IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13th January 2026

Before:

Sir Peter Roth

(Sitting as a Tribunal in England and Wales)

BETWEEN:

INFEDERATION LIMITED ("Foundem")
KELKOO.COM (UK) LTD & OTHERS ("Kelkoo")
WHITEWATER CAPITAL LIMITED ("Ciao")
SKIMBIT LIMITED & OTHERS ("Connexity")

Claimants

- and -

GOOGLE LLC & OTHERS ("Google")

Defendants

A P P E A R A N C E S

Colin West KC (instructed by Hausfeld & Co. LLP) on behalf of Foundem
Daniel Jowell KC & Sarah Love (Instructed by Humphries Kerstetter LLP and Linklaters LLP) on behalf of Kelkoo, Ciao and Connexity (the "KCC Claimants")

Meredith Pickford KC & Brendan McGurk KC (Instructed by Herbert Smith Freehills Kramer LLP and Bristows LLP) on behalf of Google LLC & Others

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Tuesday, 13 January 2026

(11.00 am)

(Proceedings delayed)

(11.28 am)

THE CHAIR: I apologise to everyone for having had to delay the start of the hearing. A personal appointment that I had overran.

I should then, as always, remind everyone that these proceedings are being live-streamed. If it should be necessary to refer to any confidential material in the bundles, and I don't think it really will be, but if that's the case, the live stream will be paused. As usual, an official transcript of the proceedings is prepared, and it is strictly forbidden for anyone to make any unofficial recording of the proceedings or take any visual image of the live stream, and to do so is punishable as a contempt of court.

So, Mr Pickford, this is your Application.

The other thing I should perhaps say, because of the confidential material, I should make an order under Rule 102, paragraph 5, of the Tribunal Rules that the confidential material, although read by the Tribunal, may not be referred to or accessed by anyone without the Tribunal's permission.

Yes, Mr Pickford.

MR PICKFORD: Thank you, Sir. Just at the outset, on introductions, I should have been appearing here with Ms MacKenzie, but unfortunately, she's been taken rather ill and so at the last moment, Mr McGurk, King's Counsel, has stepped into the breach. That explains why we have two silks here today. It wasn't intended to be that way.

THE CHAIR: Well, I'm sorry to hear that.

MR PICKFORD: And of course, in terms of the new cast, we have Mr Jowell, King's Counsel, and Ms Love for the KCC Claimants.

THE CHAIR: Yes.

MR PICKFORD: We have two Applications today. One is in relation to a pleading amendment. The other is in relation to the scope of the Trial 1 and whether the Tribunal can properly, sensibly and fairly determine the post-Decision Counterfactual at that trial.

Application on pleading amendment by MR PICKFORD

MR PICKFORD: Now, I'm glad to say that on the pleading amendment, there is a very large degree of agreement. So if I could perhaps take the Tribunal through the order as it currently stands, or at least stood last night before some further movement on costs. That's to be found in the correspondence bundle 7, tab 38, and it is at page 132 and the substance of it is in fact on page 134.

THE CHAIR: Yes.

MR PICKFORD: So you'll see that it is ordered by consent that we'll have permission to amend in the form of the drafts that we have provided; that we will within one working day from the date of the order file and serve those amended defences; the Claimants will have 14 days to serve any consequential amended replies; there'll be a week's extension for the Claimants' expert only on his report and we will pay the reasonable costs occasioned by the amended defences, such costs to be assessed, if not agreed.

Now, in relation to costs, we have a fully agreed position on costs with Kelkoo, with Ciao and with Connexity. And, in summary, we are paying 60 per cent of the total costs that they have claimed. That includes costs that were thrown away by work that they had done in relation to matters prior to the amendment. It includes the costs of the Application and it includes the costs of repleading. So we have complete agreement with those Claimants in relation to the entirety now of this part of the Application.

THE CHAIR: It's agreement to pay 60 per cent of the costs claims (overspeaking)?

MR PICKFORD: Of the costs claims and there are costs schedules. I mean, it is quite complicated. I don't need to take you through it because there's agreement on it.

THE CHAIR: Yes. So it's not 60 per cent of costs to be assessed, it's 60 per cent of a particular figure in each case.

MR PICKFORD: That's correct, yes.

THE CHAIR: Yes.

MR PICKFORD: I haven't worked it out because it only happened this morning, but a sum could be calculated.

THE CHAIR: Yes.

MR PICKFORD: Unfortunately, that is not Foundem's position. The Claimants collectively, and so Foundem now alone, made an application for indemnity costs against Google and it hasn't been willing to accept what the other Claimants have been willing to accept in terms of the 60 per cent that we have offered. I will obviously address the Tribunal in relation to that application, but it seems probably sensible, given that's the only point now remaining on that and it is Foundem's application, if Foundem want to make the application first and I can respond to it.

THE CHAIR: Yes. If you want to do that now or do you want to do that at the end?

MR WEST: I think it might be better to do it at the end, but --

THE CHAIR: That'd be sensible, Mr West. I don't think it affects anybody else. Where is the amended defence?

MR PICKFORD: Yes. So the amendment, let me show you the amendment. So that's in Bundle 1, tab 5, at page 24. 24 first, it's actually in a couple of places, but let me take you through it, if I may.

THE CHAIR: It's essentially the same form of amendment in each section.

MR PICKFORD: There were two amended aspects. The post-2008 Counterfactual is

identical in all of the claims, and that's what I'm going to show you first. Then there's a unique amendment for Foundem which is pre-2008 because it is Foundem that uniquely amongst the Claimants has a pre-Decision claim.

THE CHAIR: Yes.

MR PICKFORD: I'm going to show you -- the common amendment first begins at paragraph 3A.11.1. That's about three-quarters of the way down on page 24. It begins, "As regards the Counterfactual from 2008 onwards". And you'll see we've struck through the words “first, of product universals and then second, of shopping units", and we've replaced that with "of a specialised shopping box".

Just to explain what's going on here: what we originally had for the Decision period were two Counterfactuals. First, we had a Counterfactual in relation to the Product Universal period and then we had a different Counterfactual in relation to the Shopping Unit era. What the amendment does is, in effect, transplant the second of those Counterfactuals across the whole of the Decision period. So whereas we had two before, we now have one and it's the Counterfactual that we'd pleaded previously, in relation to the entirety of the period. That is in essence what the changes that I'm about to show you achieve.

If one goes over the page, you see at the top of the page, we strike through the original plea in relation to 2008 to 2013. That was the Product Universal era period and in subparagraph 2 of that section, we then replace "2013" with "2008". So we're now introducing the second Counterfactual across the whole period. There is a small clarification, it’s the same or materially the same as the Remedy. Then there's just some tying up loose ends in 3A.11.4, which refers back to the changed paragraph. So that's it. It represents a simplification of the issues for trial because there's no longer any difference across the whole of the period.

THE CHAIR: And then that's consistent, I suppose, with what you say for the

post-Decision period where you say, given the Remedy, there's no longer any abuse.

MR PICKFORD: It is. It's consistent with that. Exactly. So we've streamlined our case --

THE CHAIR: Yes.

MR PICKFORD: -- to something which we consider makes more sense than it had previously. We accept that our previous Counterfactual was not, in particular, consistent with the certain findings that had been made when one puts them all together, from the Preliminary Issues Judgment.

THE CHAIR: Yes.

MR PICKFORD: That's that. Then the first part of the amendment, which applies to Foundem only, one finds back on page 21, at the bottom of page 21.

Prior to this amendment, we didn't have a Counterfactual that expressly dealt with the pre-Decision period. We were struggling given that we considered there was confusion about what it really was that was being argued for that period and whether certain bits were going to be let in or not and articulating that. Obviously, we won the strike out application. We reconsidered and thought, okay, we can now properly plead a Counterfactual and that's what we've done. And so that responds to what are now the two remaining elements of Foundem's pre-Decision case. They have quite a discrete case now. They have the claim that the application of algorithms was discriminatory and we plead back to that.

THE CHAIR: Yes.

MR PICKFORD: And what we say, in essence, is, well, I mean, we obviously deny the allegation, but we said, well, if we're wrong about all of that and it's all found against us, then we wouldn't have given up on the algorithms. We would just have sought to find some way to apply them equally to ourselves, even though we deny, in fact, that they would be applicable to ourselves. So this is in a counterfactual world where we

have lost on our factual argument. One sees that at the top of page 23. It's the sentence right at the top there. It begins on the previous page but we say:

"Google would not have ceased to operate Algorithm A (and/or manual adjustments) but would instead have, insofar as relevant, applied Algorithm A (and/or manual adjustments) to both its own CSS as well as other CSSs."

But very, very heavily caveated prior to it, by saying this isn't a factual world that we believe in. This is being effectively forced upon us, as it were.

Then the second aspect of Foundem's claim for the pre-Decision period is, they say, "Even put aside discrimination, we just say the algorithms in and of themselves should not have been applied. They were problematic in and of themselves." And so we respond to that at the top of page -- sorry, I said top of it, 24 I think I've just read, unless I'm getting --

THE CHAIR: You read 22/23.

MR PICKFORD: Oh, I beg -- yes. Okay. Thank you. Yes, I've got there. I was getting confused with my own marking. Thank you. “In this Counterfactual scenario, Google would have used a different algorithm to Algorithm A, which also attempted to prevent search results from being affected by spam and low-quality sites, but which did not share those characteristics of Algorithm A which, in this scenario were found to be unlawful.”

So, there are some vagaries still left in relation to what all of that means, because we're simply responding as best we can to what we say are relatively open-ended allegations against us. But nonetheless, we consider that they are sufficiently precise that it makes sense for us to respond in similar kind with a counterfactual, in essence, always explaining that the algorithms are very important to us and therefore we're always going to try to keep them to the greatest extent possible.

THE CHAIR: Yes.

MR PICKFORD: Thank you, Sir. That is it. So I think save for the costs argument, with the Tribunal's permission, I'll move to the other part of our Application.

THE CHAIR: Yes.

Application on scope of Trial 1 by MR PICKFORD

MR PICKFORD: This is in relation to the scope of Trial 1 and if I could ask, please, the Tribunal to look at the original order which it made in relation to that, which is to be found in Bundle 2, tab 1, page 8.

THE CHAIR: Yes. The 26 March order.

MR PICKFORD: It's 26 March. That's correct. 2024. And one sees under the section "Split trial", paragraph 12 of the order ordering the split trial.

THE CHAIR: Yes.

MR PICKFORD: And in essence, what this Application is all about is really saying, "Well, we agree with the split trial, but we're concerned that actually the split for one part of it wasn't in a workable place and we need to move where the split is", effectively, is what this Application comes down to. There's then an -- obviously I'll come on to it -- a finer grained argument about exactly what one then does with the bit that's moved, but that is the essence of what we're arguing about today.

Because it's relevant to points that are made against me by my learned friends, I just draw attention to that, that paragraph 19 on page 9, there was liberty to apply in this order.

So just to give you some background on how this arose. I can, if necessary, take you to the transcript, but I don't think any of this is particularly contentious and I don't really make very much of it. But just to remind you, Sir, how the order was drawn up. There was, back in March 2024, a hearing at which I wasn't present, but there was a discussion about how the trial was going to be arranged. It was a CMC

following -- sorry, actually, it wasn't following. It was a CMC anticipating how the trial was going to be arranged. At that CMC you, Sir, very fairly and sensibly came to the parties and suggested, "Well, we think that we should make some assumptions about dominance in certain markets, and on those assumptions, we think that we should decide the question of abuse, and also then we should decide the question of the appropriate Counterfactual", on the same assumptions, essentially.

That was put to the parties. Foundem pushed back and tried to argue against any kind of split. But there was no focus at all on the question of whether the precise nature of the post-Decision Counterfactual was or wasn't in fact going to be amenable to that split. It was obviously assumed by everyone that it would be, but no particular attention was paid to that issue either.

The next stage in what happened is, if we go please, to tab 2 in the same bundle, you'll see on page 12 there was a response to an application from Connexity, I think it was, which wasn't opposed and that found expression in paragraph 1 of the order which is on page 12. Paragraph 12(a) of the scope of Trial 1 order was amended. There was obviously no suggestion by anyone at that point that we couldn't amend the scope of the Trial 1 paragraphs, unless we could show that there was a material change in circumstances. There was a request to amend them because it was considered sensible to do so, and everyone ultimately agreed to that. There was some discussion between myself and you, Sir, about the implications of it and there was a laying-down of various markers on my side, et cetera, but ultimately there was no objection taken and the amendment was made.

THE CHAIR: Yes.

MR PICKFORD: So then --

THE CHAIR: Again, there's liberty to apply.

MR PICKFORD: Sorry? Indeed, there was liberty to apply.

So then, where we get to is the draft order that we are seeking, which one can find in Bundle 4 at tab 4 on page 50.

THE CHAIR: Well, there was a further order in August with directions for the FirstTrial.

MR PICKFORD: There was. I'm sure that's --

THE CHAIR: At tab 3 of this bundle, while we're here.

MR PICKFORD: Yes.

THE CHAIR: So this first issue of the First Trial was considered further, with directions for -- there was a CMC in November 2024. It says -- no, that's the previous one. That's the previous one, I'm sorry. These are the directions. I'm not sure there was a hearing before these directions were given, and there would have been correspondence, clearly.

MR PICKFORD: I think that's right, Sir. We did have a hearing in the summer about the scope of data disclosure and expert disclosure. I'm afraid I don't recall there being argument about directions, but that may just be because I don't recall --

THE CHAIR: I think what happened is the judgment in the Preliminary Issues Trial was given. Then, there was correspondence about timing of directions to Trial 1, and that led to this order with directions for factual witnesses and the expert reports and so on.

MR PICKFORD: That's right, and obviously at this point, no particular consideration again had been given, to the point that ultimately dawned on us that there was going to be a problem in relation to the final period.

Sir, is it convenient if I move to the draft order? (Pause)

THE CHAIR: Yes.

MR PICKFORD: So we can find that in tab 4 on page 50 of Bundle 4. (Pause)

THE CHAIR: Yes.

MR PICKFORD: If one looks at paragraph 1.b, which contains the amended wording

that we're seeking. In essence, if one picks it up on the third line at the word, "save": "... save that the counterfactual for the standalone claims of alleged infringements following the implementation of the Compliance Mechanism on 28 September 2017 (the "Post-Decision Counterfactual") shall not be determined in the First Trial."

So that's the proviso that we're now seeking to introduce into the scope of the trial definition.

THE CHAIR: Yes.

MR PICKFORD: One sees in paragraph 2 that we are suggesting in our draft order that:

"The Post-Decision Counterfactual shall be determined at a separate hearing to be fixed following final judgment in the First Trial."

Now, that remains the case, but what one really means by separate hearing I think is still potentially open to debate. Obviously, if it's not determined in Trial 1, it will have to be determined at some other hearing. We've seen what the Claimants say about this matter; about whether there should be an entirely separate hearing or that hearing should form part of Trial 2. I'm going to come back to this, but in a nutshell, our position is if we're right about this Application, it would depend; it would depend on the nature of the findings made by the Tribunal at Trial 1. So it might be that the issue will never arise, because we might win. Obviously, assuming that we lost and the issue does arise, how difficult and how much further court time will be required to be invested in that determination, we say, will depend an enormous amount on the nature of the Tribunal's finding against us.

I don't want to say more about that now, because that submission will become clearer as I go through the Application, I hope. But I'm just drawing attention to the fact that we're not stuck rigidly to the idea of a further independent trial. We say it would all depend on, and it would be premature to decide that right now, exactly what form that

takes.

So that's the draft order. I should say at the outset, there's obviously a difference here between what we're saying about the pre-Decision period and the post-Decision period. We've now pleaded to a Counterfactual with the pre-Decision period. I showed it to you. The reason why we say we can do that is because, although there are still some ambiguities, they're below the threshold where it's tolerable and where we can actually, in practice, do it. We have some idea of what -- sufficiently and precisely, what the nature of the case is against us. The problem for the post-Decision Counterfactual is there is simply too much that is at large for us to be able to engage with that in any really sensibly concrete form. That's the essence of the problem and why the two situations are different.

So having explained the nature of the Application we're making, if I could now firstly consider some of the legal principles, and then I'm going to look at the Claimants' pleadings to make good why we say there's too much that's still at large.

THE CHAIR: Yes.

MR PICKFORD: So on legal principles --

THE CHAIR: How have you got a new pleading that you just showed me was a convenient place?

MR PICKFORD: I beg your pardon? I didn't quite catch that, Sir.

THE CHAIR: We've got now your new amended defence.

MR PICKFORD: That's right.

THE CHAIR: Which may be just a convenient place to go, to look at your defence.

MR PICKFORD: Well, Sir, I mean, obviously I'm happy to be taken wherever the Tribunal would like to take me, but my plan, if I may, had been to firstly deal with the law and then go on to the pleadings and start with actually the abuse claims.

THE CHAIR: I just wanted to see -- it would be helpful -- what you've said about the

post-Decision Counterfactual.

MR PICKFORD: Of course. So we don't -- the truth is we have some general pleadings about counterfactuals in general. So if one starts on page 21. (Pause)

THE CHAIR: Yes.

MR PICKFORD: We plead general points about what a counterfactual would look like for us. As I've emphasised earlier on in my submissions, I think we're always very clear that algorithms are incredibly important to us; they're part of what enables us to provide a high-quality service. So they're the last thing that we would give up on, as it were.

But we don't have a specific plea back to the post-Decision world. We don't engage with that differently. What we of course say is that, as soon as we got to the Remedy, then we were fine; that the Remedy satisfies any competition law problem with the way we previously presented our results on the SERP, and therefore the Remedy is the right counterfactual for the previous period and there isn't anything to change about it in the post-Decision period.

What we don't then do is go on and say, "If we are wrong about that, here's what we would have done". It was in trying to think about that question that it became apparent that was just not something that we could do.

THE CHAIR: But that's a question that would have occurred when drafting the defences.

MR PICKFORD: I mean, it's certainly true that it should have occurred, yes, Sir.

THE CHAIR: It must have.

MR PICKFORD: Well, I think it's -- I'm sure, at some level, it occurred. It's difficult for me to address it. I'm not saying that there's any excuse in the idea that we've been surprised by something and there's suddenly been some change, which means that we now know that we should have engaged with something that we didn't previously.

It's difficult, Sir, for me to give, I think, a response which doesn't stray into potentially privileged territory and I'd have to be very careful.

THE CHAIR: No, and I'm just making a fairly obvious comment --

MR PICKFORD: Yes. Well, I'm --

THE CHAIR: -- that anyone faced with a plea for an infringement of competition law will say, "We deny the infringement". Probably. Unless they're bound by the Decision. "But if we're wrong on that, then this is what would have happened and no more". I mean, that's the sort of standard approach, isn't it?

MR PICKFORD: Well, Sir, I'm unable --

THE CHAIR: I'm not asking you to go into privileged material. I'm just saying we all know that's the standard approach when facing a claim. But it wasn't done, you say.

MR PICKFORD: It wasn't done. I hear what you say, Sir. We obviously take that it would have been far preferable if this Application had been made earlier. What I can certainly say is that there is no bad faith tactic on our part to deliberately leave something to create problems for the Claimants. We wholly refute that suggestion. Obviously, I asked rhetorically: would I prefer this issue to have been done and addressed back in 2024? Yes, I would. Do I wish to be making this Application in January 2026? No, it's not my preference; I'd have preferred if it had been grappled with earlier. I'm afraid I'm not able, because of issues of privilege, to really begin to answer -- I totally understand what you're saying, Sir. It's very -- I can't really begin to answer or explain what the answer is, because then I've immediately sort of opened a can of worms, I'm afraid.

But, you know, what I am not submitting, to be very clear, is that there is an objective, external reason why we could have only ever realised this problem at the end of last term. That's not my case. I accept that it could have been earlier.

THE CHAIR: Yes.

MR PICKFORD: If I may, I'd like to cover two areas. If we go back to the legal principles that I say are applicable here ... (Pause)

There were two areas I'd like to cover: the first is the relationship between a finding of a tortious breach and the damages counterfactual that follows from that; and the second is the case law on amendments to case management orders -- orders generally, but in this case, obviously, a case management order.

On the first of those topics, the counterfactual point, we say that as a matter of logic, the counterfactual analysis for the purpose of establishing a causative link, between a tortious breach and damage, can only be embarked upon once there has been a determination that the defendant is in breach of some duty owed to the claimant, and a full understanding of what that duty and breach is.

In a simple case, indeed in potentially many cases, there may be a sufficiently simple relationship between the breach -- because it's relatively discretely articulated -- and the damages counterfactual; they can, in practical terms, be addressed at the same hearing, because there isn't a wide range of possibilities in relation to the breach that make it too difficult to know what one should be saying in relation to the appropriate counterfactual.

I don't say that this inevitably arises in every practical hearing at all. Obviously, I don't say that. It depends really on the complexity of the breaches that are being alleged. That's the issue. We say this is inherent in the dicta of Lord Leggatt in the Rukhadze judgment of the Supreme Court that was given recently.

If I could ask the Tribunal, please, to pick that up in the authorities bundle at tab 6, page 120. This is some dicta about counterfactuals.

THE CHAIR: Yes, I've got the case.

MR PICKFORD: Thank you. If one goes to page 119, you'll see that there is a subheading, "Causation and counterfactuals".

THE CHAIR: Yes.

MR PICKFORD: Then if you go over the page, could I ask you, Sir, to read 162 through to 165, which I say summarises the essence of the reasoning of Lord Leggatt.

(Pause)

THE CHAIR: Yes.

MR PICKFORD: The three points that I draw out from that are: firstly, the point that I made about the fact that, as a matter of analysis, logically, one has to look at the duty and then the breach first. It's only once one has done that that one can, strictly speaking, go on to the second stage of the analysis as to what would have happened but for the breach.

The second point I draw from it is that when one is constructing that counterfactual, you change the real world to the minimum extent possible. Again, that makes it all the more important that you are very clear about exactly what it is that you did wrong in the first place.

The Supreme Court judge uses the example of a road traffic accident, where one needs to know, "Is it the fact that the car was going above 30 miles an hour, or is it the fact that they were driving at a speed that wasn't with sufficient regard to road conditions?" Because that might be something less than 30 miles an hour, and that informs the nature of the counterfactual. It's a very simple example, but it brings out very pithily and clearly the need to be clear about what went wrong -- what the duty was and what the breach was, first.

Those are the points that I, I draw from, from that authority. And just --

THE CHAIR: Are you saying that Lord Leggatt suggests that in that putative claim, that therefore, because there's an infinite number of different possible hypothetical worlds -- at least in terms of speed driving alternatives -- therefore need to split trial?

MR PICKFORD: No, I am not talking about split trials.

THE CHAIR: No.

MR PICKFORD: Because as I said, my case is not that -- my point on the logical relationship between breach and counterfactual does not imply that all cases need split trials at all. I do want to emphasise, in my submission, the question about the split trial comes down to a practical one about the implications of this logic.

The reason why it's important, in my submission, to show you this passage first, is because it makes the analytical points that underpin what I say, then the practical consequences in this case. That's why I'm showing you this authority.

Then -- very, very briefly -- in my submission, it's helpful also to refer to the work of Professor Jane Stapleton that Lord Leggatt himself also uses. There's just a paragraph in that which I can show you in the authorities bundle at tab 9. It begins on page 209. (Pause)

THE CHAIR: Yes.

MR PICKFORD: 209. It's the paragraph beginning, "But consider the difficulties ..." Do you see that, Sir?

THE CHAIR: Yes.

MR PICKFORD: Thank you. If you could read that, please, as well as footnote 26, which is over the page, which is footnoting the words, "by shape".

THE CHAIR: Yes. (Pause)

Yes.

MR PICKFORD: Thank you, Sir. That's all the authority that I wanted to show you on the issue of the relationship between duty, breach and, then, on the other hand, the counterfactual for the purposes of damages.

If I could then turn to the issue of the power of the Tribunal to alter its directions. (Pause)

THE CHAIR: Yes.

MR PICKFORD: The reason why I'm going to address this is because the Claimants argue against us that the case of Tibbles imposes some kind of straitjacket on the Tribunal, such that it doesn't really have a power -- as I understand what they're saying -- to alter the directions to trial, unless we can show that there's been some material change in circumstances, or there was a factual mistake upon which the original directions were made.

Our position is that the Tribunal has a broad discretion to make whatever directions are just, and that Tibbles doesn't create a straitjacket that prevents the Tribunal from doing that. That's fortiori the case when what we're seeking is to go back under an order where there was liberty to apply, as indeed the Claimants themselves have already done, as I showed you.

THE CHAIR: Yes. Well, why don't you leave that for the Claimants to raise, because my inclination is that in terms of power, it would be curious if we were said not to have power to --

MR PICKFORD: Thank you, Sir.

THE CHAIR: Whether we should exercise it, is of course a different question.

MR PICKFORD: Of course. In which case, I can then move swiftly on to looking at the Claimants' pleadings.

THE CHAIR: Yes.

MR PICKFORD: The overview here, as I think I have indicated already, is that when one does go through an analysis of the Claimants' pleadings, what one sees is both that the Claimants make a number of differing and sometimes inconsistent allegations, and also that the nature of the allegations made against us is very, very broad and often multi-part.

To use a colloquialism, they have to some degree thrown the kitchen sink at us in terms of all the things that might be wrong with what we've done. It is not possible to

know at this stage, ahead of the Tribunal telling us, which of those we in fact did do wrong, and therefore what the shape of the Counterfactual should be.

If I could start, please, with Foundem's pleading. That's to be found in the pleadings bundle, which is Bundle 3. It's volume 3, and it's at 113 that I begin. (Pause)

THE CHAIR: Yes, so it's page ...

MR PICKFORD: 113. In tab 3. This is Foundem's --

THE CHAIR: Sorry, it's 3 ... This is --

MR PICKFORD: Oh, is your three divided? I beg your pardon.

THE CHAIR: Tab 3. Yes, yes, it's tab 3. I've got it.

MR PICKFORD: Sir, I will try to find --

THE CHAIR: I've got it.

MR PICKFORD: All right. I'm using the electronic bundle, so I don't know how they're divided up, unfortunately.

THE CHAIR: Yes.

MR PICKFORD: Tab 3, page 113. At the bottom, starting at 94J, you'll see Foundem's criticisms of the compliance mechanism. They say it:

"…does not comply with the requirements set out in the Decision. The reasons for this are in part matters of law for submissions. Foundem nevertheless addresses them briefly below."

Then it sets out, at 94K -- in essence, the complaint there is that we fail to get rid of Algorithm A and Panda in the post-Decision world.

I'm conscious, Sir, that you're looking at the pleading. Would it be helpful if I pause for a moment, or should I continue?

THE CHAIR: Yes, 94K to L, should I read?

MR PICKFORD: Yes, indeed. Then perhaps I can come back to pick out some points.

(Pause)

Also, in fact, ultimately down to N. (Pause)

THE CHAIR: Yes.

MR PICKFORD: Sir, the first point I'd like to make is that the first complaint made against us is that we fail to get rid of Algorithm A and Panda in the post-Decision world. Now, a point that the Claimants make -- and Foundem in particular makes -- against me on this Application is they say, "Well, we're already alleging that against you for the Decision period. We're saying you failed to get rid of those algorithms in the Decision period, so what's your problem? You're already dealing with it".

My answer to that is, in the Decision period of course, the only abuse is the abuse that was found by the Commission. That's what the parties are grappling with for the Decision period. We say -- it's a point that they don't agree with, but it's an answer, it's our argument -- that for that period, the Decision of the Commission inherently depends on a combination of two factors. It's the combination of promotions on the one hand, together with algorithms on the other, and that no element of itself was unlawful.

That's going to lead to the Tribunal having to determine a dispute between us and the Claimants about whether we are right when we say, as a matter of law in the Counterfactual under English law, we are permitted, therefore, just to remove one element of the combination, or whether they are right that the approach that the European courts took to a Counterfactual as a matter of competition law, under EU law, necessarily extends through. That's to be debated. I'm not asking the Tribunal to work out its intuition about the answer at all at the moment.

The reason why I'm pointing it out is because we have a very clear and discrete answer there, which is: “no, we would still have had the algorithms because we only had to remove one element of the problem”. We did that by introducing the Remedy.

THE CHAIR: That's a dispute that affects the Decision period?

MR PICKFORD: Exactly, it affects the Decision period. The reason why I'm raising it is because it's a convenient moment to cover off one of the points that's raised against us, where they say, "Aha, well, you're already having to worry about that issue, so why is it more of a problem for you in the post-Decision period?"

The reason why it's a problem in the post-Decision period is this: as I explained, for the Decision period, we simply say, "You are wrong as a matter of law that we had to get rid of Algorithm A and Panda". That's where we stop. We might win on that, we might lose on that, but that is at least something that we can say responsively to that counterfactual.

THE CHAIR: If you lose on that, might it affect the Counterfactual?

MR PICKFORD: Yes, Sir, it may. But we are at least, in that situation, able to plead a primary line of counterfactual, which is -- our counterfactual is we would have continued to apply Algorithm A, because the abuse is the combination. Therefore, the only thing that we needed to get rid of is the combination. The way we got rid of it was by dealing with the promotions aspect.

So we can plead a counterfactual there and we've done it. Now it is true, we don't have an alternative line of counterfactual, and that we say is tough on us. I mean, we can at least plead a counterfactual and we win or we lose.

The difficulty, and what is different about the subsequent period, is that Foundem says, in effect, "Forget about what the Commission may or may not have said, we still say that your application of Algorithm A was unlawful".

So we have to meet, outside the Decision period, a case that Algorithm A was unlawful. We can't answer that by saying, "Aha, but the case is only that it's a combination", because Foundem doesn't accept that it's only a combination. They have a section of their pleading, which I can show you, which just attacks Algorithm A.

THE CHAIR: For abuse in the Decision period. You say it's only the combination.

Foundem and maybe others say, "No, it's each individually".

MR PICKFORD: Yes.

THE CHAIR: If you succeed, fine. If you don't, we'll then have to deal with a counterfactual in the Decision period. The algorithm is itself offensive.

MR PICKFORD: Well, Sir, at that stage, we say we won't. We will have put our best foot forward which is our counterfactual, which is -- the problem here was the combination, and so our counterfactual is we get rid of the problematic aspect of the combination. We either win that or we lose that. Now, if we win, then that will deal with the post-Decision period, because -- well, it may or may not, but it may well deal with the post-Decision period. It might be that we then win the post-Decision period.

THE CHAIR: But if you lose on that --

MR PICKFORD: If we lose, we lose. If we lose, we lose. What will have happened in that debate is this.

We will have advanced our counterfactual where we say all we need to do is get rid of the combination. They will have advanced their counterfactual where they say, "No, not good enough. You've got to get rid of both elements". If the Tribunal thinks that they're right, then they will win. They will win the argument about the counterfactual.

What we are giving up, effectively -- because we say we cannot do it -- is to argue some kind of alternative case if we are wrong on our primary counterfactual. We're not advancing an alternative counterfactual for the Decision period. We're just saying, "Here is our counterfactual and if we're right, we're right; if we're wrong, we're wrong".

The reason why it's different -- and I do apologise if I'm not being clear but I mean, it is obviously quite a difficult issue -- is that we are able to make the arguments that we do for the Decision period because of the nature of what the Commission said. Because the Commission said it's a combination, and I showed the Tribunal at the Preliminary Issues hearing that the European courts, and in particular the Advocate

General, make a great deal of the combination point and indeed --

THE CHAIR: (Overspeaking) Isn't it possible to say the same for the post-Decision.

MR PICKFORD: -- we won on that.

THE CHAIR: Wouldn't you? You'll say exactly the same for the post-Decision period --

MR PICKFORD: No, Sir --

THE CHAIR: -- so the only abuse was the combination.

MR PICKFORD: No, Sir, we can't. The reason why we can't say the same thing for the post-Decision period is because that doesn't meet the nature of the case that's being advanced against us for the post-Decision period. Because for the post-Decision period, it's a standalone claim and so the Claimants are not required to only pursue what the Commission found.

We have a legal argument that what the Commission found inherently depends on a combination. Therefore our responsive counterfactual to that is that that's the only thing we need to deal with. But because of that legal point, we are able to plead a counterfactual to what we say the abuse means. Because we say we've got a clear understanding of what the abuse is. We may be wrong or we may be right.

THE CHAIR: I thought the Claimants are saying the abuse was just an abuse that continued. They're not saying there was a different kind of abuse --

MR PICKFORD: Well, Sir, I'm afraid --

THE CHAIR: -- in the post-Decision period. But they characterised the abuse in the Decision period differently from you, and there's no argument about that. But they say this was the abuse, and it continued. And if the abuse continued, what I don't understand is why the Counterfactual becomes different.

If it's the same abuse, it would be the same counterfactual. I appreciate you say, "The abuse is of a different kind, the Remedy has therefore resolved it and therefore there's no abuse in the post-Decision period"; that's the heart of your case. If you're right on

that, this falls away. If you're wrong on that -- because if you're right on that, there is no abuse, post-Decision.

MR PICKFORD: Sir, it's very helpful that you say that. I have two points to make in response. The first, as I will come on to show you, is that there are further elements to what is impugned in the post-Decision period. It is not simply the case that the Claimants say our post-Decision case is merely the Commission's case but extended into the future. So they do not say that. There are a number of aspects which are new. So that is part of my answer to that, and I'll come on to make that good shortly. But the other aspect of it, Sir, which in my submission is very important, is we can test whether your understanding of what the Claimants are saying is correct by putting them to the election. Are they willing to say in this Tribunal that if they lose on the legal question about whether what the Commission found depended inherently on a combination of Algorithm A and Panda, together with the promotional aspects that were impugned? And if we are right about that, as regards what the Commission found, then they do not pursue in the post-Decision period any different case. They accept that if they lose on the combination point for the Decision period, they also lose on the combination point for the post-Decision period, and they are not entitled to argue for the post-Decision period.

“We don't mind what the Commission said. We are now alleging that Algorithm A in and of itself was abusive: The fact that you applied algorithms to us is in and of itself abusive, irrespective of what you might or might not have done about the other part of the abuse.”

Now, my reading of their pleadings is that they don't accept that. But it is true: if they were willing to accept that, that would cut through that part of my submissions today. It wouldn't deal with all of them, but it would definitely deal with this issue about the many ambiguities that come out of the question about Algorithm A. So we can hear

from them in due course.

On the assumption, Sir, that they're not willing to make that concession -- that is (inaudible), I would be pleasantly but very surprised if they do make that concession -- where that takes us is that insofar as the Claimants are saying in the post-Decision period, irrespective of what the Commission might have found, we are saying that, "Your algorithms were problematic and you had to get rid of them".

There is then a serious question about what they mean by that in terms of -- for a start, they talk about, "such algorithms as Algorithm A and Panda". So there's a question about: well, are there other algorithms we would have had to consider? Because we would need to know all of the algorithms that are problematic before we can say what we would have done differently.

THE CHAIR: I'm confused. You're saying that you're facing a case where the Claimants are saying you had to do more to cure the abuse in the post-Decision period than in the Decision period, and that the Counterfactual is more extensive, as it were -- more intrusive -- post-Decision than in the Decision period.

MR PICKFORD: It's implicit in their cases that it could be, for a number of reasons. I'll come on and show you the point shortly.

THE CHAIR: You mean that something that was lawful in the Decision period becomes unlawful in the post-Decision period?

MR PICKFORD: Yes, and the --

THE CHAIR: Well, that is very strange.

MR PICKFORD: Well, the oddity, Sir, I'm -- the reason for the oddity is this: it's because for the Decision period they have a follow-on claim, and so they have to bring themselves within the form of abuse that was articulated by the Commission and ultimately upheld by the European courts.

For the post-Decision period, they don't have to do that. My reading of their claims is

that they do not purport to do that. I think there may indeed be a response to an RFI that makes it clear for Foundem that they rely on algorithms. I'll ask those behind me to assist me on that.

But on its face, for instance, if one goes back to page 80 of this bundle, under "Abuse of a Dominant Position", there is a section that begins at 61A which just challenges Algorithm A. We read that as an articulation of Algorithm A in and of itself being abusive.

THE CHAIR: That would apply through the Decision period as well.

MR PICKFORD: Well, Sir, it -- yes, but only in this sense: only if they are right in law about what the Commission found. So if we are right in law about what the Commission found, we can answer that claim. We can say --

THE CHAIR: But they're entitled to go further than the Commission.

MR PICKFORD: Well, my --

THE CHAIR: I thought we said that in the binding recitals judgment.

MR PICKFORD: Well, my understanding is that during the Decision period, we are facing follow-on claims. Could I just take instructions on that for just one moment? (Pause)

Sir, my understanding is --

THE CHAIR: Where's that passage you've just said where you say Foundem alleged that there's a problem with Algorithm A?

MR PICKFORD: Sir, that begins at 61A.

THE CHAIR: Yes. (Pause)

Have we got somewhere the judgment we gave on the binding recitals? Is that in the bundle?

MR PICKFORD: I'm not sure we put it in the authorities.

THE CHAIR: Is it in the authorities?

MR PICKFORD: Tab 7. (Pause)

THE CHAIR: Yes, it's paragraph 70 on page 172. There's no part of the Commission's -- perhaps one starts at 69:

"We agree that the recitals in the Decision cited by Google, supported by statements of the EU Courts, show that the abuse is premised on the combination of the promotion and the demotion limbs. We also agree [about the dates] ... [And at the end of this paragraph] indicates that the Commission did not consider the operation of the algorithms by themselves to give rise to an abuse [the point you made]."

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

As I understand it, that's what they're doing for the Decision period. Perhaps I should clarify with Mr Jowell and Mr West. Is that right? That you are running that argument for the Decision period?

MR WEST: Yes, it is correct.

THE CHAIR: Mr Jowell, is that correct? I mean, that's what, as we understood it, at the previous hearing that. Is that right?

MR JOWELL: I'll take instructions.

THE CHAIR: Yes.

MR JOWELL: I'll just get back to you after the short adjournment.

MR PICKFORD: Well, my understanding is, is that certainly for Connexity, Kelkoo and

Ciao, that is not correct. They are clear -- and I'm asking for bundle references -- that they are only pursuing a follow-on claim for the Decision period.

Now, I was mistaken, apparently, about my understanding of what Foundem were doing. If, as I now understand, Foundem are saying, "No, we also pursue a standalone case as well as the follow-on case for the Decision period as a matter of time", then the point that I'm making about the problems that we're going to have in pleading back to that Counterfactual also apply to Foundem's alternative case. So they apply to the post-Decision period, and we're going to have the same problem in relation to the standalone case for the Decision period itself, if it is the same thing.

Now, we hadn't apprehended that. We thought the problem only arose in relation to the post-Decision period. But I quite accept if we're wrong about that, then --

THE CHAIR: This judgment was all about the Decision, of course, the Decision period. That's what paragraph 70 is looking at.

MR PICKFORD: It is, Sir, although to be fair, I think, to our case, the context in which it was mainly argued was about what the implications were beyond the Decision, because, as I recall, there was argument about whether it was a combination or not, because in particular, that was going to make a difference to what lay outside the Decision period.

But the logical implication of the point that's now been brought out by this exchange -- and I'm very grateful, Sir, for you drawing to my attention that it extends further -- is that the problem that we identify also extends back into Foundem's standalone case. It does not extend to Connexity. It does not extend to Kelkoo and it does not extend to Ciao.

THE CHAIR: Where does that take us?

MR PICKFORD: Well, where that takes us is that that is exactly the same issue as the post-Decision period. So if we are right that it can't be done for the post-Decision

period, it also can't be done for the Decision period in respect of that alternative case, if I may put it; the standalone case rather than the follow-on case.

THE CHAIR: Make a further amendment?

MR PICKFORD: We would have to make a further amendment, yes. I'm very grateful, Sir, for you highlighting that fact.

If I could just jump ahead in Foundem's pleading to show you some of the many possibilities that emerge if Algorithm A is of itself being attacked. If we could go, please, to the particulars of claim at 102B, then (b), which we find on page 119 of Bundle 3.

So we see here this, this is Foundem's case on the Counterfactual. This is not obviously what necessarily constrained -- Sorry. Our view on the Counterfactual might be different but this is at least what Foundem says in response to its own case. They say, firstly, that:

"Determining Google's most likely counterfactual conduct will be the subject of further particularisation and expert economic and factual evidence in due course."

Well, there hasn't been any such further particularisation, so we're no further ahead in that sense, at this stage. Its factual evidence hasn't removed any ambiguities and its expert evidence is yet to come. So we're already in a situation where even Foundem seems to think that there may be ambiguities here. And then what it goes on to say, in (b), is that, firstly, it suggests no algorithmic demotions at all. It then suggests at least none that inappropriately affected CSSs. That's in 102B(c). Then it says: or alternatively, none that inappropriately affected CSSs unless there was a timely and effective appeals mechanism.

And then it goes on, in (e), to the idea that there should be none that artificially demote Foundem. So just pausing there. We say that there are a myriad of possibilities for what we would or wouldn't be permitted to do in relation to those algorithms. And

that's just the very beginning of the problem, because we then combine that with a whole set of other issues.

The next thing is that one sees, at 102B(d), is that there wouldn't have been a shopping box at all on the SERP. That's what Foundem say. As I'll come on to show you, Connexity, by contrast, would permit us to have boxes on the SERP as long as they satisfy equal treatment criteria. I'll show you that in a moment.

THE CHAIR: Just pausing here. This counterfactual, is this only pleaded for the post-Decision period?

MR PICKFORD: No, I think this is for any time that it matters.

THE CHAIR: Throughout. Yes, so it's the same.

MR PICKFORD: From their point of view, yes.

THE CHAIR: Yes.

MR PICKFORD: Yes. So that's correct and in and of itself, if this was the only aspect of the case that we had to meet, I say it would be containable. I say that there are a number of possibilities. It's not tied down but it's the thing that we are willing to address for the first period and I'm saying, already for the pre-Decision period, there are quite a lot of possibilities that are introduced here through the allegation against Algorithm A.

THE CHAIR: But if you can just address this, you accept the Decision period, what's the difficulty of extending your answer, saying, "This answer applies. It doesn't stop as being an answer in ..." 2017, is it? It continues, "This is our answer."

MR PICKFORD: For this reason, Sir, I do apologise that I'm --

THE CHAIR: Sorry if I'm being obtuse, but --

MR PICKFORD: No, no, obviously I'm not being clear and I apologise, but there is a difference and the difference is this. For the Decision period in relation to the Commission Decision, we have an answer, which is, "You're wrong about

Algorithm A being a problem of itself" and we are either right or wrong about that, but if we lose, we lose. We have an answer and we accept we can't know enough about what the alternative would be for us to plead in the alternative and so we just stick a primary answer and we might win or lose on that.

You are right, Sir, that in relation to if Foundem are saying, "Well, actually we've got a standalone claim for the Decision period as well", then the same issues that I'm just articulating at the moment do arise in relation to the standalone claim for that period.

Now, if that were all, then it might be containable but the issue is this. As I explained at the beginning, it's not that we say that, just because logically the Counterfactual comes after the abuse, that you can never do them together, what we say is that when you begin to have a very large number of different aspects of your behaviour which are challenged, then you get into problems.

What I'm going to do now, if I may, is just foreshadow the other kinds of issues that arise, as well as those in relation to Algorithm A, because I think we've obviously become very focused on Algorithm A and in a very helpful way in terms of being clear about the logic of where my point goes but nonetheless, I want to make clear it's not confined to Algorithm A. So if I may foreshadow, Sir, the other areas which become, in my submission, very complicated, very quickly.

Firstly, there's the question of the box; whether there can or can't be a box. What we're told by Foundem here is that there can't be a box and what I'll come on to show you is that Connexity say that there can be a box, but it's got to satisfy certain conditions. So already we've got two very, very different worlds from Google's point of view, added into the permutations that arise in relation to, well, what can or can't we do with our algorithms? Are we allowed any algorithms? Are we allowed some algorithms as long as we give entirely -- as long as CSSs are totally exempted from them, et cetera. We're building a number of multiples of permutations.

The next problem, which I'm going --

THE CHAIR: Sorry to interrupt you. Does Connexity say there can be a box in the Decision period, but there can't be a box post-Decision?

MR PICKFORD: No, they don't distinguish.

THE CHAIR: No.

MR PICKFORD: I've already said that this issue affects any standalone claim in the Decision period as well as the post-Decision period. I concede we didn't make that clear because we hadn't properly picked up the logic. But you've very helpfully pointed out to me, Sir, that if Foundem aren't confining themselves to a follow-on in the same way as all the other Claimants are confining themselves, then it affects both sets of standalone claims. I accept that logic.

May I come back to the point that I was seeking to make about the complexity that is going to be introduced, that we are not going to be able to deal with? It's not just about the ambiguities as to what we could or couldn't have done by way of our algorithms. It's also, was there a box? Wasn't there a box? For the follow-on claim, we have a legal answer to that, which is we didn't have to get rid of the box, we just had to provide equal treatment in respect of the box and so that's what we did.

It seems that Connexity seemed to agree with us, sort of, on that but Foundem don't. Foundem say "No, the box is going just as the algorithms are going. Everything's going." We've already got a sharp point of divergence there.

As I will come on to show you by reference to the other pleadings, there are other things that get introduced. So, for example, some of the Claimants complain about the auction mechanism. They say, "Well, there are problems with your auction mechanism." Well, understandably, there's nothing in the Decision about that at all because we didn't have an auction mechanism in the Decision so we can't rely on that to inform, well, what is the problem with the auction mechanism? And the problems

that they are currently articulating are fairly broad, to say the least, and don't tie it sufficiently down that we know how we would articulate our counterfactual because we don't know what the problem is.

Another problem that I'm going to come on and show you is a point that it's said, "Well, you haven't sufficiently separated your businesses. There are problems with, still, the relationship between Google Shopping Europe and the rest of Google and that's problematic from a point of view of the abuse." So that's again something that's entirely new and not tied down by findings in the Decision.

Another aspect which is also pleaded against us, which I will also come on to show you, is that it's said not only do we need to take away the abuse, we need to take positive steps in the Counterfactual world to put the Claimants back in the position they would have been in, had they not suffered the abuse at all. So for the post-Decision period, there is this idea that it's not good enough for us merely to stop abusing as if it's day zero, we've actually got to go, apparently, beyond that and put the Claimants back in the position they would have been in.

That raises a whole series of questions about, well, what is the nature -- what does that imply for a counterfactual? And when one builds these up on top of one another, one gets to a situation where there are so many permutations in terms of things that are being said that Google did wrong, that we are not able, sensibly, to say, "Okay, well, here is the one or the two or maybe even the three answers to those claims." There is a huge number of permutations because obviously you can have any number of combination of them.

THE CHAIR: Doesn't that apply to the Decision period, even for Connexity? Because your case is, as you've just shown me, the Remedy -- the Counterfactual for the Decision period is the Remedy. That's your case. Connexity says, "No, it isn't because the Remedy doesn't remove sufficiently, or at all, the abuse". So you've got all these

issues over the Decision period, because you're going to have to look at the Remedy, which you say is the Counterfactual, and you look at Connexity's arguments saying, "No, the Remedy for various different reasons doesn't address the abuse". So you've got the same point.

MR PICKFORD: Well, I --

THE CHAIR: I fully take your initial argument or logical analysis that counterfactual and breach are different, but we are looking at counterfactuals in the Decision period and what I'm struggling with, as I've tried to indicate, is this break, even on Connexity's case, between the Decision period and the post-Decision period because you accept there's going to be a trial looking at counterfactuals for the Decision period, although you're now with a caveat regarding Foundem, which complicates things. But all these issues arise for the Decision period because your counterfactual is the Remedy.

MR PICKFORD: Well, they do and they don't, Sir, in this way -- if I can explain. You are entirely right that, in a perfect world, from our point of view, if we are wrong about our primary case, that we say, "Here's our answer: our answer is you get the Remedy, that's all that's necessary to remedy what's in the Commission's Decision, and that's it".

Now, Sir, what you say is, logically, entirely correct. I understand that if we are right about that, that's the end of it. If we're wrong about that, what we would ideally like to know in that situation is why we are wrong, so that we could make submissions about that further counterfactual world.

What I apprehended is that would be a bridge too far for this Tribunal, because we are able to plead a counterfactual. There's no problem with us pleading a counterfactual, it's our answer that I've given you. We are not being prejudiced to the extent that we can't at least plead one positive case.

In that world, my submission would be -- if I was asking for the indulgence of the

Tribunal to deal with my problem there, I'd be saying, "Okay, well, notwithstanding that I can plead a positive case there, I want to draw the line at firstly examining whether we're right or wrong on our positive case, before we go on to any of the rest of it, because I can't really know what the nature of the problem is until I know why we're wrong on the first part".

As a matter of logic, what you say, Sir, I entirely endorse. It's just that, because we can plead a positive case -- at least one -- we thought certainly -- I thought -- it was not going to be something that the Tribunal would be willing to stomach to say, "Okay, well, just because you, Google, would ideally like to meet the alternative case for there to be effectively a preliminary issue about whether you're right or wrong on your case, and then to take stock". That's not the split that we asked for. As a matter of strict logic, I could have asked for that split, but that's not what I'm seeking.

The reason why I say it would be fair, however, to have the split that I'm seeking is that, for both the post-Decision period and the standalone claim for the Decision period, we cannot even plead a primary Counterfactual. Because, by definition, our Remedy Counterfactual does not work if they are right that there was an abuse during the post-Decision period. By definition, we've lost on that. It's totally pointless for me to say, "It's the Remedy", they'll just say, "No, it's not. You lost. That doesn't meet the abuse".

THE CHAIR: By definition, you've then also got a counterfactual for the Decision period.

MR PICKFORD: That is -- well, we don't have a fallback, yes.

THE CHAIR: Well, by definition, you lose on that.

MR PICKFORD: We've lost, yes. My point, Sir, is that we're going into this pragmatically. We're willing to go into a trial where we have at least a case, and we do have a case on the Counterfactual. That is: we see what the Commission said was

abusive; here's how the world would have been different if we deal with all of the problems that the Commission identified.

That's why we can at least engage with that. I quite accept that we may come unstuck. It may be that the Tribunal says, "No, you're wrong". At that point, if that's what happens, then the implication of my stance is that we wouldn't have a fallback position to advance to the Tribunal.

But that is very different, in my submission, to the case that the Application is based on, which is going into a trial to determine a Counterfactual when we can't even advance a primary case on the Counterfactual, because of all the manifold uncertainties about what it is that we did wrong.

Now, I hope that that's made clear the nature of the problem. You know, I quite accept it's extremely helpful for the Tribunal to have put the points back to me that it has -- that the logic of the points that you've made -- but I say they don't defeat ultimately the fairness of the Application that I'm making.

Sir, may I pause there if that's a convenient moment? (Pause)

THE CHAIR: Okay. 1.55 pm.

(1.03 pm)

(The short adjournment)

(2.01 pm)

THE CHAIR: Yes, Mr Pickford.

MR PICKFORD: Thank you, Sir. You will recall that prior to the short adjournment, we got into a bit of a debate that depended on whether Foundem were pleading, for the Decision period, a standalone claim. Mr West confirmed expressly to the Tribunal they were pleading a standalone claim for that period, not merely follow-on.

That, obviously, pulled the rug somewhat from my understanding, and there was some difficulty, therefore, in responding to that.

Could I go, please, to the Bundle 3, tab 3, page 51. So this is Foundem's pleading.

THE CHAIR: Yes.

MR PICKFORD: As most recently amended. Could I begin at the top.

"Follow-on and standalone claims."

"9I. As a result of the dismissal of Google's said appeals, the claim pursued by Foundem herein is now a follow-on action insofar as that claim relates to Google's Conduct in the period between January 2008 and June 2017. In the premises, liability in respect of that part of the present claim has been resolved in Foundem's favour (subject only to proof of loss), meaning that the outstanding issues under such claim are now limited to causation and quantum."

That was, I'm now reminded, why I thought that Foundem did not have a standalone claim for the Decision period, because it says so in express terms that it doesn't have such a claim.

THE CHAIR: Yes, I see.

MR PICKFORD: I'm going to come on to 9J in a moment, but can I just draw the implications that I get from 9I.

THE CHAIR: Yes.

MR PICKFORD: Which is that I had to make a concession before lunch in the light of Mr West's assurance that they, that they were pleading a standalone claim for the Decision period that what I said in relation to the post-Decision period would also have to apply to Foundem's standalone claim for the Decision period. But now we know that they haven't got such a claim. It's absolutely clear they haven't got such a claim. Therefore, there wasn't any such concession that was needed by me in relation to that.

THE CHAIR: Yes, I see.

MR PICKFORD: And we're back to where we were.

THE CHAIR: They say the abuse is the same in the post-Decision period.

MR PICKFORD: That's right. So if you go into 9J, what they say is for their standalone claim, it's the same. Now, we have some difficulties there because they also plead that there was a problem with requiring them to change their business model, that there's a problem with the auction mechanism, that there's a problem in relation to the separation of Google entities, that -- I think it's Foundem that says this, I might be getting confused with one of the other Claimants -- there's a problem in not remedying the past -- that is, you don't really just take away your bad behaviour, you actually take further positive steps to remedy what you did.

Now, in my submission, it's quite hard to reconcile that with saying that it's simply the Commission Decision projected into the future, because the Commission Decision doesn't grapple with three out of those four, and it only grapples with the change of business model in a subsidiary sense; it doesn't say that the change of business model is of itself a problem. So it's quite hard to understand really what they mean in 9J, which is one of the concerns that we've had, and certainly I don't think that there's a similar paragraph in the other Claimants' pleadings.

If the Claimants are willing to say that, if they lose on the construction, effectively the implications for the Decision period as to whether what we did in the Remedy was lawful or unlawful, and that there's nothing new -- there's nothing sufficiently different as regards the post-Decision period -- then, conceivably, the problem that I'm seeking to explain to the Tribunal disappears, because we can just focus on the Decision period. But I don't read them as saying that, and it's very hard to read 9J other than subject to qualification, as regards later things that are pleaded which don't appear in the Decision.

Now, I think I understood that the other Claimants, as represented by Mr Jowell and Ms Love, were going to clarify whether they pursued standalone claims or not. My position is: I could show you the various parts of their pleadings that make it clear they

do not. I don't know whether that's necessary for me to do that, because I don't know whether that's going to be disputed. But, I can, if it's helpful to the Tribunal, take you to each of Kelkoo's and Ciao's pleadings and show where they say that for the Decision, it's standalone only.

MR JOWELL: No, that's not necessary. We do accept that we plead only a standalone claim for the Decision period. We also do accept that, as Foundem have pleaded, that we say that the same abuse continued. By "the same abuse", I mean the abuse of self-preferencing; that is the type of abuse that continued because the Remedy did not stop the abuse, for the reasons that we summarise in our claim. We think that's abundantly clear.

THE CHAIR: Just while you're on your feet, Mr Jowell.

MR JOWELL: Yes.

THE CHAIR: As I understand it, you put forward your Counterfactual which says the same for the Decision period and the post-Decision period; is that right?

MR JOWELL: Yes, that is correct, yes.

THE CHAIR: You're not advancing a different Counterfactual?

MR JOWELL: No. (Pause)

THE CHAIR: Yes.

MR PICKFORD: That was elucidating in a number of respects. The particular one that I seize on is that what Mr Jowell was willing to say is, "It's the same abuse because it's self-preferencing".

Of course, the devil there is in the detail. What he's not willing to say is, "If I lose, in the sense of whether what Google has put forward as a Remedy for the Decision period isn't good enough, and so if what Google put forward for the Decision period is good enough, I am therefore precluded from arguing that it's still not good enough for the post-Decision period".

Are you with me, Sir?

THE CHAIR: Because the abuse is the same, and if the Remedy cures the abuse in the Decision period, it cures it in the post-Decision period.

MR PICKFORD: Well, I don't understand that the Defendants' -- sorry, the Claimants' Remedy --

THE CHAIR: It would have cured it if, in other words, it was the correct Counterfactual in the Decision period. They accept the same Counterfactual, I think Mr Jowell said so, that the Counterfactual would be the same.

MR PICKFORD: Well, I --

THE CHAIR: I think that's right. If the Remedy is the Counterfactual in the Decision period, then it cures the abuse, because the Counterfactual is a world where there's no abuse, in which case, post-Decision, there is no abuse, because you've got the Remedy as the Counterfactual.

MR PICKFORD: Yes, I suppose the issue is this: we then potentially get into the alternative world where, as you were putting it to me before, Sir, we lose on whether we've got a perfect answer in terms of what we say is the nature of the abuse. Then we're into kind of open season again as to, "Well, what was the problem with what we did?"

In that regard, can I just come back to the discussion we're having at the end of the hearing before the short adjournment. The most logical division, in my submission in terms of the issues is as follows. It's not the one as we advanced it in the Application, but under questioning from you, Sir, I now understand that there is a more logical division than the one that we initially advanced.

The most logical division is this: we ask ourselves, is the Remedy lawful by reference to the standalone claims that are articulated in the post-Decision period?

We ask ourselves: insofar as there is a different question -- and it might be that the

answer is the same, from what has just been said by the Claimants -- does the Remedy address the Commission's abuse as found for the Decision period? (Pause) We answer that in either the positive or the negative. Now, if it's in the positive, then that's the end of matters, because effectively Google is right about the issues that are now thought to be determined by the Tribunal. If we lose on that, then the Tribunal will necessarily have determined what it is that is wrong about Google's post-Decision behaviour – i.e. the behaviour that it says would have also existed in the Decision period in its Counterfactual -- that infringes competition law, that is abusive.

Taking that finding by the Tribunal, we could then go on to have a hearing that determines what the Counterfactual is that comes out of that.

Now, I realise that's not the way I put it in the Application. In my submission, in terms of the different issues that would need to be decided, it's the most logical one and I've been pressed into that by the interchange that I had with you, Sir. We'd be very happy with that division, because we say that it's actually the most sensible one.

What I had conceded and am willing to live by -- unless the Tribunal says to me, "Well, actually, wouldn't it just be more sensible to do it this other way" -- is that in circumstances where we can at least advance a Counterfactual, then we will live with whatever the Tribunal decides in relation to that. But we can't do it for the post-Decision period when we don't know what the abuse is. I hope that's clear.

So what remains for me to do -- but you may feel that you don't need me to particularly labour this -- is I was going to go through and show you in each of the Claimants' pleadings how they articulate the abuse and what I say remains at large in terms of consequences for a Counterfactual. So what they're saying is wrong with the Remedy and what it doesn't answer, i.e. the many permutations in terms of what we should have done instead.

So I'd like to do that, if I may, because that makes good on my point that there are just

a manifold number of different optionalities, and it's too difficult for us to be able to pin our colours to one particular version of the Counterfactual world. Effectively -- apart from drawing some strands together at the end -- that's the essence of what I have that remains. Because all the kind of analytical, difficult bits in terms of the logic, I think we've now covered.

THE CHAIR: Yes.

MR PICKFORD: Okay. So if I could then continue with Foundem's pleading. If we could return to Foundem at paragraph 94L, which we'll find on page 114 of Bundle 3.

(Pause)

So, what's pleaded at 94L -- which, Sir, you read earlier -- is in particular, that the auction-based Compliance Mechanism, falls foul of the Decision, effectively. But obviously the Decision didn't cover the auction-based Compliance Mechanism, so there's going to be a lot of fresh debate there about whether in fact there is a problem in the auction-based Compliance Mechanism or not, and if so, what is it that was wrong about the auction-based Compliance Mechanism? Is it that it's auction-based at all, or is it about the specifics of the auction?

So that remains an open question. There's then the next point, which is at 94M, which is that:

"Third [they say] Google has confirmed that "the [Compliance Mechanism] provides [competing CSSs] with the same two options for accessing Shopping Units as they had before the Decision". However, the Decision found that "competing CSSs are not eligible to participate in Google Shopping, unless they change their business model by adding a direct purchase functionality or acting as intermediaries [et cetera] ..."

So that then raises the question: well, is changing your business model of itself abusive, or is it part of an abuse, or is it in fact not going to be ultimately part of the abuse at all? Because that's just one of the many things that's pointed to, but it's one

that we win on. So again, there's another set of permutations that's being introduced through that aspect of the claim.

Then fourth, they say at 94N, that the Compliance Mechanism is objectionable because the bids placed by Google Shopping are not equivalent [it says] to those placed by competing CSSs, since:

“every cost of a bid by Google's CSS results in a corresponding and equal credit”. [as read]

So again, there's then a new further aspect, which raises questions about whether any connection between Google Shopping and the rest of Google is per se a problem, or whether internal separation is needed beyond what we have, or whether it's the fact that we derive profit from the Remedy.

Again, those are all aspects that will come to be determined at trial in relation to abuse. I'm not complaining about the Tribunal grappling with those for abuse; what I'm saying is we're now beginning to get further and further permutations of what the nature of the abuse might look like that make it increasingly impossible for us to put our money on, "Well, here is the Counterfactual that addresses all of the problems that had been cited about the Remedy".

THE CHAIR: It is not about what the abuse would look like; it's whether this Remedy sufficiently corrects or, to use the tautology, remedies the abuse. Is it fully effective? They say it isn't.

MR PICKFORD: Well, Sir --

THE CHAIR: That's what they're saying. There is an abuse. You've come up with this Remedy. They're saying, for various reasons it's not good enough because it doesn't deal with this or deals with that in a way that's inadequate and so forth. That's what they're saying.

MR PICKFORD: Yes, but --

THE CHAIR: It doesn't change the nature of the abuse.

MR PICKFORD: Well, Sir, for the post-Decision period, it's a standalone claim. Whereas the Commission made findings about Google's conduct based on the fact that there was a box in which the other rival CSSs could not appear -- and also there were algorithms -- we are now considering both as regards the Counterfactual for the Decision period, and also as regards the actual, for the post-Decision period, a different factual matrix. It's a very different factual matrix. Because there was now a box in which both rivals and Google could appear.

There's a big debate about whether it does or doesn't comply with principles of equal treatment, but the factual situation is different. There was an auction mechanism to get into that box. That's different. There's the point that's raised that, "Well, we had to change our business model to do it", and in the context of what Google's business is when it appears in that box as compared to what the CSS's business is when it appears in that box, there's a debate about that. That's a new debate. None of those have to be had anymore in relation to the old world, because the world as it was during the Decision period was factually different.

There's also the point -- which we haven't encountered here yet in this pleading, but we do have in other pleadings -- which said, "You don't just get rid of the problem; you've got to take further positive steps to basically put us, the Claimants, back into the world we would have been in had you never done any of this".

So what they seem to be saying is, if we start in 2017, it wasn't good enough for us just to stop committing the abuse in 2017; we had to take further proactive remedial measures to put the Claimants back in the position that they would have been in 2017 had the abuse in the Decision not occurred. That raises -- I mean, that's totally open-ended. If that is in and of itself abusive, it's totally unclear what he said that we should have done in a Counterfactual for that.

THE CHAIR: That's not in this pleading.

MR PICKFORD: Not in this pleading, no. I'm going to come to that.

THE CHAIR: Well, perhaps you should show me that.

MR PICKFORD: I will show you that. I don't want to skip over anything that's also relevant in Connexity's -- because I think it probably is in Connexity's pleading. So if I may, we'll go through and I will rapidly get to show you that example of the problem. Yes, I think it comes up in Connexity. So maybe if we move on to Connexity. That's in tab 15 of volume 3, which I see is, I think -- is it in part -- thank you.

THE CHAIR: Page 1170.

MR PICKFORD: That sounds about right to me. Thank you. So if I could ask, Sir, you go to page 1267. At 19A.8, Connexity pleads three distinct elements. It says:

"Google was therefore required to take all necessary measures to restore effective competition and ensure a level playing field for all competitors, by: (a) ceasing, in all its manifestations, the conduct that the Commission found to be abusive and unlawful ..."

So just pausing there, we're with them as a matter of law on that. We say, yes, we obviously did have to cease the abuse. But then they go on:

"... (b) taking positive action to stop the actual and likely effects of that conduct, including its distortive effects on competition and (c) ceasing to benefit from its unlawful conduct."

So those are all pleaded as separate things that we needed and failed to do in the post-Decision world.

We say that although we understand the idea of ceasing the conduct, what is going to be found that we needed to do beyond that in terms of our positive action remains entirely at large. We don't know what Counterfactual we could possibly plead to that at this stage, ahead of the Tribunal making the Decision itself.

Then, Connexity goes on, later in its pleading at 1269, to make particular allegations about the "Shopping Ads" measure, and it says that doesn't comply with the Commission's Decision. It says that it merely -- at 19A.11.1, it purports to grant comparison shopping services -- access to the shopping box, but "this was not required". So that introduces a further set of permutations into things that might or might not be lawful.

Did we actually grant access, or was the problem that we merely purported to do it, and where does it -- whether it was required or not by the Commission's Decision -- fit in again into the abuse?

It then goes on to say at 19A.11.3, that:

"The "Shopping Ads" measure does not address in any way either (a) the discriminatory positioning and display on the general results pages of Google's general search service of the results of competing comparison shopping services or (b) the simultaneous and intentional demotion (whether by algorithms such as [and I won't say them], manual intervention or otherwise) of results from competing comparison shopping services."

Now, that is articulated here as a point on its own; that is, we're dealing with the algorithms issue. Sir, if I can make some submissions very briefly about -- we're coming back to a point that I was canvassing with you earlier. If the Claimants are going to stick to saying it's only what the Commission found to be unlawful and nothing more, then it may be we haven't got a problem here because we have an answer to that, which is algorithms on their own are not problematic. But if they are going to say, "Even if we lose as regards the meaning of the Commission Decision", that is: that it's not just a combination, the Commission were actually saying Algorithm A by itself is abusive. "Even if we lose on that and we can't get you for the Decision period, we're still going to get you for the post-Decision period for our standalone claim, because

we are attacking, not just the combination here of algorithms with the box; we are attacking algorithms in and of themselves".

Have I been clear about what my point is there? That there is the possibility, unless Connexity are going to disclaim it, of this being broader than the Decision claim.

Then if we go on, at [19A.11.4], we see that "Without prejudice ..." this comes to the crux of what the problem is. So "Without prejudice to the above ..." and we then explained the reason why it said we continue to favour our own comparison shopping services:

"... [We continue] to favour [our] own comparison shopping service within the "boxes" with specialised search results ..."

The reason for that is said to be because they must change their business model, and it's also said to be that they must cease being a competitor. This exacerbates the exclusionary effects of our conduct.

So what we're left with here is a number of further permutations. Is it just that this is an extension and an exacerbating effect? Or is it that of itself requiring a competitor to change their business model is abusive? Or is it that it becomes so if they cease being a competitor to Google? These are all possibilities and permutations which the Tribunal might arrive at in its conclusions about whether what we're doing in the Remedy is abusive but until we know the extent to which any of these things matter, we can't specify what we would have done in the alternative world of the Counterfactual.

THE CHAIR: I don't think there's a separate claim that the Remedy constitutes an abuse of a dominant position. I think the claim is there is this abuse; it continued; although you put in the Remedy for these various reasons, it doesn't cure or doesn't adequately cure the abuse.

MR PICKFORD: In my submission, that must amount to a claim that the post-Remedy

conduct is itself abusive because they say they have a standalone claim of abuse in relation to the post-Remedy conduct.

THE CHAIR: Well, the conduct under the Remedy continues to be abusive for the same reasons.

MR PICKFORD: Well.

THE CHAIR: In other words, it doesn't remove the abuse and for the very same reason it's not the appropriate Counterfactual during the Decision period. It's all the same point.

MR PICKFORD: Well, Connexity hasn't -- In my submission, they haven't clearly confined themselves in that way. Obviously, if, as I said previously, all of the Claimants are happy to confine themselves to saying that the only problem is, in its most narrow and finely articulated form, that articulated in the Decision and they're not going to turn around at any point and say, "Well, even if we lose on what the Commission found, we still say that there was this other thing that the Commission didn't consider that is abusive", then this problem will go away.

But Mr Jowell wasn't willing to say that. He says, "It's a continuation because it's still self-preferencing." Well, obviously that covers a multitude of sins. That's not him saying, "I've got nothing further to say in relation to the post-Decision period that doesn't arise in any event in relation to what the Commission itself found." And as I said, there are all sorts of things -- necessarily, he can't do that. I wouldn't expect him to do that because there's all sorts of parts of his claim that concern issues that the Commission didn't itself make findings on.

The Commission did not itself find that changing your business model is of itself abusive, as the Tribunal points out in its Preliminary Issues Judgment. The Commission did not find that the auction mechanism was abusive because there wasn't one to look at. It didn't find that anything about the box was abusive because

we didn't have the type of box that we had. It didn't find that not remedying the previous sins was abusive because it wasn't concerned with that world.

So in my submission, Sir, it's not as simple as saying we simply look at the Commission Decision and that answers everything. It only answers everything, in fact, if we are right. If we are right that the Remedy was correct, because all we needed to do was take away this combination abuse and we addressed it, then it does answer. It provides the full answer.

If we are wrong about that, then there are a host of issues that the Commission simply never considered, and we don't know which of those it is that is ultimately going to be settled upon by the Tribunal as constituting part of what is wrong with the Remedy, and therefore, abusive in the post-Decision world.

I come back to the point that I made before that I do accept, on the Tribunal's logic, that where we would ideally and most sensibly draw the line is after determining whether what Google advances does or doesn't meet the problems that were articulated by the Commission. And then, if it doesn't, the Tribunal makes findings about why it doesn't and then we could come back and present our Counterfactual. But the reason, as I explained before the short adjournment, why I don't do that is because at least we can come in relation to the Decision period and advance a Counterfactual but we cannot do that logically for the post-Decision period, because necessarily there is only a problem there if our Remedy is not good enough.

So if I could then return to the Connexity pleading, it then introduces at 19A.12, which is on page 1271, a complaint about the comparison listing ads. One sees that at 19A.12. Those were not ads that existed during the Decision period. (Pause)

And again, they are necessarily not addressed in the Commission Decision. We don't know whether that will or won't form part of yet another of the permutations of what's said to be wrong about the post-Decision world in which the Remedy applies and until

we do, we can't say, well, the Counterfactual would not have the CLAs or the CLAs would be different in this particular way. They would be more prominent or something else about them. We simply, until we've had the Decision on the liability aspect of the post-Decision period, we can't say.

We then have a complaint at 19A.16.4, over two pages, at 1273. They say that:

"If Connexity's bid for a PLA is accepted ... the ad is displayed in the Shopping Unit "boxes", the link contained in that "box" is to the merchant's website and is not to a website of Connexity's own comparison shopping service. Accordingly, participation in the "compliance mechanism" does not generate any traffic to or revenue for that comparison shopping service."

So this might all be part and parcel of some other point on the PLAs or this might be a further unique thing that may or may not enter into the Tribunal's decision on what is wrong with what we did. And I can see, Sir, I understand I have been going on for some time. I could continue through the pleading, showing you lots of examples of things that simply -- we cannot know whether the Tribunal is going to agree with the Claimant that this is problematic, it's a problematic aspect of the Remedy, and therefore it should be removed, or it's going to agree with us that it's not a problem aspect of the Remedy and therefore we're entitled to keep it.

THE CHAIR: All those things will arise on the consideration of the Counterfactual for the Decision period, because they all concern the Remedy.

MR PICKFORD: Well, they will, Sir, insofar as, if we are wrong on our primary case.

THE CHAIR: Yes.

MR PICKFORD: And that's what this hinges on. I mean, I would commend us actually making the dividing line, as I said, in the way that I articulated it about five or ten minutes ago, which is the dividing line is, first, is what Google did sufficient? Does what Google did meet the Commission's concerns and is it lawful? And if not, what is

wrong with it?

THE CHAIR: That's almost the same question. If it meets the Commission's concerns, then as the (audio error) only perhaps -- certainly about Foundem's case, if what the Claimants are saying is that the abuse continued, which is the abuse found by the Commission, if it meets the Commission's concerns -- in other words, if it remedies the abuse -- that's it. It doesn't need a further question: is it lawful? That's part of the same question, isn't it?

MR PICKFORD: It may or may not be part of the same question. I'm not sure that the Claimants accept that it is 100 per cent necessarily part of the same question. I do say that that is the most logical place to draw the line because at that point, the Tribunal will be able to say, "Okay, well, we reject Google's case. We don't think that Google's Remedy went far enough. Here are the problems with Google's Remedy. Here's what we say is unlawful about that world."

Whilst we can accept that we may just have to live with that for the Decision period, for the post-Decision period, we're then being expected to say, "Okay, what's the Counterfactual for the post-Decision period?" And we don't know. We can't advance a case on that until we know what it is that's abusive in that period. And I do stand, Sir, by my submission that we understand the Claimants to be alleging a standalone abuse for that period. Again, those behind me and by my side can give you the references if necessary. But that's what I understood to be implicit in the passage of Foundem that I took you to where they said, "It's follow-on only for the Decision period. We're alleging something standalone", albeit they then go on and say (overspeaking).

THE CHAIR: It has to be standalone because there's no Decision for the post-Decision period. It's inherently standalone.

MR PICKFORD: Yes.

THE CHAIR: But it doesn't mean that it's different in kind.

MR PICKFORD: Well, it is, Sir. It must be. In all those respects that I showed you, there's all sorts of things that I've just spent time showing you that are not considered by the Commission in terms of all the aspects of Connexity's pleading that the Commission does not consider. Because there was a different factual matrix during that period. We behaved differently and so necessarily there is a different question to be asked about whether what we did is abusive because the question of equal treatment has to be measured up against that new world.

In the Decision period world, it's measured up against what we did then and we failed that test. You know, we have lost. During that period, we did not measure up to the standards that were required of us and that's the finding ultimately confirmed by the Court of Justice of the European Union.

In the post-Decision period, there is no such finding and there are all sorts of aspects of our conduct that are very, very different to what we did before. Those are all the things that we need to know, is that abusive or is it not abusive, before we can tell you, okay, well, our Counterfactual to address that would remove this thing that was found to be abusive. It would include this thing because that's okay. You know, for example, the comparison listing ads might be found to be -- that tab might be found to be okay, so that's still in there, but certain aspects of the auction mechanism are found to be wrong and abusive so that's not in there, et cetera.

Until we know that matrix of all the things that are bad about what we did, we can't say, "Well, here's what we would have done in the alternative world." We simply do not know. The most that we can say is to make the trite legal point that, "Well, we would have taken away the abuse", but that's not going to help the Tribunal, in concrete terms, make a factual finding about it.

THE CHAIR: Well, I don't think we need to go through all these points that are taken on the Remedy.

MR PICKFORD: Thank you. I think, I've made it illustratively by reference to the first two pleadings. There are obviously more that I could introduce, including in relation to Kelkoo and --

THE CHAIR: I know we started late but you've had close to half a day now.

MR PICKFORD: Thank you. And in relation to the issue of prejudice, what I say is this: at most it's very modest because we're not saying that these matters don't get determined and we're not saying that any work that's been done in relation to these issues should be wasted. We're simply saying the Tribunal needs to take a breath and consider, ideally, in fact, as soon as it's rejected our case on the Remedy, if that's what it's going to do, and explain why it rejects it before we can then advance a proper Counterfactual, at the very least, for the post-Decision period.

We would prefer it if also we had that opportunity for the Decision period but I accept that's not how our Application is put but we say that does not cause particular prejudice to the Claimants. What it will actually do is enable the Tribunal to consider the issues, these clearly very complex issues, in an appropriately logical sequence in exactly the way that Lord Leggatt urged should be the consideration when he set out his obiter comments about the relationship between breach, on the one hand, and the implications for the Counterfactual on the other. Because you should only remove the minimum, you only need to pinpoint the bits that we got wrong, and as yet we cannot know.

Sir, can I just take instructions to see if there's anything further that I need to say? Sir, I'm very grateful. Those are our submissions on behalf of Google.

Submissions by MR JOWELL

MR JOWELL: May it please the Tribunal, it's tempting simply to dive into the key point that you, Sir, have already identified, which is namely that all of the issues that my

learned friend identifies as being problematic for the post-Decision period Counterfactual also apply to the Decision period Counterfactual, and therefore, at least in terms of the Application as initially formulated, it doesn't assist my learned friend to defer this issue in the way he proposes and that is the crucial issue and the reason why this Application makes no sense at all. But if I may, let me take it step by step a little bit more slowly.

We say, first of all, there are two preliminary points that the Tribunal should bear in mind. The first is that, as you can see from the Tibbles case that we cite, where the law is summarised by Lord Justice Rix at paragraph 39. I can show you that in a moment.

There is a desirability of finality in relation to interlocutory orders and that does mean that the discretion to vary such orders, once made, should be limited within principled limits. I don't say, as my learned friend mischaracterised our position, that there are strict tramlines here, and I certainly don't say that you don't have jurisdiction to vary the order. What I do say is that ordinarily it is only appropriate to vary an order that has been made where there has been a material change of circumstances since the order was made, or where the facts on which the original decision was made were misstated. And of course, neither circumstance pertains in the present case.

THE CHAIR: I think what would -- sorry to cut you short.

MR JOWELL: Not a bit.

THE CHAIR: But I've heard a lot on this. What would help me is if you could go to just this last point that was being made by Mr Pickford about the allegations that are being made about in your pleading about further steps being taken to correct the effect of the abuse.

We were just there now -- 19A.8, but just those particular points, and Mr Pickford saying that there is a -- at 19A.8(b), "taking positive action", and, at 19A.8(a), you say

"ceasing ... the conduct [that the Commission] found to be abusive…".

Yes, and then it says "taking positive action". What I'm not quite clear is: is that a further ground of claim, that they didn't take positive action, or is that just ...

MR JOWELL: The point is not aimed at the Counterfactual; it's aimed at the question of damages, which is that one can't simply say, "Well, we pick up where we started after this very long-standing abuse, and now we've remedied the abuse, therefore, there can be no further damages".

Because the point is that the prior abuse has an ongoing effect. So it's not really a separate point that we are stipulating for the Counterfactual; it's a point that goes to damages.

THE CHAIR: Yes, I see. So you're not saying that that's a ground of claim they haven't taken.

MR JOWELL: No.

THE CHAIR: You're saying that, in looking at the damages that have been suffered, they haven't taken the positive action which might have reduced them and therefore those damages are --

MR JOWELL: Exactly, are still accruing.

THE CHAIR: Yes.

MR JOWELL: Exactly.

THE CHAIR: The other points that are there, the various things that you say about the position under the Remedy --

MR JOWELL: Yes.

THE CHAIR: -- are, as I understand it, all things that you say as regards the Counterfactual in the Decision period being put forward by Google.

MR JOWELL: Yes.

THE CHAIR: Which is the Remedy.

MR JOWELL: Exactly. This is the fundamental point. They now say for the entire Decision period, "Well, we would have applied the Remedy". We, of course, say everything that we say is wrong with the Remedy was always wrong with the Remedy.

THE CHAIR: Yes.

MR JOWELL: So all of those issues still arise.

THE CHAIR: Yes. Well, I think I'll rise ...

MR PICKFORD: Sir, just before you do that, and I do realise that I was heavily indulged, but if I could just -- on that, that I didn't go through each of the Claimants because I was taking it as read that there were lots of similar points, but if one goes to Kelkoo's pleading at 321 of Bundle 3, so it's tab 7, probably in the second one.

THE CHAIR: Yes.

MR PICKFORD: If you go to 95 on page 321, one sees there -- sorry.

THE CHAIR: Which page, 321?

MR PICKFORD: Yes. In fact, if you begin on 319, you see the heading, which is important.

THE CHAIR: "Abuse ..." Yes.

MR PICKFORD: So it's in the "Abuse of dominant position" section. I said this actually applies to Connexity, but it could not be clearer in relation to Kelkoo. Then if you go on to page 321 and look at 95E, which is in the same section -- we're still in the abuse of dominance. You see that one of the reasons why we abused our dominance is that: "Further and in any event, the aforesaid purported compliance mechanisms have failed to repair the damage to the structure of the market or to enable Kelkoo, as a disadvantaged competitor, to regain strength or eliminate in any material way the harmful consequences of the infringement."

So there it is being put, very clearly, as part of the abuse.

MR JOWELL: Well, with respect, it's not. It's talking about what are the effects of the

abuse. It's precisely the same point that I made in relation to Connexity; in fact, it's even clearer.

MR PICKFORD: Well.

MR JOWELL: The abuse has got --

THE CHAIR: I think I've got the point.

MR JOWELL: Yes.

(2.54 pm)

(A short break)

(3.25 pm)

Ruling (submitted to the Tribunal for approval)

(3.44 pm)

Costs

Submissions by MR JOWELL

MR JOWELL: Sir, we're very grateful and we do seek our costs, and do so on an indemnity basis. As you'll know, the test for indemnity costs is the matter -- the conduct must be outside the norm, and as you rightly observed, there are two features in your judgment that take this clearly outside the norm.

One was, to use your words, the “extraordinary” timing of the Application, both in terms of its lateness as regards the course of the proceedings, served so close to trial and after factual witness statements have been exchanged, and of course, in terms of serving the Application just before Christmas and expecting a response by 2 January.

The other aspect, that takes this outside the norm is the fact that it clearly was not properly thought through, as demonstrated by the recasting of the Application on the hoof.

So for those reasons, we do seek our costs on an indemnity basis.

THE CHAIR: Have you got a schedule?

MR JOWELL: We do.

THE CHAIR: Has it been served?

MR JOWELL: It has been served, and Ms Love will address you on the details of that. She will also address you on our request for summary assessment for an interim payment.

THE CHAIR: Yes. Can I see the schedule, please?

MR JOWELL: Yes, of course.

Submissions by MS LOVE

MS LOVE: Sir, the --

THE CHAIR: Just a moment. Let me (inaudible), please.

MS LOVE: They should already be in the correspondence bundle.

THE CHAIR: Ah, in the correspondence bundle. (Pause)

Do you have a tab number?

MS LOVE: Kelkoo and Ciao costs schedule is in Bundle 7, tab 36, and within that --

THE CHAIR: Just a minute. (Pause)

The First Application --

MS LOVE: (Inaudible). So, Sir, you'll be looking at --

THE CHAIR: -- is the ...?

MS LOVE: -- internal pages 4 and 5 of that. Sorry I don't have the bundle numbers. It post-dates my hard copy.

THE CHAIR: This is the first because this is done in terms of the First Application. Is this the First Application?

MS LOVE: This is the first. The second (audio error).

THE CHAIR: I'm trying to just -- incurred costs and estimated costs, because the first

is between ... (Pause)

Is there a total?

MS LOVE: I beg your pardon, Sir?

THE CHAIR: Is there a total? I've got ...

MS LOVE: The total is around £84 [thousand]. I'm sorry, I -- it may be set out -- yes, sorry. It's on page 3.

THE CHAIR: Oh, yes. Thank you.

MS LOVE: For Connexity, there have been two schedules sent: one relating to the amendments; and one relating to today's hearing.

THE CHAIR: Just a minute. So this is Kelkoo, is it?

MS LOVE: Kelkoo and Ciao. (Pause)

THE CHAIR: Yes, and then you were going on to tell me about Connexity.

MS LOVE: Yes, Connexity has one schedule that covers the costs in relation to this hearing, which was originally listed to address both Applications. That is to be found behind tab 43 in bundle 7. (Pause)

(Inaudible), Sir, the total on the second page of it.

THE CHAIR: Grand total?

MS LOVE: Yes, Sir.

THE CHAIR: But that's both.

MS LOVE: That's both. In fairness, the solicitors were instructed in respect of both, and Mr Jowell and I appeared for all three Claimants for both. That having been said, Sir, we accept that some adjustment ought to be made to remove the Second Application, the Product Universal era Counterfactual amendments. So that total would require a broad-brush adjustment downwards.

THE CHAIR: Well, there was one skeleton. There's one representation and the two of you, but for these three parties.

MS LOVE: Yes, Sir.

THE CHAIR: I'm not clear why there should be so much additional cost. (Pause)

MS LOVE: There are two sets of solicitors, Sir --

THE CHAIR: Yes.

MS LOVE: -- and different clients (inaudible) in relation to these matters, and this has come on, quite frankly, out of the blue, shortly before vacation, has had to be dealt with in swift order and has taken both sets of solicitors a lot of time in respect of their clients.

THE CHAIR: Well, it's not -- I mean, it's a broad issue of principle. Your skeleton argument was commendably succinct. There's some basic facts and analysis of the point. It's an important application, clearly. Very important. But it's not really a heavy application. You know, it's not a case where we've got lots of witness statements that were looking at or anything of that kind.

MS LOVE: Sir, of course, if you were with Mr Jowell as to an indemnity cost basis, it is for Mr Pickford to persuade you that these costs are unreasonably incurred.

THE CHAIR: Yes. Well, it may be, but I can have an initial questioning myself. At the moment, you haven't actually got a figure that separates the Connexity costs as between the two matters, but it's clear from the Kelkoo and Ciao costs that the second matter involved significantly more work for everyone, in particular solicitors, than the matter I'm concerned with.

MS LOVE: Sir, if I may say so, insofar as you're looking at the third internal page entitled "Summary of costs" on Kelkoo and Ciao, that includes -- the share of the costs in relation to the Second Application concerns those that were thrown away responding to the now rightly withdrawn September case. In fact, if one were looking purely at the costs incurred for the Second Application in relation to this hearing, or if I can put it this way, the immediate procedural costs generated by the Application, it

would be internal page, I think, pages 7 and 8 of the Linklaters -- of the Kelkoo and Ciao schedule, which would be about £62,000. So the split for Kelkoo and Ciao is about 60/40 of the costs for the First Application versus the second in relation to the costs that have been incurred in responding to them and preparing for this hearing. It may be that a similar split is appropriate for the Connexity figure.

Sir, I'm told by those behind me who've looked at this that if anything to split it 60/40 would be generous to Google because the reality is that the First Trial application, the First Application, has occupied considerably more of the last couple of weeks. I can say it has occupied a lot of time , Sir, you rightly observed it's an important application.

THE CHAIR: Yes. Well, if I applied 60/40, given the grand total of just over £100,000, that effectively is about £60,000; is that right? I mean, if we're looking at summary assessment, we're not going to worry about individual pounds and pence. Yes. Those are the clients you represent. And then, Mr West will have something to say.

Submissions by MR WEST

MR WEST: We also have a schedule of costs. I'm told it's in tab 40 of Bundle 7. If it isn't, I can hand it up and it was also duly served. The total for this Application is very modest. You'll see, Sir, at pages 2 to 3, the solicitors' work is particularised. The figure appearing on page 3. And then --

THE CHAIR: Sorry, we're at page -- the total -- got it, I think, but I'm trying to just distinguish between the Applications at the moment.

MR WEST: So if I explain how it works. There should be a total of about £35,000 on page 3 and then a total --

THE CHAIR: My page is unfortunately not paginated other than the bundle pagination. If you've got a copy you want to hand up, that might be easier. This is a schedule dated 12 January; is that right? That's the one I've got here. Yes. Yes, this has got page numbers. If I go to page 3.

MR WEST: There's the solicitor's figure then over the page, counsel, and there should then be a total of about £41,000 appearing.

THE CHAIR: This one has got a total of £35,900.

MR WEST: That's the solicitors' fees. Then over the page on page 4, there are some counsel fees and then a total appearing about a third of the way down of £41,000-odd.

THE CHAIR: Yes.

MR WEST: That's then been split in two to reflect the fact that there were two Applications and that figure, a very modest figure, of £20,000 is the total figure I'm claiming in these, my submissions on costs. So it's a very modest figure.

THE CHAIR: It's effectively £21,000.

MR WEST: The balance of the costs, I'm happy to tell you, Sir, have now been agreed in relation to the Second Application. That wasn't so this morning, but over the short adjournment the parties agreed those so those come off the agenda.

THE CHAIR: So just so I've got this right, because the total on page 3 is for both Applications --

MR WEST: Yes.

THE CHAIR: -- and similarly your fees therefore what's been done is to effectively cut them in half, end up just under £21,000.

MR WEST: Correct.

THE CHAIR: Yes. Thank you.

Mr Pickford, what do you say about costs?

Submissions by MR PICKFORD

MR PICKFORD: We do accept that we should pay some costs. I very strongly reject the application that they should be paid on an indemnity basis for the following reasons. The first point that's taken against me by Mr Jowell is that the application --

THE CHAIR: But just pausing there, so I'm clear, when you say "some costs", you

accept that your Application, having failed, that there should be an order for costs against Google. The question is then on what basis?

MR PICKFORD: Yes.

THE CHAIR: Yes. Right. That's what I thought you meant. Yes.

MR PICKFORD: The first point that's made by Mr Jowell is he says, "Well, the reason why this stands out from the ordinary, as something justifying indemnity costs is because the Application is made late, near to trial." Could I ask the Tribunal, please, to look at the case of the Leaflet Company, which I asked, Sir, you to look at. I mentioned it to you yesterday.

THE CHAIR: Yes.

MR PICKFORD: This is a judgment of the Chancellor and it was in relation to an application that was made on 30 July 2008 and one sees that, at the top of the second page just under Nicholas Green QC and Colin West, Jon Turner QC and Alan Bates, and the trial had been listed for 24 November 2008. In that case, as explained towards the bottom of page 224:

"It occurred to the claimant's advisers that it was an impossible task to perform [that is going through all the various different permutations of the allegations of infringement] before the trial which was due to take place in November. Accordingly, on 3 July 2008 the claimant's solicitors responded by suggesting a split trial in order to avoid having to prepare the loss claim arising from all the potential findings of infringement."

So what this concerned -- initially, there was a sole trial and then four months out, the Claimants came along and said, "Actually, we think it should be a split trial" and it should be split, in fact, in exactly the way, effectively, I was seeking to urge the Tribunal to split this trial, namely, is that for the post-Decision period, we confine ourselves -- it was being said in this case -- that they should confine themselves merely to the question of infringement only and nothing to do with causation. One picks that up from

page 225, where you see there's a line at about one-third of the way down where it says, "To explain that proposal --".

THE CHAIR: Have you got the paragraph number because I've got this from the other bundle so it's --

MR PICKFORD: It's the end of paragraph 4. It's paragraph 4, as it appears under the line indicating it's the top of a new page:

"To explain that proposal ..."

Does that --

THE CHAIR: The manuscript proposal.

MR PICKFORD: "... it is necessary to understand that paragraphs 1-186 ..."

THE CHAIR: Oh, I see, yes.

"To explain that proposal, it is necessary to understand that paragraph 1 ... of the particulars of claim ... infringement. ... Loss and damage."

Yes.

MR PICKFORD: And then:

"Paragraphs 187-190 fall under the heading, 'Loss and damage.' ..."

And then, this is actually important to understand, paragraph 187 says:

"By reason of the abuse by the Royal Mail of its dominant position as pleaded in section D above, and breaches of the law concerning anti-competitive agreements, pleaded [below], The Leaflet Company has suffered loss and damage.'"

And then paragraph 188 went on to say that particulars would be given by way of accounting evidence. So 187 is the core causal paragraph, which it was complained -- well, they don't know precisely what causes they should be articulating until they've decided the court has decided what the abuse is. So [5]:

"Counsel for Royal Mail does not, as I have indicated, consent to any order for a split trial, but, if there is one, he submits that the issues arising out of para 187 should fall

within the purview of the first trial and not be deferred to the second."

And he then goes on to take the court through various parts of the particulars. And cutting to the chase, if you then go on to paragraph 7, the Chancellor is satisfied that there should be an order for a split trial. He says:

"I am satisfied that there should be an order for split trial. To include in one trial not only the difficult issues, both legal and factual, involved in the issue of infringement but also of all consequential damage would seem to me to involve a waste of both time and money."

He then goes on to make it clear exactly where he is splitting it and that's dealt with in paragraph 8. He says:

"But what of the damage necessary to complete the cause of action? It is true, as counsel for the Royal Mail submits, that proof of infringement will in many, if not all cases, involve proof of some sufficient damage to complete the claimant's cause of action. On that basis, there might be much to be said for including para 187 [that was the causal paragraph] in the main first trial, but if I do, then it seems to me I leave to the first trial not only proof of the minimum damage required to complete the cause of action but all of the damages claimed by the claimant not specifically dealt with in the subsequent paragraphs of the particulars of claim. The result would be to leave to the first trial the assessment of damages caused by all those permutations and findings as on the pleadings are possible, with the consequences to which I've already referred."

Ultimately, what the Chancellor decided to do in that case was to accede to the split four months out that was being suggested. Now, obviously, in a different case and for different reasons, this Tribunal has rejected what I say is a very analogous application. So to suggest that it is in some way so out of the ordinary and worthy of condemnation to even be suggesting a different split to the trial is, in my submission, wholly wrong.

This is an illustration of a case where, in fact, such an application was granted four months out from trial. Obviously, no indemnity costs were paid by the party that was successful in that application. So that's the first point about timing. We say it's quite wrong to suggest that this is in some way, so abhorrent as to merit indemnity costs.

The second point made is about the amount of time, I think, that was allowed to prepare for this hearing.

THE CHAIR: I think the point was that it was -- yes -- asked for just before Christmas.

MR PICKFORD: It was originally -- as soon as we realised that there was a problem that we needed to draw to the -- what we considered to be a problem -- that we needed to draw to the Tribunal's attention that we would like a hearing about, we wrote to the other parties, even though we weren't able to make the Application at that time, and we did that on 12 December.

If I could take you, please, to the Correspondence Bundle, that's tab 14 of Bundle 7, you see, when we initially floated that there was going to be something that we were going to be raising shortly. On paragraph 6 of that letter, we say we're going to need to be moving the Tribunal. I quite accept we don't say what the problem is yet, because we weren't in a position to actually present the Application, but we were at pains -- because we could see that Christmas was approaching, we didn't want to entirely spring something that we hadn't foreshadowed at all before Christmas. We wanted to explain that something would be coming very shortly. I realise that that letter, of itself, does not explain what it is. I'm going to come on to deal with the next one. But that was, out of the abundance on our part, of trying not to be in a situation where just before Christmas we'd sprung something.

Then on the --

THE CHAIR: But you don't say, as you could have done, that it may well be necessary

when you say "a number of other case management issues", that we might want to revisit the scope of Trial 1.

MR PICKFORD: Yes, we don't say that until 18 December and I'm going to come to that. The background here, Sir, is that this was also a very busy period, not just in terms of preparing evidence in this jurisdiction. Google and its witnesses and those instructing were all taking part in proceedings in Sweden about these very same matters. And so that does, in my submission, have a bearing on quite how quickly one is able to obtain instructions and to take the necessary steps in order to be able to move the Tribunal.

On 18 December, that letter is at tab 18, and that's where we set out in terms what the nature of the problem was that we foresaw. So that was still well within term.

THE CHAIR: Well, term ended the next day, didn't it?

MR PICKFORD: It was within term, Sir.

THE CHAIR: Well, it wasn't "well within".

MR PICKFORD: Well, it wasn't "well within". I withdraw that. It was within term time. But there couldn't have been any doubt after this letter what it was that we were concerned about.

THE CHAIR: Yes.

MR PICKFORD: Then we then took steps to get the Application in front of the Tribunal as quickly, as quickly as was reasonable. We asked for a response by 2 January, obviously, if anybody thought it wasn't reasonable what we were asking of them, they were quite at liberty to say, "We can't respond by date X, but we'll respond by date Y". Indeed, that is characteristic of the correspondence in these proceedings; I don't think I need to take you to individual letters to show you that. But the entire time, one side or other might set a deadline and the other side says, "Well, we can't respond by this date, we'll respond a bit later".

We asked for a response by 2 January, and, ultimately, the Claimants were able to make clear their position -- I think it was by then.

In any event, nobody before this Tribunal now, as at 13 January, on the Claimants' side, has not been able to prepare properly for this Application. It's nearly a month after we wrote the letter of the 18th, which explained precisely what it was that we were seeking to do, and we were well aware that given that trial is obviously coming up to five months away, this wasn't something that we could sit on indefinitely.

So having appreciated that, we thought there was a problem, we sought to move the Tribunal sufficiently swiftly that we couldn't have been said to be sitting on our hands, but nonetheless, not unreasonably so given the total time period, that there has been between this Application being heard and the letter that we wrote on 18 December.

So, Sir, I entirely reject what is said in the Claimants' skeleton against me that this is old school litigation tactics, or US litigation tactics.

There is no -- as I said before -- bad faith here whatsoever in relation to this Application. It was brought on, we say, within a reasonable time once it was apparent to us that we thought we should bring it on.

The next point is that the same allegation that our conduct is deserving of censure and award of indemnity costs was made against us in relation to the amendment Application. Ultimately, although they sought indemnity costs against us in relation to that Application, what they've actually accepted is 60 per cent of the costs that they sought on paper.

So they gave us a costs schedule and we said, "We will pay 60 per cent". That is what Connexity and Kelkoo and Ciao accepted in relation to that. In my submission, that is indeed a sensible amount of costs, given the very high costs that they've been seeking in relation to both claims, not an award of indemnity costs in either case.

The next point I would make is that it is unsatisfactory, in an application for an award

of indemnity costs, to not have a precise costs figure from Connexity to say what it is that is the indemnity costs that they're seeking. What they've come with is a combined figure which they then, on instruction, seek to say, "Well, it's about 60 per cent, 40 per cent". In my submission, that's a wholly unsatisfactory way of going about making an application which is as serious as an indemnity costs application, because I'm not properly able to respond on the relevant costs for the Application. I just have to take it that what's on instruction from Ms Love is right, it's about 60 per cent, 40 per cent.

So, Sir, in the light of those points, we reject the application for costs on an indemnity basis. We do accept costs on a --

THE CHAIR: Yes, on a standard basis.

MR PICKFORD: On a standard basis. We say that a reasonable amount would be the same percentages as was agreed in relation to the other aspect of this claim, which is 60 per cent for the KCC Claimants. And we ultimately agreed to pay 65 per cent to Foundem, because we recognise that Foundem's costs were more reasonable, and we didn't want to punish in effect Foundem for coming up with lower, more reasonable figures, so we agreed 65 per cent for them.

In the absence of more detailed costs schedules, it is very hard for me to make more submissions about the reasonableness, or otherwise, of particular items of costs. It was suggested to the Tribunal by Ms Love that if you make an order for indemnity costs, well then now it's over to me to demonstrate which particular bits shouldn't be allowed. But I can't do that on the basis of the detail of the costs schedules you've got, because they're at a very high level. In my submission, they're only suitable for an award of costs on a standard basis. And that's the basis on which I urge the Tribunal to make an order.

THE CHAIR: Well, summary assessment on a standard basis in fact involves more

scrutiny than on an indemnity basis, because you look at proportionality as well as reasonableness. On an indemnity basis, you only look at reasonableness.

MR PICKFORD: Yes, but in my submission, it's very hard for me to make submissions on reasonableness, beyond the ones that I've already made, that overall, you should treat them in the same way as they were treated for the other aspect of the Application, where the sums claimed, in my submission, are all very high.

I mean, if we take Foundem as a starting point, Foundem's costs are £21,000. We know that Connexity's are a proportion of £101,000. I think it's being said about £60,000; is that correct?

THE CHAIR: Yes.

MR PICKFORD: And Kelkoo's and Ciao's are £84,000. In my submission, those are very large sums for the nature of the Application, and I would suggest not reasonable in the context of an indemnity costs application. In any event, on a standard basis, they should be cut down in the way that I've suggested.

May I just take instructions if there's anything else that those behind me would like to say. (Pause)

Sir, I have no further submissions on the costs issue.

(4.17 pm)

Ruling on costs

THE CHAIR: Thank you. I entirely accept that this application was not made in bad faith and that it was not a strategic tactic, but that it was a very late assessment by those advising Google that this would be, from the client's perspective, a satisfactory or appropriate way to proceed to trial.

Nonetheless, I am just persuaded that this is an appropriate case for an indemnity costs order. It seems to me wholly different from *The Leaflet Company* case to which

Mr Pickford has referred me. My reasoning in coming to that conclusion is that this is very complex and heavy litigation where the parties are far from short of expert advice, and the question of what issues should be in trial 1 was expressly considered back in March 2024, and reconsidered, as I mentioned in my judgment, in November 2024. There was every opportunity, which should in the ordinary course of litigation of this kind have been taken, to address the scope of trial 1 before everyone proceeded with detailed preparation, including the preparation of both factual and expert evidence for that trial. And I found no proper explanation for why this was advanced so late.

I do not, by that, mean that it was raised over the Christmas period. I mean that it was raised in December 2025, just six months ahead of trial the following June, in proceedings that have been running for many years and, as set out in the judgment, where defences have been pleaded and repleaded. And yet Google now says, in effect, "Without the split, we have difficulty in pleading".

So I do regard this as an exceptional case. The fact that the costs are on an indemnity basis means that proportionality is not at issue, but reasonableness is nonetheless a question for the tribunal. I think Foundem's costs are reasonable and I will summarily assess those costs in the amount sought, which is £20,972.50.

As regards Kelkoo, Ciao and Connexity, the total costs sought related to this application are about £144,000, and the two sets of costs have been added together because the parties are jointly represented by a single team of senior and junior counsel. This amount is, I have to say, an extraordinary amount of costs for an application which effectively took a little over half a day and involved no witness evidence. The skeleton arguments advanced for those three parties was, entirely appropriately, just 12 pages. The amount claimed is unreasonably high, I think. A reasonable amount would be significantly less than that, without having regard to proportionality and recognising that this was a very important application for those

parties to oppose.

Reasonable costs in those circumstances, I consider to be £50,000 for Kelkoo and Ciao and £25,000 for Connexity. I therefore determine that the costs payable for Kelkoo, Ciao and Connexity, summarily assessed on the indemnity basis, are £75,000 and that's the order I will make.

Google is to pay the costs within 14 days.

(4.22 pm)

MR PICKFORD: Yes, Sir.

THE CHAIR: Yes. Can you draw up that order between you and submit it to the Tribunal?

MR PICKFORD: Of course.

THE CHAIR: And please remember to include in it the order I made at the outset of the hearing under Rule 102.5 about confidentiality.

MR PICKFORD: Understood, Sir, thank you.

MR JOWELL: Just before (inaudible), could I (several inaudible words)?

THE CHAIR: Yes.

MR JOWELL: (Several inaudible words).

THE CHAIR: Yes. I didn't ask you to respond, I think, on that, did I?

MR WEST: I may have misheard you, Sir, but a suggestion has been made that the Commission subsequently approved the arrangements put in place by Google, which they call the Remedy. We have clarification of that: this was never approved by the Commission.

THE CHAIR: That's for the Decision period?

MR WEST: For the Decision period. (Several inaudible words).

THE CHAIR: Yes. I see. I did say that I'm happy to correct it. What --

MR WEST: Simply that Google adopted what it contends is an effective remedy, but that's --

THE CHAIR: And the Commission --

MR WEST: Clearly, as we've heard today, whether that is an effective remedy is a matter in dispute.

THE CHAIR: If I say that Google -- and I'll be given an opportunity to correct the transcript, obviously, this being an unreserved judgment -- Google adopted arrangements, or put in place arrangements, which were submitted to the Commission.

MR WEST: That would be correct. Yes, which was submitted to the Commission, and that leaves open the question whether they were approved or not. I'm not going to get into that.

THE CHAIR: Yes, thank you.

MR WEST: I'm very grateful.

THE CHAIR: Very good. Is there anything else? I'm very grateful that you've resolved the outstanding costs issue, which would not have been very welcome at 4.30 pm. Is there anything else for me to deal with? Well, thank you all very much.

(4.25 pm)

(The court adjourned)