8, 9 and 11 of
23 the table that deal with Mr Raff. So that's the second of the Annexes. They --

24 THE CHAIR: Yes. I think just to look at those bits -- the part in Mr Raff's statement,
25 which you say is the traffic analysis.

26 MR PICKFORD: Yes.

1 THE CHAIR: I did have a short look at that over the lunch adjournment to see -- I want
2 to be clear what part you say is that traffic analysis which you say is going to be done
3 by the expert; is it section 3.2.4?

4 MR PICKFORD: It's -- so?

5 THE CHAIR: Just tell me what it is.

6 MR PICKFORD: Yes, bear with me, Sir. I've got it by paragraph. It starts at
7 paragraph 146, I believe.

8 THE CHAIR: 146?

9 MR PICKFORD: 146.

10 THE CHAIR: "A Real-World Example".

11 MR PICKFORD: Yes. So that's 3.2.5:

12 "A Real-World Example: Foundem's Google Search Traffic vs Twenga's."

13 THE CHAIR: Yes.

14 MR PICKFORD: There are a number of sections, beginning there, that go through
15 and analyse traffic by reference to the traffic data that was disclosed. We see a graph
16 at figure 29 which is looking at Twenga, and then if one goes on a couple of pages to
17 figure 30, you'll see another graph that's all about analysis of traffic. (Pause)

18 THE CHAIR: Yes.

19 MR PICKFORD: That's on page 62. Then there's more traffic analysis, I think, in
20 figure 31. There are visits from Google natural search, so there's traffic as part of that.
21 That goes on for a substantial part of the report, figure 32 is very clearly "UK Google
22 Search Traffic to Foundem and Other CSSs". There's a comparison graph there on
23 page 66.

24 Obviously, I'm highlighting the graphs because they bring out the point clearly, but the
25 text is an analysis which goes along with the graphs. But it's not quite as easy to
26 discern from the text.

1 THE CHAIR: Yes.

2 MR PICKFORD: It goes all the way through to the end of -- I think, what is row 11 in

3 the table. I'm just going to have to look that up to tell you what the paragraph is that

4 goes with that. Bear with me. I beg your pardon.

5 THE CHAIR: Well, some of the section is not about traffic analysis; it's about the

6 character of Foundem's site compared to another site.

7 MR PICKFORD: Yes, there is a section -- Sir, so you're right. There are --

8 THE CHAIR: That's 3.2.7, I think. Section 3.2 --

9 MR PICKFORD: The way we divided it up was if -- I'm slightly improvising at the

10 moment because my notes are by reference to the rows in our table. I didn't go

11 through the statement and there is a section, you're right, that we don't criticise as

12 being problematic for reasons of analysing traffic, and one sees that in the table.

13 All I'm seeking to demonstrate at the moment is that there's a significant part of this

14 witness statement, and it's that that's dealt with in rows 8, 9 and 11 of our table, that

15 is concerned with analysing traffic. And obviously in the document we're going to

16 provide you with by the end of Wednesday, we'll make it extremely clear what are the

17 traffic bits.

18 THE CHAIR: Yes.

19 MR PICKFORD: And the submission that I make is that there is a real practical

20 problem here, which is if -- the Tribunal has made an Order for expert evidence, in the

21 ordinary sense, from the economists, the economists are going to be grappling with

22 traffic analysis. It didn't make an Order for two experts on the Claimants' side.

23 THE CHAIR: No, I think I've got your point.

24 MR PICKFORD: Yes, and I would have to cross-examine --

25 THE CHAIR: I understand, I think I got the point. Thank you.

26 MR PICKFORD: Sir, those are the two loose ends that I wanted to cover.

1 THE CHAIR: Thank you. Yes.

2

3 Submissions by MR WEST

4 MR WEST: Can I just briefly address that point. I do object to these new objections
5 being raised on the hoof. My friend said I'll have seen this document many times
6 before. I have never seen this document before. If this was such a major issue, the
7 overlap between the instructed experts and the evidence of Mr Raff, why is this the
8 first time we are hearing about it? My friend put in an application. He then put in
9 a Reply. There was no mention of any of this.

10 I note, looking at the paragraphs he referred to, 1.13 to 1.14, that they fall under the
11 heading "Methodologies in relation to pre-Decision period abuse". They are only
12 concerned with the pre-Decision period, whereas Mr Raff's analysis is not so limited.

13 THE CHAIR: Well, whether or not this was evident before, the reality is, it seems to
14 me, you, or at least those instructing you, will know what it is that Mr Hunt is planning
15 to do.

16 MR WEST: Yes.

17 THE CHAIR: If he's planning to do traffic analysis, then it seems to me, subject to
18 what you may say, of course, that, on this particular point, Mr Pickford is right that it's
19 then not for the witness of fact to give his own analysis of traffic when it's going to be
20 done by your expert and effectively then being done twice or differently, or if it could
21 be done by your expert, whether it's a case of effectively handing over this analysis to
22 Mr Hunt so that he considers it, and either includes it in his report or not, that's a matter
23 for him, but it seems to me it can't be right that we have a traffic analysis for Mr Hunt
24 and we have also Mr Raff producing a traffic analysis. And that is something that
25 possibly can't be established today but as a matter of principle, that seems to me the
26 correct position.

1 MR WEST: Well, I'll have to be given an opportunity to investigate exactly what
2 Mr Hunt is doing but my principle submission is that what he will not be doing is
3 investigating how penalties operated as a technical matter. He may be looking at the
4 effect of penalties on traffic, but what Mr Raff is intending to demonstrate is how
5 penalties operated so as to generate the rankings that they did and he explains in his
6 evidence how it is that they operated, for example, in relation to long-tail queries.

7 That's a matter, in my submission, which Mr Hunt is unlikely to be addressing.
8 Otherwise, as I say, I'll have to take instructions on precisely what he is addressing.

9 THE CHAIR: But certainly, on a very quick read -- and you've probably read it much
10 more thoroughly than I have, (inaudible) section 3.2.5 is not really looking at anything
11 about penalties. It's drawing a conclusion about penalties but what it's actually looking
12 at is traffic patterns as between Foundem and another site and tabulating them
13 graphically.

14 MR WEST: The focus of that analysis is to demonstrate the effect of penalties to which
15 Foundem was the subject upon its traffic, compared with a rival service which does
16 not appear to have been penalised. So again, it goes to the effect on traffic of penalties
17 and how penalties operated.

18 THE CHAIR: Yes, but I think that's also possibly what Mr Hunt is going to do, certainly
19 in the pre-Decision period, and whether he's going to do it in the Decision period.
20 Mr Hunt plans to test the impact of relevant demotions on traffic. Well, demotions is
21 a form of penalty.

22 So at the moment it's not very clear but as a general point of principle, if these are
23 analyses of the kind Mr Hunt is planning or indeed no doubt already working on, then
24 they should be done by him and, indeed, not only is it potentially oppressive to Google
25 in more practical terms, it's disproportionate and doesn't necessarily help your client
26 for it to be done separately by him.

1 MR WEST: I see that but --

2 THE CHAIR: And at the moment, I don't know and I'm not sure you do what exactly
3 Mr Hunt is planning to do, but that seems to me a general point which can be clarified
4 over the next week.

5 MR WEST: I'll have to clarify that. I can't make any more submissions on that specific
6 point.

7 THE CHAIR: Yes. And on the other point been mentioned, we've heard the reference
8 to that. Yes.

9 MR WEST: Can I then briefly address the question of the "expert evidence", if I can
10 put that in inverted commas, the application applies. There is a terminological issue
11 about how one describes the opinion evidence in Mr Raff's statement, because one
12 can define the term "expert evidence" as simply referring to expert reports of
13 independent experts. Equally, the term can, I think, be used accurately to refer to the
14 evidence of a factual witness, which is adduced under section 3(1) of the
15 Civil Evidence Act and so the question of which terminology one uses is in a sense
16 irrelevant because one has to decide the point as a matter of substance.

17 We looked earlier at the Practice Direction, if we can just turn that up briefly, at
18 paragraph 3; that's Bundle 9A, tab 7. My friend took you to this.

19 THE CHAIR: Yes.

20 MR WEST: 3.1(1). In fact, 3.1(2), dealing with:

21 "the evidence as to such matters that the witness [...] would be allowed to give, in
22 evidence in chief if they were called to give oral evidence."

23 So what this allows Mr Raff put in his witness statement anything he could have said
24 in evidence-in-chief, in my submission. That is the link between the Practice Direction
25 and the question of admissibility because if the relevant evidence would be admissible
26 from the witness in evidence-in-chief, then equally he's entitled to put it in his witness

1 statement, in my submission.

2 That takes me to the Civil Evidence Act.

3 THE CHAIR: Well, there is a difference, isn't there? This is dealing with matters of
4 fact of which the witness has personal knowledge. It's not opinion evidence. It seems
5 to me there is two different stages of this. One is, is this admissible as a matter of
6 law? And that's the Civil Evidence Act and Practice Direction cannot change the law
7 and indeed the Practice Direction only applies in the CAT. The Practice Direction 57A
8 only applies in the BPC. It doesn't apply in the rest of the King's Bench Division.

9 So where admissibility is more fundamental, on the question of whether your client
10 could give opinion evidence on matters which are within his expertise and whether
11 that would be admissible as a matter of law, I am with you, and you needn't address
12 me on that. I've heard Mr Pickford's submissions on that. Provided he has got the
13 expertise and seeing what he has said in his witness statement, it seems to me that
14 he does.

15 There is a quite separate question of how the practice of -- and the Practice Direction
16 allows for, as 4.2 makes clear, that you can depart from it. Well, you can't depart from
17 it if it's not admissible as a matter of law. So it would allow you to ask and say, "Well,
18 in this case, we're not going to call an expert on search engine optimisation or
19 algorithmic operation, it's too expensive, or we couldn't find one, or nobody wants to
20 give evidence against Google or whatever so we wish to do it through the evidence of
21 Mr Raff, who's very experienced, and to ask, therefore, for permission to vary from the
22 Practice Direction." You could have done that but you didn't and it does seem to me
23 that quite a lot of his evidence, the challenged paragraph, is not matters of fact, it's
24 matters of expertise and opinion through his expertise, which therefore would require
25 a variation of the Practice Direction, which you could have sought and I don't know
26 why you didn't, but to say it does comply with 3.2, I find a bit difficult.

1 MR WEST: Well, my primary submission is that it does. If you're against me on that,
2 and the position is that we should have sought an exclusion or variation of the terms
3 of the certificate of compliance, then, in my submission, the court can approach any
4 question of exclusion on the basis that the sanction to be applied is one for a failure to
5 seek a variation of the wording of the certificate of compliance. In my submission, if
6 the Tribunal is of the view that it would have granted that application, or may well have
7 done, that would clearly be relevant to the sanction to be applied.

8 But, in my submission, it would be surprising if the effect of this Practice Direction is
9 that a whole category of admissible evidence, all evidence admissible under the Civil
10 Evidence Act of 1972, is automatically in breach of the Practice Direction, unless some
11 exclusion is sought or applied for.

12 There is an equivalent -- there is an authority addressing not this point specifically, but
13 a similar point in that in the High Court and that's the MAD Atelier case. Might just be
14 worth briefly looking at. Bundle 9B.2, tab 11.

15 THE CHAIR: Yes.

16 MR WEST: So this was an application of the High Court alleging breach of the
17 Practice Direction 57AC and the background to the case, which is set out at
18 paragraph 5, is that this was a joint venture agreement for the development of
19 a number of restaurants, under the brand "L'Atelier de Joel Robuchon". The claimant
20 said that it had been deprived of the benefit of the joint venture.

21 One of the questions that arose is whether the restaurants which were to be developed
22 by the joint venture, would have been successful and some of the existing employees
23 of the restaurant as it existed, gave evidence as to whether, in their view, it would have
24 been a success. That's described at paragraph 5. That was objected to by the
25 claimant on the ground that it was in breach of the Practice Direction. You see that at
26 paragraph 2.

1 The question arose and was addressed at paragraph 8 as to whether the Practice
2 Direction changed the law as to the admissibility of evidence or overruled directions
3 given by previous authorities and the judge, Sir Michael Burton, held that it did not.

4 He said at 9:

5 "I agree with Mr Dhillon that the new Practice Direction does not change the law as to
6 admissibility of evidence or overrule the directions given by previous authorities,
7 including in the Court of Appeal, as to what might be given in evidence.

8 "[He says] There is support in those authorities ... for such hypothetical evidence as to
9 what would or could have happened ... being evidence as to matters of fact, and hence
10 falling within 3.1(1) of the Practice Direction.

11 "Mr Hayman did not refer to 3.1(2), which I have included in my citation
12 above ... which ... makes it clear that in addition to matters of fact the witness
13 statement may include evidence which a witness 'would be allowed to give in evidence
14 in chief if they were called to give oral evidence at trial'. Hence the test is one of
15 admissibility.

16 "Reference in witness statements to documents does not necessarily amount to
17 'commentary', because paragraph 3.2 of the Practice Direction requires identification
18 of documents to which the witness has been referred for the purpose of giving
19 his statement.

20 "The 'sanction' ... is in any event discretionary."

21 The judge goes on to say:

22 "I shall therefore address the questions raised by Mr Hayman by reference to the
23 authorities upon which Mr Dhillon has relied, [that is, the authorities on admissibility]
24 which I do not regard as overtaken by the new Practice Direction. The Practice
25 Direction is obviously valuable in addressing the wastage of costs incurred by the
26 provision of absurdly lengthy witness statements merely reciting the contents of the

1 documentary disclosure and commenting on it, which is expressly abjured by the
2 statement which is now required under paragraph 4.1 ... But it was not in my judgment
3 intended to affect the issue of admissibility."

4 He then goes to the Civil Evidence Act 1972 and addresses the authorities on
5 admissibility. Then in the conclusion at 13 on page 250, he says:

6 "The evidence by the Claimant's witnesses, which Mr Hayman seeks to exclude, may
7 turn out to be self-serving or unreliable, particularly if not supported by documents, but
8 is not in my judgment inadmissible and is either itself factual evidence or evidence of
9 opinion given by those with knowledge of the facts and by reference to the factual
10 evidence which they give ... It does not seek to get round the absence of expert
11 evidence ... but rather enables the independent expert evidence to be better tested.
12 I have read the passages in question and I am satisfied that they are all admissible
13 and should not be struck out."

14 What is notable there is that it doesn't appear to have been suggested anywhere that
15 in order for this expert evidence to be admitted under the Civil Evidence Act, the
16 claimant had to require an exemption from the requirements of the Practice Direction.

17 Instead, having come to the conclusion that the law and the admissibility was not
18 changed by the Practice Direction, the Practice Direction was simply put to one side.

19 The question was addressed as one of admissibility. So in my submission, this
20 judgment suggests that there is no prohibition, certainly in the High Court Practice
21 Direction, and I would suggest the position must be the same in this Tribunal upon
22 a factual witness statement, including evidence which is properly admissible under the
23 1972 Act, and that there isn't any requirement to obtain a derogation in order to do
24 that.

25 The basis for that is the one that I suggested previously, namely that the Direction
26 allows the witness to give evidence he could have given in evidence-in-chief, and that

1 that same provision ... (Pause)
2 It might just be worth looking briefly at the material which it sought to exclude, just so
3 the court has a flavour of the type of material at issue, not by way of cherry-picking,
4 but just so the court has some understanding of what the material is which Google is
5 seeking to exclude. As I say, one topic addressed by Mr Raff is the operation of search
6 penalties. Bundle 4, tab 1 at paragraph 107.

7 THE CHAIR: Paragraph ... you say 107?

8 MR WEST: 107. He gives what he says is his account of Google search penalties
9 and how they operate; their impact on affected websites. He says that is based on
10 a combination of his first-hand knowledge of these matters and knowledge he has
11 acquired or deduced over time from documents and data in disclosure. So it is
12 a combination of what he knows and what he has learned over time, including from
13 the disclosure in this action. I say that if Mr Raff's evidence is admissible as expert
14 evidence, then he is entitled to refer to Google's disclosure in a way that wouldn't be
15 permissible in the case of an ordinary factual witness.

16 One can see this, the fact that it includes both matters personally known to him and
17 that matters he has subsequently learned, for example from paragraph 126 on
18 page 51, where he sets out screenshots from September 2009 and December 2009,
19 which capture Foundem's pre- and post-whitelisting Google search rankings for
20 certain long-tail queries.

21 Now, these are clearly facts known to Mr Raff at the time, because these are
22 screenshots showing Foundem's rankings in 2009. So these are matters I would say
23 which are personally known to him. Clearly, what is not personally known to him is
24 how Google's penalties operated so as to generate those results, and that is what he
25 analyses in his evidence.

26 One of the factual issues to which all of this goes is whether Foundem continued to be

1 subject to a penalty between its whitelisting from Algorithm A in 2009, and it's been
2 subject to the Panda penalty beginning in, I believe, 2011. There was a dispute
3 between the parties as to whether some other penalty applied over that period, and
4 that is a matter addressed by Mr Raff by analysing the rankings which Foundem
5 obtained and seeking to explain why those rankings suggest that there was a further
6 penalty which applied over that period.

7 THE CHAIR: He does give opinion evidence.

8 MR WEST: Yes.

9 THE CHAIR: And 3.2 of the Practice Direction says you must set out only matters of
10 fact which the witness has personal knowledge. (Pause)

11 MR WEST: 3.1(2) also allows them to give evidence which he would be asked by the
12 relevant party to give and would be allowed to give in evidence-in-chief.

13 THE CHAIR: What you say is that 3.2 qualifies 3.1(1) and it's relating to that; not the
14 totality. Is that the point?

15 MR WEST: That's what I said --

16 THE CHAIR: Yes.

17 MR WEST: -- and that's what MAD Atelier appears (inaudible). In my submission, it
18 would be very peculiar if it were otherwise. It would be most peculiar if, in order to
19 provide perfectly admissible evidence, a party had to obtain an exemption or
20 qualification from the application of the Practice Direction.

21 THE CHAIR: Well, any variation of the Practice Direction to allow something in that's
22 not covered by the Practice Direction can only be matters that are admissible. You
23 couldn't vary the Practice Direction and allow something in that's not admissible, as
24 a matter of law. So I'm not sure that necessarily goes anywhere. But as I understand
25 it, what you say is, well, that variation would be to allow, for example, taking the
26 Tribunal through all the documents or potentially arguing the case or whatever.

1 MR WEST: Or possibly the (inaudible) Practice Direction about how the statement
2 should be drawn up.

3 THE CHAIR: Yes, but -- and that's what you say the MAD Atelier case covers. Yes,
4 I see. That deals with, on that view, all the sections that are opinion evidence.

5 MR WEST: Indeed.

6 THE CHAIR: Which I think you accept: there is quite a bit that is opinion evidence.

7 MR WEST: I do accept that, yes.

8 THE CHAIR: Yes.

9 MR WEST: There's nothing wrong with that, it's allowed by the 1972 Act, and
10 therefore, it's open to Foundem to produce such material to adduce such evidence.

11 THE CHAIR: Yes. That's the expert part of it. But the other objections are, as you
12 know, to matters that really are submission. As I indicated -- and I, for that reason, cut
13 Mr Pickford short on that -- it did seem to me quite a bit of both statements, and
14 particularly Ms Raff's statement, but also Mr Raff's statement to a lesser extent, which
15 are really argument; all pure speculation.

16 MR WEST: Much of the material which is attacked under this heading -- so not the
17 expert material -- is, we say, permissible references by the witness to documents that
18 he or she saw contemporaneously. I don't, with respect to my friend, accept his
19 submission as to what the test is. In my submission, if a witness saw a document
20 contemporaneously, it is within their knowledge and experience, therefore they are
21 entitled to give evidence about it under the Practice Direction, particularly, for example,
22 where the witness was the author of the document where the document explains
23 actions that the witness took or did not take.

24 Many of the examples of material which it sought to strike out that consists of material
25 of that kind. Could I just show you one example. It's in Ms Raff's statement which is
26 Bundle 4, tab 3, starting at page 290. (Inaudible) page 21, at page 310 of the bundle.

1 You'll see what this passage describes. It describes that Ms Raff submitting
2 a reconsideration request after Algorithm A had struck the site --

3 THE CHAIR: Well, can I interrupt you? This was what I was indicating to Mr Pickford,
4 that saying, "We wrote; we got no reply. We then wrote again; we got no reply", seems
5 to me quite unobjectionable.

6 MR WEST: Well, I agree, but a lot of that material is subject to this application.

7 THE CHAIR: Well, some of it is. And some of it, then -- even here, there's a gloss put
8 in. If you go to paragraph 49, in the end of this section, it says -- and this is not
9 confidential, I think:

10 "None of Foundem's reconsideration requests ever received any kind of
11 acknowledgment or response from Google. [Full stop.]"

12 That's fine, it seems to me.

13 Then, there's a commentary and an argument of submission in the next sentence. So
14 that's the kind of thing that you would say in addressing the Tribunal.

15 MR WEST: Well, I don't know about that. This is an allegation which is still pursued
16 by Google. Google says in its Defence that Foundem failed to pursue the proper
17 reconsideration channels. That's an allegation of fact which the witness is entitled to
18 answer, in my submission.

19 THE CHAIR: Well, she has answered it, but she's now going on to make the argument,
20 saying, "Well, we did all this, so that allegation is wrong". I mean, that seems to me,
21 effectively, submission. That's what you would say. You would say, "Look at all what's
22 said in paragraph 48. Therefore, this allegation, we submit, is incorrect". So that
23 seems to be getting into arguing the case.

24 Now, that wouldn't be of concern if it was only that part of paragraph 49; that's
25 a relatively minor example. But there do seem to be quite a number of points where
26 Ms Raff does get into arguing the case or speculating as to what Google was doing or

1 thinking, and that seems to me to be inappropriate.

2 MR WEST: Well, it may depend that if Foundem's understanding of what Google was
3 thinking impacted upon what Foundem then decided to do.

4 THE CHAIR: But her speculation about what Google was thinking, that's not evidence
5 of fact.

6 MR WEST: An example of that would be at 74.

7 THE CHAIR: Now, 74, I think is, from memory, about her state of mind; is it? (Pause)

8 MR WEST: She says what she thought Google's understanding must be, and in light
9 of that, she decided that they had to do one of two things, which they then proceeded
10 to do. In my submission, it is acceptable for the witness to explain in that way what
11 their decision-making process involved, even if it did involve an analysis of what she
12 thought other people were believing or were doing.

13 THE CHAIR: But if you look at paragraph 82, where she's giving her belief about what
14 she thinks Google was doing internally, that's just speculation. (Pause)

15 Similarly, paragraph 117. The suspicion, so her speculation of what -- that's not
16 evidence of fact. As I say, there are a number of examples of that. (Pause)
17 I think it's only a part of the many aspects here which are objected to, but there are
18 a number of places where it did seem to me that she is really speculating about what
19 Google was doing, and that's not evidence of fact.

20 MR WEST: Your Lordship said there are a small number of examples which fall into
21 that category.

22 THE CHAIR: Yes.

23 MR WEST: That's one thing. But in my submission, it does not justify the very much
24 larger application which has been launched here, which does cover a number of other
25 paragraphs which Google now appears to accept are unobjectionable, such as
26 referring to contemporaneous documents. (Pause)

1 THE CHAIR: The other thing: there's a long section toward the end where there's
2 extensive narrative from documents which is of the kind that the Practice Direction
3 seeks to avoid, or paraphrasing of long documents.

4 MR WEST: Again, as I say, these are all documents that the witness was (inaudible)
5 at the time, and in many cases, the documents themselves do not necessarily provide
6 the full context. For example, at paragraph 217, Ms Raff refers to points made in oral
7 submissions to the General Court. As I understand it, there are no transcripts for that.
8 So in order to fully understand submissions that Foundem made on that Appeal, it is
9 necessary to add that context.

10 THE CHAIR: Let's take that in stages, that section, because there's a lot in that whole
11 section about the Commission's investigation. Really, starting at going through the
12 Commitments and so on. Really, going back to around about 166 of this statement,
13 the Commission's investigation. Going through what happened in the investigation,
14 reciting in 167 from a document from the Commission -- oh, no, sorry. Google's Reply
15 to Foundem's Complaint. Long recitation of 167, over about two pages.

16 I mean, that's exactly the sort of narrative -- those documents will be before the
17 Tribunal, where the Practice Direction is saying: don't put in long narrative quotes from
18 documents because they result in very long statements which are not helpful. It's quite
19 enough to have the first sentence of that -- or the first two sentences -- and then you've
20 got all the Commitments; I'm not even sure why that's relevant, because, as she goes
21 on to state, the Commitments were in the end not accepted.

22 MR WEST: That's correct. But Google contends in its defence that the Compliance
23 Mechanism has somehow been approved by the Commission because the
24 Commission didn't bring infringement proceedings in relation to the Compliance
25 Mechanism. So the point the witnesses here are making is that the Commission
26 cannot have approved the Compliance Mechanism because it is, in substance, the

1 same as certain Commitments offers that Google made, which weren't accepted by
2 the Commission. Now --

3 THE CHAIR: If all that's being said is Compliance Mechanism is the same as certain
4 Commitments, that were not accepted, the Commitments documents will be in
5 evidence; the Compliance Mechanism will be in evidence; so that's a submission.

6 When you say it can't have been approved, that's exactly a piece of submission, isn't
7 it? It's not for a witness of fact to be saying that.

8 MR WEST: Well, (inaudible) it's within her personal knowledge.

9 THE CHAIR: Well, it's not her personal knowledge why the Commission accepted the
10 Compliance Mechanism; it's only in the Commission's knowledge. She can speculate.

11 MR WEST: The fact that the Commission didn't accept the suggested Commitments
12 is a matter within her personal knowledge. If none of that --

13 THE CHAIR: Well, that's a matter of record that the Commission didn't accept the
14 Commitments, and the Commitments proposed is a matter of record. What she's
15 saying is here are details of the Commitments; she's just reciting from documents.

16 Then she says, "The Commission didn't accept them". Well, she doesn't have to give
17 personal evidence of that because that's well known. Indeed, I think it may even be
18 in the Decision that there were various discussions on Commitments at various stages.

19 Then the Compliance Mechanism is in the Decision. If what she's doing is saying,
20 "Well, as a result of that, I consider that the Commission could not have accepted the
21 Compliance Mechanism as resolving the matter", that's a submission.

22 MR WEST: That is a submission.

23 THE CHAIR: It's not evidence. It did seem to me that the whole of that last section,
24 until about the quote from the General Court is just what we're seeking to avoid in
25 these witness statements. It's all matters that you can say to this Tribunal at the trial.

26 MR WEST: In my submission, that doesn't mean it's automatically excluded from the

1 witness statement evidence, if it consists of matters within the witnesses' knowledge.
2 If it's not disputed that the documents say what they say, then none of this will be in
3 dispute.

4 THE CHAIR: Well, it may not be in dispute, but when the idea of the Practice Direction
5 is that it's not the function of the witness, either to argue the case or to take the Tribunal
6 through the documents in the case, that's exactly what it seems to me this section is
7 doing. I don't think, frankly, Foundem needs it, because it's all there, and it shouldn't
8 have been put in a witness statement. It just is not what the function of these witness
9 statements is to do.

10 MR WEST: In my submission, the authorities to date, under the Practice Direction are
11 generally concerned with the case where the witness has gone through the opposing
12 side's documentary disclosure. That is clearly something that the Practice Direction
13 was concerned to limit or avoid.

14 Here we are concerned with documents which are within the witnesses' knowledge.
15 I've obviously heard what your Lordship has to say. In terms of how we address the
16 individual paragraphs, as I understand it, your Lordship has in mind that the parties
17 should seek to agree a list of which paragraphs fall within each of the categories of
18 objection which my friend raises, and your Lordship can rule on those by category, if
19 possible, or on an individual basis.

20 THE CHAIR: Yes.

21 MR WEST: So it may serve little purpose to go through each of the individual
22 paragraphs at the hearing in this way.

23 THE CHAIR: No, I just want to I don't want to go through it paragraph by paragraph,
24 which would not be proportionate or sensible or practicable, but to get just your
25 submission on the point I'm making, namely that under this category, it seems to me
26 that is what the Practice Direction is seeking to exclude, and avoid lengthy witness

1 statements that quote extensively from contemporary documents or say things which
2 are "extensively" from matters that are public record. Not because it's controversial,
3 but just because it produces excessively long witness statements and leads to
4 cross-examination of the witness and matters that really don't fall within the scope of
5 cross-examination.

6 If there is an argument about the effect of the final remedy or Compliance Mechanism,
7 then that is submission. The fact that your client's director agrees with the submission
8 doesn't mean that it therefore goes within the witness statement. She may agree with
9 a lot of your advocacy -- you would hope she does -- but that doesn't mean she puts
10 it in a witness statement.

11 MR WEST: I hear what your Lordship has to say. In relation to the Compliance
12 Mechanism, there may also be factual aspects to that, i.e. what is the difference
13 between, as a matter of fact, the Compliance Mechanism and the infringement, or
14 between the Compliance Mechanism and the offers of Commitments. Those are
15 matters really, which Mr Raff has briefly addressed. Those would fall within the expert
16 evidence part of the application.

17 THE CHAIR: That's a somewhat different point.

18 MR WEST: I'm not sure I can take that any further. I've heard clearly what
19 your Lordship has said, that even if this material or some of it is removed, these are
20 all points that can be made in due course, in my skeleton arguments and in
21 cross-examination.

22 THE CHAIR: Yes. And I think when objection is taken to parts of the witness
23 statement as being advocacy, it's almost accepted that it could be your advocacy, but
24 it shouldn't be in the witness statement.

25 MR WEST: Well, it's my submission that the two are not necessarily mutually
26 incompatible. Something can be both a matter of record within the witness's

1 knowledge and a proper matter of submission. But I understand your Lordship to be
2 broadly against me on that submission.

3 THE CHAIR: Yes, I am, because I think argument on what conclusions or inferences
4 can properly be drawn is distinct from what is factual matter within the witness's
5 knowledge. It's her view, but it's not her knowledge.

6 As I say, I did find there are a number of areas where there is both unnecessary and
7 extensive recitation of fact and areas where there's speculation which, it seemed to
8 me, is inappropriate.

9 I mean, just to give you an example, if we go back to paragraph 138. (Pause)

10 That is objected to, but it seems to me it's a statement of fact about what Ms Raff and
11 her husband did at the time, and she's reciting fact. That seems to me therefore
12 entirely proper.

13 139 goes on to speculate as to what the Commission might have done if they had
14 known something which she thinks they didn't know. That seems to me speculation,
15 and not evidence of fact. That's the sort of distinction that I'm making.

16 I don't have a problem with 138, but I do have a problem with 139. That brings out the
17 distinction that I'm trying to make.

18 Similarly, if you look at 147. That's objected to in its entirety, but the first two sentences
19 are statements of fact: what happened -- which I think, Ms Raff is saying, she knew at
20 the time; they were aware of that -- the last sentence is speculation. She says it's
21 speculation. That's the difference.

22 MR WEST: I understand. The position we have reached is that provisionally of the
23 view that some of the objections are justified and others are not. My concern is how
24 we proceed from here: try and reach a resolution on all of the matters in dispute?

25 THE CHAIR: I think your original proposal was that this should be determined on the
26 papers. I think that was Foundem's original proposal. I think it's been helpful to have

1 an oral hearing. There have been some important issues of principle, especially on
2 what we can loosely describe as expert opinion evidence, namely, evidence that
3 clearly could have been provided by an independent expert, but which Foundem has
4 chosen to do through Mr Raff in particular -- in fact, only through Mr Raff; I think it's
5 not suggested that Ms Raff does that -- on which Mr Pickford's made extensive
6 submissions, and you have responded.

7 That's been very helpful, and I'll need to rule on that. That will cover the significant
8 area of the objections to Mr Raff's statement.

9 Then separately, there's objection on grounds of matters being speculative or
10 advocacy.

11 Thirdly, there's objection on the grounds, not that this necessarily embarrasses
12 anyone, but that it's contrary to the Practice Direction to have long extracts from public
13 documents, or indeed any documents, or long paraphrases of documents, because
14 that's what the Practice Direction is clearly seeking to avoid.

15 This Tribunal, like Business and Property Courts, was getting fed up with very long
16 witness statements that quote extensively from correspondence or documents that are
17 all going to be in the bundle. There are various categories of objection, and I think
18 we've identified them.

19 When I have your respective lists within the different categories, I can then
20 produce -- and I'll do it certainly next week because you will need to have it
21 quickly -- a list of paragraphs that should be excised. Therefore the statement
22 reserved, or which can stand, that is subject to the point about the traffic analysis,
23 where, if this is a matter that is going to be covered by your expert, then I think
24 Mr Pickford is right, that it's not appropriate. That it should be done also supplemented
25 by further analysis or alternative analysis or whatever, in your client's witness
26 statement.

1 That's something you're going to clarify over the next few days. So that I think is where
2 we've got to.

3 MR WEST: Can I just take instructions in case there are any (inaudible).
4 Can I just clarify what your Lordship has in mind, both in terms of content and timing
5 for the respective lists to be provided of the paragraph numbers. Does your Lordship
6 have in mind that that should reflect the existing schedule, or do the parties have the
7 right to change their positions as set out in the schedule?

8 THE CHAIR: I don't really mind whether it's reflected or not; I just want on the heading
9 of, "Expert evidence" in quotes. It's the following paragraph on the heading of
10 "Advocacy speculation", following the heading of, "extensive narrative", following
11 paragraph.

12 MR WEST: That will be Google to produce that and then Foundem would --

13 THE CHAIR: I think Google to produce it probably first and Foundem.

14 MR PICKFORD: What we'd anticipated, in fact, was to prevent you from having to go
15 and look at the same paragraph twice, because sometimes they're intermingled, is
16 we'd have a list of paragraphs and then a sort of table which like ticks, effectively, "Like
17 this is the problem with this one", "These two are the problem with this one", et cetera,
18 but whatever. I mean, we're in your hands, so whatever's most convenient.

19 THE CHAIR: Well, I think it will achieve the same result.

20 MR PICKFORD: What we'll do is, I think, we'll probably aim for that initially. If it looks
21 like we could simplify it and make it easier for the Tribunal by doing it the other way
22 round that you've suggested, we'll do that. We'll consider which one ultimately is going
23 to be easiest.

24 THE CHAIR: I think there's no alternative, regrettably, from my point of view, to me
25 then going through them paragraph by paragraph, basically saying yes, no, rather like
26 in our recitals, binding recitals judgment, where we set out some general principles

1 and then we listed all the paragraphs that were relevant, as it were.

2 MR WEST: Well, it may be that in light of the guidance you've helpfully given, the
3 position between the parties, the dispute can narrow to some extent, yes.

4 THE CHAIR: I mean, you may agree what goes in which category, even if you
5 disagree whether it should be admitted or not.

6 MR WEST: If my learned friend disagrees that a particular paragraph in a particular
7 category, we should set that out in our box --

8 THE CHAIR: Yes.

9 MR WEST: -- whenever the deadline is for us to do.

10 THE CHAIR: Yes.

11 MR PICKFORD: So, yes. On deadline, originally, I hastily said that we'd get you
12 a document by Wednesday. Obviously, if it's a document that's got to go between us
13 before it goes to the Tribunal, it may be --

14 THE CHAIR: Well, if --

15 MR PICKFORD: -- we need it.

16 THE CHAIR: It's clearly desirable for everyone that you get this done quickly.

17 MR PICKFORD: Yes.

18 THE CHAIR: And I know you even wanted this hearing to be held last term, but that
19 wasn't possible. What would be a reasonable time for you to produce that, to send it
20 to Foundem?

21 MR PICKFORD: We can still produce our version by Wednesday.

22 THE CHAIR: Yes.

23 MR PICKFORD: And then perhaps if Foundem have two days in which to put their
24 bits in.

25 THE CHAIR: Yes, (inaudible) respond by the end of Friday.

26 MR WEST: Those behind me are asking to have until Monday, if that's at all possible.

1 THE CHAIR: Yes. Well, if that makes a big difference to you. For end of Monday.
2 Yes. I think that would be practical. And as I say, I don't need long arguments or
3 indeed any arguments about what goes where, because I can refer back to the
4 schedule where you set out your position on particular paragraphs.

5 MR WEST: And we also have to prepare a note about what Mr Hunt is looking at.
6 Should we also aim to submit that by Monday?

7 THE CHAIR: Yes. The traffic analysis. And I think I have made it clear and I'm not
8 sure you have particularly pushed back against that, that if he is going to do this sort
9 of thing, it's not right that Mr Raff should do it as well or in a different way.

10 MR WEST: I simply don't know, standing here --

11 THE CHAIR: Yes.

12 MR WEST: -- what the position is.

13 MR PICKFORD: May I make just a couple of very --

14 THE CHAIR: But I think you're entitled to reply, particularly on the MAD, however it's
15 pronounced.

16 MR PICKFORD: The MAD Atelier case.

17 THE CHAIR: Atelier case, yes.

18

19 Reply submissions by MR PICKFORD

20 MR PICKFORD: Well, so in particular, there were two points that I wanted to address
21 the Tribunal on. One was that there was a submission made by Mr West as to
22 a particular way in which 3.1(1) and 3.1(2) of the PD interacted and if I could respond
23 on that, please, first. That's at 9A, tab 7 and it's on page 117.

24 THE CHAIR: Yes.

25 MR PICKFORD: Our reading of the operation of 3.1 is different from Mr West's. So,
26 as I understood it, he effectively treats the "and" at the end of 3.1(1) as an "or" so that

1 you either got to have evidence that satisfies 3.1(1) or satisfies 3.1(2), I think.

2 THE CHAIR: (Several inaudible words) it can contain both?

3 MR PICKFORD: Well, in my submission, the way that it must work is this: that (2)

4 refers to "the evidence as to such matters" and so it's referring back to (1) and (1)

5 requires that the evidence is to "as to matters of fact that need to be proved at trial".

6 So what (2) is doing is narrowing (1) and putting a further condition on it. So the first

7 thing is it has to satisfy (1). It must be evidence as to matters of fact that need to be

8 proved at trial. And then secondly, by (2), it can only be as to such matters where the

9 witness would be able to give that or allow to give that evidence if they were giving it

10 in chief.

11 THE CHAIR: Yes, if you say "such matters" is the matters of fact referred to in (1).

12 MR PICKFORD: In (1).

13 THE CHAIR: Yes, I understand.

14 MR PICKFORD: So they're to be read cumulatively and the effect of (2) is to narrow

15 (1) and that answers Mr West's point that he says, "Oh, it doesn't have to be matters

16 of fact." It does.

17 The second point -- please stop me if I'm labouring it -- Mr West mischaracterised my

18 submission about the interaction between admissibility and the Practice Direction. He

19 did it previously and he did it in his submissions. Because the Tribunal may be writing

20 a judgment about this, I just want to be very clear what my submission is. He said that

21 my argument is that to be admissible, an exemption from the Practice Direction must

22 be obtained. That is not my argument. It's never been my argument. It's effectively

23 the wrong way round.

24 My argument is that step one is that the Practice Direction requires you to advance

25 Practice Direction-compliant evidence and that is evidence of fact. If you want to go

26 and produce something which is opinion evidence, then you need to get an exemption

1 from the Practice Direction under 4.2, as I said before, and as part of that, obviously if
2 you're relying on producing opinion evidence, it must be admissible opinion evidence
3 and so you also need to satisfy the common law requirements and section 3(1) of the
4 Civil Evidence Act 1972. That's how I say it works. And that's my submission and
5 that's what it's always been.

6 It was just those two points on this. I did also want to raise one matter, if I may, in
7 relation to tomorrow. I appreciate that --

8 THE CHAIR: Do you want to say anything about Sir Michael Burton's judgment?

9 MR PICKFORD: The MAD Atelier case? I don't really see that it takes us -- I mean,
10 it's in very different contexts. It was not really about the kind of expert evidence that
11 is being advanced by Mr Raff, which is, in effect, a substitute for an independent
12 expert. It was opinion evidence about a hypothetical, as I recall in that case, and it's
13 on very different facts and certainly what we have argued, which is the point that the
14 court addresses there, is that the PD changes admissibility. That's the whole point of
15 the submission I just made. The Practice Direction is separate from admissibility but
16 because section 3(1) is subject to it, it means that there are two matters that need to
17 be considered by a Tribunal: both the question of admissibility and secondly, how it
18 fits within the framework of the Practice Direction. And so I think the answer to
19 MAD Atelier is what was being argued in that is that the Practice Direction changed
20 the rules on admissibility and that, as I've sought to stress, is not our case. So that's
21 my answer in relation to MAD Atelier.

22 THE CHAIR: And on Mr West's other point, namely if, contrary to his argument, there
23 is non-compliance with the Practice Direction, he says, well then the court or the
24 Tribunal, by way of sanction, could now give permission to depart from the Practice
25 Direction and that would be one way in which it could deal with this matter if it felt that
26 was appropriate.

1 MR PICKFORD: I was addressing you on that before lunch. My position on that is
2 that there is a proper procedure that they should have followed. We followed it. When
3 we wanted to rely on a witness statement that we felt was never going to be able to
4 satisfy the Practice Direction, we jumped through the right hoops and so --

5 THE CHAIR: When you say, "We followed it ..."

6 MR PICKFORD: Google. So the evidence of -- I forget the name of the witness -- the
7 witness O'Callaghan was produced in response, I think, to a request from the Tribunal
8 prior to the introduction of the Practice Direction.

9 THE CHAIR: Yes.

10 MR PICKFORD: And, in particular, I think it was to do with a particular interim -- an
11 issue that arose at an interim hearing -- I'm afraid I don't have the details of it because
12 I don't happen to be involved in it -- but we explained why, strictly speaking, it was not
13 prepared in -- accordance with the Practice Direction but we were.

14 THE CHAIR: I thought you said it was before?

15 MR PICKFORD: Exactly. It was before. Exactly. Originally. But we have resubmitted
16 it for trial. Yes. And so because the Practice Direction now applies but it was prepared
17 in a pre-Practice Direction world, we made sure, as we were required to do, that we
18 made an application under 4.2. So my primary submission is Foundem were well
19 aware of the operation of -- Hausfeld are a very, very major international law firm.
20 They know how the system works.

21 THE CHAIR: So you did make an application?

22 MR PICKFORD: We did, yes, and it was granted by you, Sir, I think.

23 THE CHAIR: Yes, well, we do all sorts of things.

24 MR PICKFORD: Quite, quite, quite. Yes, yes. So, we did. We made -- and Foundem
25 were in fact aware of that application that we made in this case. The only reason I'm
26 referring to it is just to illustrate, it can be done. Foundem knew that was the practice

1 in this very set of proceedings.

2 THE CHAIR: Yes.

3 MR PICKFORD: Sorry. I've just been corrected. It wasn't a pre-Practice Direction
4 statement, but the Practice Direction didn't apply to it because it wasn't a trial
5 statement.

6 THE CHAIR: Yes, but it's now been submitted.

7 MR PICKFORD: But it's now been submitted and it's been approved because we
8 explained the context and we made the application. It's a very long-winded way of me
9 saying, Foundem know what the rules are. They're represented by a big firm and they
10 should have made the application. It's too late, at this stage, to be making an
11 application in the very hearing when they're at risk of having the evidence struck out
12 to say, "Oh, well, we'll make the application now". If they made the application, as
13 I said, before we would have an opportunity to ultimately seek to say to the Tribunal,
14 even if it did originally grant it, you shouldn't have granted that application because
15 here are the problems and we would have come to that hearing armed with responding
16 to that application.

17 It's not, in my submission, fair for Google to have to respond to an application that as
18 yet, Mr West hasn't even made. He's just saying, "Well, I would, in theory make it
19 were I required to do so". So that's my primary case. I just say it's too late.

20 If the Tribunal rejects that primary case and says, "Well, we're going to seek to try and
21 assist the Raffs here in some way", and I say that they shouldn't, the Tribunal
22 shouldn't, then it will obviously have to consider how it could fairly do what Mr West is
23 asking of it, which is to effectively grant the application at the same time as considering
24 our strike-out application and that might well mean hearing from us on what we would
25 need to do in order to respond to it. But in my submission, that's really all too late now.
26 We're in January. We've got the expert evidence deadlines coming up in February

1 and March. We're then into PTRs a month or so after that. We begin in June. We
2 shouldn't be having to worry about further areas of expert evidence that were not
3 previously canvassed before, is my submission.

4 THE CHAIR: Can I ask you this?

5 MR PICKFORD: Yes.

6 THE CHAIR: You've put in your evidence in response.

7 MR PICKFORD: Yes.

8 THE CHAIR: That includes, obviously, as there are only two witness statements from
9 the Claimants in response to those two witness statements.

10 MR PICKFORD: Yes.

11 THE CHAIR: Apart from the traffic analysis, which is a particular exercise, is it the
12 case that you have not responded to any of the paragraphs that you object to on the
13 basis that they should be excised?

14 MR PICKFORD: No, I think what we've done is sometimes provided very high level
15 responses to say -- so, for example, on the analysis of Google's penalties, we have
16 made some very high level comments to say, well, here's what we -- given the
17 constraints we're under, because we are providing PD-compliant evidence, and we're
18 doing it fast, because it's reply evidence.

19 THE CHAIR: Your people have direct knowledge of what Google was doing, because
20 you are Google.

21 MR PICKFORD: Yes, but what we haven't done -- sorry, so to be clear, what we
22 haven't done, however, is stepped back and thought, "Okay, well if we were to engage
23 in the kind of mathematical modelling exercise that Mr Raff engages in, what would
24 we do? How would we go about modelling this?"

25 THE CHAIR: No, I understand on the modelling.

26 MR PICKFORD: Yes.

1 THE CHAIR: But there are a whole other areas --

2 MR PICKFORD: Yes, to be clear --

3 THE CHAIR: -- aside from the modelling.

4 MR PICKFORD: To be clear, the modelling isn't the traffic analysis. The traffic

5 analysis is the part that begins [at] 3.2.5, from recollection. It begins with an analysis

6 of traffic per se. Then prior to that, and I think it's 3.2.3, there is a mathematical

7 modelling exercise of how Google's algorithms, and in particular penalties, take effect.

8 Not as regards traffic, but just in terms of in and of themselves. There's a whole

9 section there of mathematical modelling.

10 We have not responded to that in kind. We have not said, "Here is our position on the

11 true mathematical modelling that you would have to engage in if you wanted to do

12 what Mr Raff is trying to do". We've just made some extremely high-level comments

13 about the way in which our algorithms operate.

14 Now, had we stepped back in time, and had there been an application six months ago,

15 or 12 months, ago by Foundem for expert evidence, whether it's from them or from

16 whoever, on a modelling exercise of how penalties work, then we'd have had to

17 consider, there, "Well, do we agree that that's helpful, or do we think that that's really

18 unhelpful?"

19 We would have made submissions to the Tribunal about whether we were prepared

20 to agree to that area of expert evidence or not, and we would have probably said,

21 I imagine -- given that we don't haven't put in any evidence of our own on this -- we

22 don't think that's very helpful.

23 So we say, it's just really too late now to be trying to reconstruct a set of applications

24 that really should have been made in the past, responsibly, to this application, now.

25 THE CHAIR: Yes.

26 MR PICKFORD: The point that I wanted to mention for tomorrow -- is Mr West here

1 tomorrow?

2 MR WEST: Yes.

3 MR PICKFORD: Obviously, I'm conscious that the other Claimants are not here, so
4 I will make sure that they are aware of what I'm about to say. We have alerted the
5 other Claimants over the weekend to an authority that was in the bundle for this
6 hearing, that actually we say it would be very helpful for everyone to look at for
7 tomorrow's hearing.

8 It's hopefully going to make its way into your bundle, Sir, but if you don't mind, if I can
9 just mention what the authority is and where it is in this set of bundles. It's The
10 Leaflet Co v Royal Mail, and it's in 9B.3 tab 7, 257. I understand it has now made it
11 into the Day 2 bundle, so if you prefer to see it there, it's now actually in volume 5,
12 tab 11 of that.

13 We have alerted, over the weekend, all the other parties that we intend to rely on it.
14 I'm just drawing it to your attention, too, Sir, because we say it would be helpful for the
15 Tribunal to be aware of it.

16 THE CHAIR: While you're on the subject.

17 MR PICKFORD: Yes.

18 THE CHAIR: I think there are two quite separate aspects for tomorrow.

19 MR PICKFORD: There are.

20 THE CHAIR: One is the scope of trial 1.

21 MR PICKFORD: Yes.

22 THE CHAIR: And the other is amendment of defence.

23 MR PICKFORD: Yes.

24 THE CHAIR: What's the position on the amendment; is that still resisted?

25 MR PICKFORD: The position on the amendment is: substantively, it is not resisted at
26 all. There has been negotiation between the parties as to the particular conditions.

1 I can just turn around now to find out what I'm permitted to say on that, because I know
2 some of it's been without prejudice. My understanding is it's incredibly narrow what
3 remains between the parties on that.

4 THE CHAIR: Yes, that's just what I wanted to know.

5 MR PICKFORD: Can I just take very quick instruction? (Pause)
6 Yes, there is only one matter remaining, which is costs. Everything apart from costs
7 is now agreed on that. So that means, apart from costs, the only point for tomorrow
8 then in any substance is the scope of trial 1.

9 THE CHAIR: You can explain to me how the amendments got resolved tomorrow;
10 I won't try and work my way through the negotiations, and then to deal with costs, and
11 concentrate on the point about the scope of the trial, which is the main dispute. That
12 seems right.

13 MR PICKFORD: Indeed, it is.

14 MR WEST: If I could rise, Sir, I don't intend to make any more submissions, but I don't
15 agree with my friend's characterisation of his evidence in response. Mr Cutts's reply
16 evidence is in the bundle.

17 THE CHAIR: Yes.

18 MR WEST: I would invite the court to read it, and it does respond in detail to Mr Raff's
19 evidence. That, of course, gives rise to one question, which is: what would happen to
20 Mr Cutts's responsive evidence if Mr Raff's evidence were to go, and in my submission
21 it must follow that that evidence would go as well, although Google don't seem to have
22 accepted that.

23 THE CHAIR: Yes.

24 MR WEST: Also much of that evidence is, of course, evidence which could be
25 described as falling under the Civil Evidence Act, for which, of course, no exemption
26 was sought.

1 THE CHAIR: Yes.

2 MR PICKFORD: You want to hear me responsively on that, or ...

3 THE CHAIR: No, I will look at Mr Cutts's evidence in dealing with that point.

4 Very well, so you will be submitting to Foundem by the end of Wednesday, and by the
5 end of Monday, I'll receive something from both of you. I will do my best -- no
6 guarantee -- to get you a judgment by the end of next week.

7 MR PICKFORD: Thank you, Sir, I'm very grateful.

8 THE CHAIR: Thank you.

9 MR PICKFORD: I apologise. That's obviously going to be not the most enthralling of
10 the judicial exercises that you've done of late.

11 THE CHAIR: Well, we're sadly used to that.

12 (3.14 pm)

13 (The court adjourned until 11.00 am on Tuesday, 13 January 2026)

14

15

16

17

18

19

20

21

22

23

24