Neutral citation [2026] CAT 7

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

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

4 February 2026

Before:

SIR PETER ROTH

(Sitting as a Tribunal in England and Wales)

BETWEEN:

INFEDERATION LIMITED
("**Foundem**")

Claimant

- v -

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

Defendants

Heard at Salisbury Square House on 12 January 2026

JUDGMENT (ADMISSIBILITY APPLICATION)

APPEARANCES

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

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

A. INTRODUCTION

1. This application is made in one of four cases brought by companies operating comparison shopping services ("CSS") against companies in the Google group ("Google") alleging abuse of dominance through, in essence, self-preferencing by Google of its own CSS. The four actions have been case managed together and what has been called the "Stage 1 Trial" of specified common issues in the cases is listed to commence on 22 June 2026.

2. These actions are in part 'follow-on' and in part 'stand-alone' cases in relation to the decision by the European Union Commission ("the Commission") of 27 June 2017 in Case AT.39740 *Google Search (Shopping)* ("the Decision") which found that Google had abused a dominant position in a number of national markets, including the UK. Google's appeals against the Decision were dismissed (save in a minor respect) by the EU Courts.

3. Foundem was a complainant to the Commission as long ago as November 2009, and it was the complaints by Foundem and others which in part led to the Commission commencing its investigation, which eventually led to the Decision. Foundem ceased trading in December 2016, which it contends was due to the unlawful conduct of Google impugned in these proceedings.

4. By Order made on 1 August 2025, the parties were directed to serve factual witness statements for the Stage 1 Trial by 23 October 2025, and factual witness statements in reply by 23 December 2025.

5. Pursuant to that Order, Foundem served statements from two witnesses of fact, Mr Adam Raff and Mrs Shivaun Raff. No other factual witness evidence is put forward on behalf of Foundem. Mr and Mrs Raff were the co-founders of Foundem, which effectively launched its CSS in June 2006. They are both directors of Foundem.

6. By application dated 26 November 2025, Google sought an order requiring Foundem to serve new witness statements to replace both Mr and Mrs Raff's statements.

B. SUMMARY OF THE APPLICATION

7. Google alleges that both statements fail to comply with Practice Direction 2/2021: Trial/Appeal Witness Statements in the Competition Appeal Tribunal ("PD 2/2021"), or with the Tribunal's Order dated 20 December 2024 (the "December 2024 Order") setting out the permissible scope of expert evidence in this case. Google contends that Foundem should be required to replace both statements with new statements that excise those paragraphs that do not comply with PD 2/2021 or go beyond the scope of expert evidence permitted by the December 2024 Order.

8. Google alleges that various paragraphs in the statements do not comply with PD 2/2021 or the December 2024 Order for one or more of the following reasons:

   a) they contain commentary on Foundem's case and/or documents that were not available to Mr and Mrs Raff during the period in respect of which they are giving evidence. This includes commentary on documents provided by Google during the course of disclosure in these proceedings;

   b) they seek to construct factual timelines through excessive reproduction of documentary evidence, speculate on Google's motives or actions, confirm alleged beliefs or understandings that the witness is said to have held at an earlier time, and to engage in advocacy and legal submission more generally; and

   c) they contain expert opinion evidence for which no permission has been given, or which ought to have been advanced by an independent expert rather than a witness of fact.

9. Foundem filed its response to Google's application on 10 December 2025 (the "Response"). Foundem accepted that a witness should not ordinarily give factual evidence about the contents of documents seen only during the course of disclosure. However, the Response explained that Foundem has no employees other than Mr and Mrs Raff, who were therefore the only individuals able to review disclosure documents on the company's behalf. The first tranche of disclosure was provided as long ago as

2013 during the course of the Commission's investigation. Foundem considered that the Raffs were entitled to give factual evidence about documents affecting their subsequent conduct, which is itself relevant to the proceedings. However, Foundem agreed to provide an updated version of Mr Raff's statement which removed references to documents that were seen only during the course of disclosure. Accordingly, this point is no longer in issue. Foundem otherwise maintained that the two witness statements are fully admissible.

C. LEGAL FRAMEWORK

10. Section 3 of the Civil Evidence Act 1972 ("CEA 1972") provides:

> "(1) Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.
>
> (2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.
>
> (3) In this section "relevant matter" includes an issue in the proceedings in question."

11. The meaning of "*qualified to give expert evidence*" in s. 3(1) was addressed by the Court of Appeal in *Brendon International Ltd v Water Plus Ltd* [2024] EWCA Civ 220, [2024] 1 WLR 2434 ("*Brendon*") at [76]-[77]. In the lead judgment, Snowden LJ adopted and quoted the description by Bingham LJ in *R v Robb* (1991) 93 Cr App R 161 at 165:

> "[…] the essential questions are whether study and experience will give a witness's opinion an authority which the opinion of one not so qualified will lack, and (if so) whether the witness in question is *peritus* [skilled] in Lord Russell's sense. If these conditions are met the evidence of the witness is in law admissible, although the weight to be attached to his opinion must of course be assessed by the tribunal of fact."

And Snowden LJ continued to observe:

> "In the same case, at 166, Bingham LJ memorably contrasted the nature of an expert with that of a non-expert, when remarking that a defendant,
>
> > "[…] cannot fairly be asked to meet evidence of opinion given by a quack, a charlatan or an enthusiastic amateur.""

12. PD 2/2021 contains the following relevant provisions:

"**2. The purpose of a trial/appeal witness statement**

2.1 The purpose of a trial/appeal witness statement is to set out in writing the evidence in chief that a witness of fact would give if they were allowed to give oral evidence at the trial or the hearing of the appeal without having provided the statement.

2.2 Trial/appeal witness statements are important in informing the parties and the Tribunal in advance of the evidence a party intends to rely on at trial or the hearing of the appeal. Their use furthers the governing principles (defined in rule 4 of the Tribunal Rules) by helping the Tribunal to deal with cases justly, efficiently and at proportionate cost, including by helping to put parties on an equal footing, saving time at trial and promoting settlement in advance of trial.

3. The content of witness statements

3.1 A trial/appeal witness statement must contain only –

> (1) evidence as to matters of fact that need to be proved at trial or the hearing of the appeal by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial or on the appeal, and
>
> (2) the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence in chief if they were called to give oral evidence.

3.2 A trial/appeal witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, […]

[…]

5. Sanctions

5.1 The Tribunal retains its full powers of case management and the full range of sanctions available to it and nothing in paragraph 5.2 or paragraph 5.3 below confines either.

5.2 If a party fails to comply with any part of this Practice Direction, the Tribunal may, upon application by any other party or of its own motion, do one or more of the following –

> (1) refuse to give or withdraw permission to rely on, or strike out, part or all of a trial/appeal witness statement,
>
> (2) order that a trial/appeal witness statement be re-drafted in accordance with this Practice Direction or as may be directed by the Tribunal,
>
> (3) make an adverse costs order against the non-complying party,
>
> (4) order a witness to give some or all of their evidence in chief orally."

13. Further, PD 2/2021 requires, at para 4, that the witness statement should (unless the Tribunal otherwise directs) include a confirmation, in specified form, of compliance with the requirements of the practice direction; and also a certificate of compliance

signed by the relevant legal representative. Paras 4.2 and 4.4 provide that an application can be made to dispense with such requirements.

14. PD 2/2021 reflects Practice Direction 57AC – Trial Witness Statements ("PD 57AC") under the CPR, introduced in January 2021 in the Business and Property Courts ("BPC"). The provisions quoted above mirror the equivalent paragraphs of PD 57AC but there is no equivalent to para 3.4(1) of PD 57AC which incorporates a duty to comply with the Statement of Best Practice appended to PD 57AC.

15. PD 57AC was produced as a result of the report of the Witness Evidence Working Group, established to address widespread concern that factual witness statements were often being produced that went beyond their proper scope. As stated in the Implementation Report of 31 July 2020 of the Witness Evidence Working Group, whose recommendations were accepted by the BPC Board, at paras 10-12:

> "10. At the heart of the Final Report, and the founding concern that led to the creation of the Working Group, is the phenomenon of the over-long, over-lawyered trial witness statement. Experience of such statements and how they neither reflect the evidence in chief that the factual witnesses in question realistically would have given nor operate fairly to witnesses or the court at trial is a staple for the judges trying cases in the Commercial Court, TCC and Chancery Division. The problem is endemic in the litigation of well-funded document-heavy, business disputes that is the core function of those three parts of the High Court. […]
>
> 11. It is important to emphasise that the Working Group (including in particular its judicial members) does not take the view that the problem is one of conscious abuse of the process, although most judges will have seen examples that may have been that. The problem is not that parties, those advising them, or their witnesses are providing witness statements they believe to be inappropriate. But that makes it harder to tackle without systemic reform.
>
> 12. What has been lost, in cases conducted in the BPC jurisdictions, is a discipline in the application by parties of the core principles created by or reflected in CPR 32.1, 32.2, 32.4 and 32.5: firstly, that factual witness evidence should be adduced at trial only on matters on which such evidence is required on disputed issues that stand to be resolved at the trial; secondly, that a factual witness statement for trial should contain only the evidence in chief the witness could and would be allowed to give at trial if the witness statement were not being taken as their evidence in chief."

16. In *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 27247 (TCC), O'Farrell J stated at [37]:

> "The purpose of the new Practice Direction is not to change the law as to the admissibility of evidence at trial: per Sir Michael Burton GBE, sitting as a Judge of the High Court in *MAD Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at

> [9]; rather it is to eradicate the improper use of witness statements as vehicles for narrative, commentary and argument. The Practice Direction explains that the purpose of trial witness statements is to further the overriding objective by helping the court to deal with cases justly, efficiently and at proportionate cost, including by helping to put parties on an equal footing, saving time at trial and promoting settlement in advance of trial."

17. I consider that just as PD 2/2021, like PD 57AC, cannot render admissible material which was otherwise inadmissible as a matter of law, similarly it does not render inadmissible as a matter of law material which was otherwise admissible. As Sir Michael Burton noted in *MAD Atelier International BV v Manes* [2021] EWHC 1899 (Comm) ("*MAD Atelier*"), the sanction for non-compliance in para 5.2 of PD 57AC is discretionary. Like PD 57AC for the BPC, PD 2/2021 reflects the exercise of power by the Tribunal to control the evidence which will be allowed at trial, to conform to good practice and as part of effective case management. In the same way, under rule 55(1) of the Competition Appeal Tribunal Rules 2015 (the "CAT Rules"), the Tribunal may limit the number of witnesses that a party may call, or the matters on which they may give evidence. Indeed, para 1.6 of PD 2/2021 states:

> "The Tribunal may direct under rule 21(3) or 55(1) that this Practice Direction does not apply in whole or in part to a witness statement or statements."

18. The application of PD 57AC has now been considered in a large number of cases at first instance. That includes the question of what the court should do in the event of non-compliance and when it is appropriate to address the matter in advance of trial or only at trial: see e.g. the authorities cited in Malek (ed) *Phipson on Evidence* (21st edn, 2025) at para 11-06. It is sufficient to say that, like most matters of case management, this is very dependent on the circumstances of the particular case. The same approach should clearly be applied in respect of the Tribunal's PD 2/2021.

D. GOOGLE'S OBJECTIONS

19. Google set out its objections under different heads, while recognising that there is some overlap between them.

(i) Opinion evidence and analysis that might be given by an expert

20. Google submits that there is no scope for "expert evidence", meaning opinion evidence or analysis of the kind that may be given by an expert, to be given by a witness of fact. Such evidence may only be given by an expert, for which the permission of the Tribunal is needed and who would be subject to the obligations of an expert to the Tribunal: see the Tribunal Guide to Proceedings (2015) (the "Tribunal Guide"), para 7.67, and now Practice Direction 3/2025 Expert Evidence. Mr Raff (to whose statement this objection relates) is obviously not put forward as an independent expert.

21. Secondly, Google contends that by the Order of 26 March 2024, made in all four proceedings ("the March Directions Order"), at para 10, the Tribunal directed the parties to exchange the names of experts they had appointed in the areas of (a) competition economics, (b) CSS / vertical internet search markets, and (c) search engine optimisation. The claimants (including Foundem) decided jointly to instruct an expert economist, Mr Matt Hunt of AlixPartners, but none has sought to adduce evidence from experts in fields (b) or (c). On that basis, the December Directions Order provided, at para 6, that the claimants in all four proceedings may jointly adduce economic expert evidence from Mr Hunt. However, there are lengthy sections of the statement of Mr Raff which amount to expert evidence in fields (b) and (c). Google argues that Foundem is therefore seeking to put in, by the back door, expert evidence contrary to the Tribunal's orders.

22. Thirdly, Google submits that in consequence Mr Raff's statement flouts PD 2/2021 since it is not confined to evidence "as to matters of fact", whereas no application had been made by Foundem for dispensation under paras 4.2 and 4.4.

23. I accept that there are significant sections in Mr Raff's statement which are not matters of fact known to him but opinion evidence and analysis of a kind that is often given by an expert. But I do not consider that this alone makes this evidence inadmissible as a matter of law. As set out above, s. 3(1) CEA 1972 provides that a witness's evidence "*on any relevant matter on which he is qualified to give expert evidence*" shall be admissible. In its Reply, Google contends that just because Foundem's CSS has interacted with Google for over a decade, Mr Raff is not qualified to give an expert view as regards the operation of Google's algorithmic search penalties and Universal

Search. I take this to mean that Mr Raff is not qualified in the sense explained by Bingham LJ in *R v Robb*: see para 10 above.

24. However, I do not think that does justice to the basis on which Mr Raff claims expertise. As set out in his statement, he has a BSc in Computer Science, worked as Analyst in Charge for one of the world's leading supercomputing sites, and was for some six years until 2003 a member of Fujitsu's High-Performance Computing division. In his own right, he has developed and obtained patents, first, for an application for mobile devices that could conduct parameterised searches in a configurable way, while protecting data confidentiality; and then for an internet-based version of the configurable vertical search platform (which became the basis for the technology underlying Foundem). Altogether, he has some 33 years' experience of computer software analysis and development. In my view, this is sufficient, at least for the basis of admissibility, to establish Mr Raff's expertise for the evidence he seeks to give. The full extent of his understanding is a matter which can be explored, if Google so wishes, in cross-examination.

25. This case is therefore very different from the situation in *New Media Distribution Co SEZC Ltd v Kagalovsky* [2018] EWHC 2742 (Ch), where a witness of fact sought to reference in his statement, and thereby include as exhibits, statements about New York and Ukrainian law by two other individuals who were experts in those fields. There, the witness himself had no such expertise, and it is unsurprising that Marcus Smith J held that his statement was inadmissible where it was being used as a gateway for adducing expert evidence from others without their being subject to the safeguards of CPR rule 35.

26. Section 3(1) CEA 1972 is expressly subject to any rules of court, but the CAT Rules do not provide for any particular requirements for evidence other than that a relevant witness statement or expert report must be submitted in advance of the hearing in accordance with the Tribunal's directions: rule 55(2). The Tribunal applies the same provisions as under CPR rule 35 as regards the overriding duty of a person instructed as an expert and the requirement for an attestation to that effect in their report: Tribunal Guide, paras 7.67-7.68 (which has the status of a practice direction). However, that does not apply to Mr Raff, who is not instructed as an expert but is a witness from a

party. The fact that he is clearly not independent of Foundem is a matter which may be relied on by Google as going to weight but does not affect admissibility.

27. The admissibility of such evidence from a factual witness was considered by the Court of Appeal in *Brendon*. A key issue in that case was whether the sewer into which waste water drained from the claimant's premises was properly to be regarded as a public sewer (in which case the defendants were entitled to charge for drainage services under the Water Industry Act 1991). One of the defendants' main witnesses was a Mr Griffiths, the wastewater network technical manager of United Utilities. Snowden LJ summarised Mr Griffiths' evidence in his judgment at [26]:

> "Mr. Griffiths had almost 39 years' experience in the industry. His evidence was to the effect that (i) the standard of construction of a sewer, and in particular its size or material, is generally a good guide to whether it is a public or a private sewer, because public sewers tend to be of a higher standard of construction, (ii) that the size and standard of construction of the drainage scheme of which the sewer in issue in this case formed part, and the fact that it served more than one property, was more in line with what would be expected from a large scale civil engineering project rather than a private system, which suggested that the sewer in question was a public sewer, and (iii) that the sewer had been built to a standard that suggested it had been built with the intention that it would be adopted by the undertaker under the WIA 1991."

28. The Court of Appeal reversed the holding of the trial judge that Mr Griffiths' evidence was inadmissible. In doing so, Snowden LJ (with whose judgment Baker and Falk LJJ agreed) adopted and quoted passages from two prior decisions, as follows:

> "86. The position of witnesses who give both evidence of fact and evidence of opinion in a field in which they have particular expertise was considered in *Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited (No.6)* [2008] EWHC 2220 (TCC). At [667]-[672], Jackson J stated,
>
> > "667. The question then arises as to whether [the witness] is confined to giving evidence of fact, without including his expert opinion on matters. Alternatively, can he include statements of professional opinion bearing upon facts within his personal knowledge?
> >
> > 668. This question arises in many fields of litigation, for example professional negligence actions where the defendant is a witness of fact but also wishes to justify his actions by drawing upon his professional experience. This question arises with particular frequency in litigation in the Technology and Construction Court. Most factual witnesses called are possessed of technical knowledge and expertise. In relation to major engineering projects … those factual witnesses are likely to have very considerable expertise. Otherwise they would not have been engaged upon such projects in positions of responsibility.

669. Despite the diligent researches of counsel, there is relatively little authority on the extent to which witnesses, who are possessed of special expertise, can gloss their factual evidence with expert comment.

670. In *Lusty v Finsbury Securities Ltd* (1991) 58 BLR 66 the Court of Appeal held that an architect suing for fees could give opinion evidence as to the value of his work. In *DN v LB Greenwich* [2004] EWCA Civ 1659 the Court of Appeal dismissed an appeal against the trial judge's finding that an educational psychologist had been negligent. One of the issues in the appeal concerned the admissibility of opinion evidence given by the psychologist. Brooke LJ said this:

> "25. It very often happens in professional negligence cases that a defendant will give evidence to a judge which constitutes the reason why he considers that his conduct did not fall below the standard of care reasonably to be expected of him. He may do this by reference to the professional literature that was reasonably available to him as a busy practitioner or be reference to reasonable limits of his professional experience; or he may seek to rebut, as one professional man against another, the criticisms made of him by the claimant's expert(s). Such evidence is common, and it is certainly admissible…
>
> 26. Of course a defendant's evidence on matters of this kind may lack the objectivity to be accorded to the evidence of an independent expert, but this consideration goes to the cogency of the evidence, not to its admissibility…"

671. As a matter of practice in the TCC, technical and expert opinions are frequently expressed by factual witnesses in the course of their narrative evidence without objection being taken. Such opinion evidence does not have the same standing as the evidence of independent experts who are called pursuant to CPR rule 35. However, such evidence is usually valuable and it often leads to considerable saving of costs.

672. Having regard to the guidance of the Court of Appeal and the established practice in TCC cases, I conclude that in construction litigation an engineer who is giving factual evidence may also proffer (a) statements of opinion which are reasonably related to the facts within his knowledge and (b) relevant comments based upon his own experience. For example, an engineer after describing the foundation system which he designed may (and in practice frequently does) go on to explain why he believes that this was appropriate to the known ground conditions. Or an engineer brought in by a claimant to design remedial works (which are subsequently challenged as excessive) may refer to his experience of rectifying comparable building failures in the past…."

87. That decision was referred to without any adverse comment in *Rogers v Hoyle* [2015] QB 265. That case concerned the slightly different issue of the admissibility in civil proceedings of a published report prepared for different purposes by a third party expert air crash investigator. In the Court of Appeal, at [62]-[64], Christopher Clarke LJ stated,

> "62. … Section 3 of the 1972 Act does not purport to be all embracing or to restrict or alter the position at common law. The expert with whom CPR 35 is concerned is a person "who has been instructed to give or prepare expert

> evidence for the purpose of proceedings". The expert evidence referred to in CPR 35.1 and 35.5 and the expert's report referred to in CPR 35.4 and 35.10 are the evidence and report of such a person. The purpose of CPR 35 is to regulate the evidence of experts instructed by the parties, to ensure that they act as experts, and to regulate the use and content of their reports….
>
> 63. CPR 35 is not a comprehensive and exclusive code regulating the admission of expert evidence. It regulates the use of a particular category of expert evidence …
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> 64. The courts have in practice received expert evidence outside the confines of CPR 35. Thus in *DN v Greenwich London Borough Council* [2005] LGR 597 this court held that the trial judge was wrong to decline to allow the defendants to a professional negligence claim to rely on the opinion evidence contained in the witness statement of a school educational psychologist who was said to have been negligent. That decision was applied by Jackson J in *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC) where he ruled that an engineer giving factual evidence could also proffer statements of opinion reasonably related to facts within his knowledge and relevant comments based on his own experience…""

29. Mr Pickford KC, on behalf of Google, sought to distinguish the approach of those cases on the basis that they concerned only the ability of a witness with expertise to "*gloss their factual evidence*" with comment or opinion of an expert nature. But the decision in *Brendon* that Mr Griffiths' evidence was admissible, in reliance on those cases, shows that admissibility is not so narrowly confined. Mr Raff gives substantial factual evidence on the rankings of Foundem's website and that of other CSSs, which was determined by Google's algorithms. He is, in my judgment entitled to consider, on the basis of his expertise and considering the available evidence, how those algorithms will have operated to produce those results and the way in which Google could have operated to avoid the self-preferencing which the Decision found to be an abuse.

30. As regards the December Directions Order, Mr Pickford sought to rely on what was said by Snowden LJ in *Brendon* at [91]:

> "I quite accept that CPR 32.1 or the inherent power of the court to control its own proceedings would enable a court to exclude evidence which it considered was designed to circumvent or undermine CPR 35. This might be the case, for example, if the court had given specific directions under CPR 35 for the production of a limited number of independent expert reports, but one party chose, in addition, to invite a factual witness who had some expertise, to volunteer his opinions on the very issues that the court had directed to be addressed by the experts under CPR 35."

31. However, the December Directions Order and must be read in the context of the earlier March Directions Order. The March Directions Order permitted the parties to call

expert evidence in any of the three specified fields, provided that the experts' names were duly exchanged and subject to control by the Tribunal of the number of such experts if the claimants in the four proceedings could not agree on joint experts. That order of course did not *require* any party to call any such experts. Since the parties then appointed an independent expert only in the field of competition economics, the December Directions Order related only to economic experts.

32. Foundem was entitled to decide that it will give evidence that may cover the vertical internet search market and search engine optimisation not by an independent expert or experts but through the testimony of Mr Raff. It will obviously have realised that Mr Raff's evidence may be criticised as partial and lacking objectivity. But on the other hand, Foundem has referred in its Response to the difficulty of finding an expert in this specialised area who was willing to testify against Google, and Google had previously strongly objected to an expert then instructed by Foundem being admitted to the 'inner' confidentiality ring: see my earlier judgment in these proceedings prior to their transfer to the Tribunal: [2020] EWHC 657 (Ch). Instead, Mr and Mrs Raff were admitted to that ring in return for their undertaking not to resume work in this area for five years after the resolution of these proceedings. Moreover, the present case is in contrast to a case where permission to call an expert to testify on such matters had been expressly refused, in which case it would clearly be wrong for a party to seek to adduce, by a witness of fact, opinion evidence which the court had decided it could not adduce by an expert: cf. *JD Wetherspoon plc v Harris* [2013] EWHC 1088 (Ch), [2013] 1 WLR 3296 ("*JD Wetherspoon*") at [40].

33. This is subject to the important caveat since, as just mentioned, the claimants are calling an expert economist, Mr Hunt. In section 3.2.5 of his statement, at paras 146-153, Mr Raff undertakes an analysis of traffic data from Google to the websites of Foundem and another CSS. The report of Mr Hunt had not been served at the time of the hearing of this application, but insofar as he seeks to conduct a traffic analysis of that nature, I agree with Mr Pickford that it would be wrong for Mr Raff to give similar or supplementary evidence by way of traffic data analysis. Once a party decides to adduce evidence from an expert in accordance with permission granted by the Tribunal, it cannot in *addition* put in such evidence from a factual witness.

34. Since Foundem's representatives at the hearing were unclear as to the scope of what the economic expert would address, Foundem was directed to submit a note after the hearing clarifying the matter. It duly did so on 20 January 2026, annexing a helpful letter from Mr Hunt.

35. Foundem says that whereas section 3.2.5 of Mr Raff's statement sets out a "*narrowly focused*" comparison of the traffic to Foundem's CSS compared to a CSS (Twenga) launched around the same time in France, Mr Hunt's analysis will involve a broader consideration of traffic patterns using data across CSS domains. Foundem states: "*Twenga's data will only be considered as part of his wider empirical analysis of CSS domains*." Mr Hunt's letter confirms that and states:

> "To the extent data on Twenga is available in the disclosed datasets, I would consider the penalties actually applied to Twenga and the resulting traffic effects. This would form part of a wider CSS-level analysis and is not substantively duplicative of the historical narrative set out [in Mr Raff's statement]."

36. However, while the analysis put forward by Mr Raff and the analysis to come from Mr Hunt are of course not identical, I think this is sufficient to show that they are directed at the same issue and involve similar considerations. Accordingly, I consider that it is impermissible for Mr Raff to seek to supplement the expert's analysis of traffic data with one of his own. That is not in my view consistent with the appointment of an expert pursuant to the December Directions Order. If Mr Hunt considers it appropriate, consistent with his duties as an independent expert, to provide a comparison of traffic to Foundem and Twenga as part of his report, he is of course free to do so. But this is not a matter which can properly be addressed by Mr Raff in these proceedings where traffic analysis is being conducted by Foundem's expert.

37. Accordingly, section 3.2.5 should be deleted from Mr Raff's statement. I should add that the same objection does not apply to section 3.2.4, which considers the impact of a Google search penalty on traffic. Mr Raff explains that impact based on his technical knowledge and experience of operating Foundem. Those are not matters within Mr Hunt's expertise and, as he says in his letter, will not form part of his analysis.

38. By its letter of 21 January 2026, Google's solicitors raised a further objection contending that Mr Raff also analyses traffic to another CSS, CompareStorePrices.

Although not specified in the letter, that appears to refer to section 3.2.7 of the statement (paras 163-166). Since this was not identified by Google in the hearing, nor indeed does Google's subsequent schedule object to those paragraphs as comprising "traffic data", neither Foundem nor Mr Hunt addressed them in the post-hearing note and letter.

39. It is unfortunate that this was not highlighted by Google at the proper time, but it would be disproportionate and cause further delay to invite yet more submissions. I consider that section 3.2.7 falls into two parts. Paras 163-165 express an opinion as to the nature and character of CompareStorePrices's website. Para 166 expresses the view that it has done comparatively well in terms of traffic, supported by the analysis in Figure 39. Figure 39 is not just a comparison of traffic as between Foundem and CompareStorePrices but comprises tables of traffic to some 16 CSSs over the period 2006-2016. In that regard, it largely corresponds to Figure 35 in the previous section, albeit that CompareStorePrices is for some reason not included in the tables in Figure 35. In the circumstances, I think the appropriate course at this stage is to allow section 3.2.7, including Figure 39, to remain in the statement. When Mr Hunt's report is served, it will be possible to ascertain whether these tables of traffic data should more properly be attested to by Mr Hunt or Mr Raff: Foundem will not be permitted to rely on both. But it may well be that the figures in the tables are not contested.

40. As for the commentary on the nature of the different CSSs, that seems to me within the scope of Mr Raff's expertise and not economic expert evidence at all, so it is not objectionable on account of Foundem calling an expert economist. Indeed, in Google's responsive evidence, one of Google's factual witnesses (Mr Cutts) has engaged with and contested this commentary.

41. The third ground for objection to opinion evidence was that it contravenes PD 2/2021, as it is not evidence of fact known to the witness. Mr Pickford acknowledged that Foundem could have applied to depart from the requirements of the Practice Direction, but no such application had been made.

42. For Foundem, Mr West KC submitted that PD 2/2021 does not preclude opinion evidence of this kind. He said that such evidence comes within para 3.1(2) as it comprises matters that the relevant party could give as evidence in chief.

43. This comes down to whether the requirements in para 3.1(1) and (2) of PD 2/2021 are cumulative, as Mr Pickford submitted (so that "*such matters*" in (2) refers back to the "*matters of fact*" in (1)), or in effect alternative routes, as Mr West submitted. Foundem's position is supported by *MAD Atelier*, where Sir Michael Burton, referring to the parallel provision of PD 57AC, said at [9(ii)] that para 3.1(2) covered matters which may be included in a witness statement "*in addition to matters of fact*". However, with great respect to Sir Michael Burton, I do not agree. The confirmation of compliance which para 4.1 of the Practice Direction requires the witness to give, is clear. It reads:[1]

> "I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge.
>
> I understand that it is not my function to argue the case, either generally or on particular points, or to take the Tribunal through the documents in the case.
>
> This witness statement sets out only my personal knowledge and recollection, in my own words.
>
> On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when.
>
> I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge."

44. Accordingly, I consider that Mr Pickford's interpretation is correct and that the terms of PD 2/2021 relate to statements of fact. I note also that occasions when a witness of fact seeks to give opinion evidence based on their expertise are relatively rare, and it is clear that they were not expressly considered by the BPC Witness Evidence Working Group. It follows that insofar as Mr Raff's statement contains expert opinion, it does not comply with the practice direction.

45. However, as I have observed, it is accepted that Foundem could have applied to the Tribunal for dispensation to depart from these requirements: see paras 4.2 and 4.4 of PD 2/2021. The sanctions for non-compliance in section 5 are discretionary. Moreover, as noted above, para 1.6 of PD 2/2021 states:

[1] The wording is the same in PD 2/2021 as in PD 57AC.

> "The Tribunal may direct under rule 21(3) or 55(1) that this Practice Direction does not apply in whole or in part to a witness statement or statements."

46. The Governing Principles in rule 4 of the CAT Rules provide:

> "(1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate— (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly;
>
> (e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases; and
>
> (f) enforcing compliance with these Rules, any practice direction issued under rule 115, and any order or direction of the Tribunal."

47. There is a massive inequality of arms in the present case, even allowing for the fact that Foundem is supported by litigation funding. Foundem is a private company that was effectively run by Mr and Mrs Raff and has ceased trading; Google is one of the world's largest multinational groups. Even with Foundem's outside funding, the financial position of the two sides is in sharp contrast. It may be said that there is here some tension between placing the parties on an equal footing and enforcing compliance with the practice direction. However, I note that in *JD Wetherspoon*, the Chancellor observed of the rules and guidance regarding witness statements, at [41]:

> "It is conceivable that in particular circumstances they may properly be relaxed in order to achieve the Overriding Objective in CPR r. 1 of dealing with cases justly."

48. Accordingly, what Foundem should have done was to apply to the Tribunal either for dispensation from the requirement of a confirmation of compliance under para 4.2 of PD 2/2021 (and the related certification under para 4.4), or for a direction pursuant to para 1.6. Such an application enables the Tribunal to determine in advance of witness statements being served whether such a dispensation or direction is appropriate and whether the circumstances appear to justify a particular witness giving opinion

evidence. However, given the view taken in the *MAD Atelier* case, I do not think Foundem is to be criticised for the interpretation which it placed on para 3.1 of PD 2/2021, although I have held that to be mistaken.

49. Here, Google is well able to call witnesses with the expertise to contest the opinion evidence given by Mr Raff, and has put in full evidence from Mr Matthew Cutts, an engineer who was for many years in the Search Quality Team at Google, including a response to Mr Raff's witness statement. In my judgment, in accordance with the Governing Principles, the just course in all the circumstances is to direct under para 1.6 of PD 2/2021 that the practice direction does not apply to those parts of Mr Raff's witness statement which amount to opinion evidence of an expert nature.

50. It follows that, apart from paras 146-153, the paragraphs (and associated figures) in Mr Raff's witness statement which have the character of expert opinion evidence can remain (unless excluded on another ground below). Rather than list those paragraphs, it is more practical to set out below those paragraphs from Mr Raff's statement which are to be excised. I should add that some of the comments in Mr Raff's statement, to which Google classifies its objection on a different ground (e.g. as amounting to advocacy or commentary on documents), in my view come within the scope of expert opinion: e.g. Mr Raff's comments on the proposed and actual compliance mechanism.

51. Although Google's objection under this head was directed at Mr Raff's witness statement, there is one paragraph of Mrs Raff's statement which I consider amounts in part to "expert" opinion evidence, which is para 160, where in the first sentence she expresses her assessment of what effect a Google penalty score update should have had on Foundem, based on Google penalty score data. Like her husband, Mrs Raff has substantial experience of software development and programmes. In my view, her career gives her a sufficient basis of expertise to put forward this assessment and I direct that PD 2/2021 does not apply in respect of that sentence in her statement.

(ii) Advocacy and speculation / excessive reproduction from, and commentary on, documents

52. Although these are raised by Google as two distinct heads of objection, there is substantial overlap between them. When a witness engages in commentary on an extract from a document, that commentary often involves advocacy or speculation. Therefore, for practical purposes, when considering whether Google's objection to particular paragraphs in these two witness statements should be sustained, it is convenient to consider these two heads together.

53. There is an increasing trend for statements from witnesses of fact who are themselves, or are involved with, a party to the litigation to include advocacy and argument. A witness of fact would not be permitted to make statements of that kind when giving oral evidence in chief, and they therefore should not appear in the witness's written statement. Similarly, as is clear from the quotation above from the Report of the Witness Evidence Working Group, extensive recitation of documents was one of the concerns which led to CPR PD 57AC, and is reflected in the Tribunal's PD 2/2021.

54. *JD Wetherspoon*, decided several years before the issue of PD 57AC, but when similar proscriptions were set out in the Chancery Guide, provides a glaring example of an inappropriate statement in that regard. The case involved allegations of dishonest assistance and breach of fiduciary duty surrounding two property transactions which took place in 1995 and 1996. The claimant applied to strike out the majority of the witness statement of a Mr Goldberger made on behalf of the second defendant. In his judgment, Sir Terence Etherton C noted that Mr Goldberger became a director of that defendant only in 2003 and had no prior involvement with the matters which are the subject of the proceedings. The Chancellor continued, at [33]:

> "The vast majority of Mr Goldberger's witness statement contains a recitation of facts based on the documents, commentary on those documents, argument, submissions and expressions of opinion, particularly on aspects of the commercial property market. In all those respects Mr Goldberger's witness statement is an abuse. The abusive parts should be struck out."

And the Chancellor explained at [39]:

> "Mr Goldberger would not be allowed at trial to give oral evidence which merely recites the relevant events, of which he does not have direct knowledge, by reference to documents he has read. Nor would he be permitted at trial to advance arguments and make submissions which might be expected of an advocate rather than a witness of fact."

55. The position of Mr and Mrs Raff is clearly very different in that they were closely involved throughout. Nonetheless, I consider that their statements at times include extensive quotations from documents in a manner contrary to PD 2/2021. I also find that there are significant instances of advocacy and argument in both Mr and Mrs Raff's statements.

56. Foundem has accepted that it is not appropriate for its witnesses to refer in their statements to documents which they received only through disclosure by Google during these proceedings. Manifestly those are not documents of which Mr and Mrs Raff were aware at the time and so they do not have direct knowledge of them. As noted above, Foundem has accordingly agreed to excise those passages.

57. However, Foundem played a role in the prolonged Commission investigation as it was an early complainant and was periodically sent information by the Commission. Mr and Mrs Raff's statements include sometimes extensive quotations from Commission documents and sometimes commentary on those and other documents. Mrs Raff's statement in particular includes a lengthy narrative account of the exchanges and submissions made when the Commission was engaged in considering different forms of commitments being offered by Google. That is inappropriate: such material will be in evidence through the documents themselves. Much more limited recitation is sufficient for Mrs Raff to explain what she (with Mr Raff) decided to do on behalf of Foundem at the time. Section XIII.C of her statement comprises a narrative of arguments made in the course of Google's appeal against the Decision to the General Court: that does not belong in a witness statement.

58. As many judges have emphasised, it is important to adopt a pragmatic approach when dealing with such objections to avoid disproportionate satellite litigation seeking to excise paragraphs of witness statements: see e.g. *Lifestyle Equities CV v Royal County of Berkshire Polo Club Ltd.* [2022] EWHC 1244 (Ch) at [98]. This Tribunal, like the court, is well able to disregard such matters during the trial. However, where there are clearly and significantly offending passages, I think it is appropriate and will assist the conduct of the trial for them to be excluded at an early stage. But where statements or remarks are on the borderline or the alleged non-compliance with PD 2/2021 is minor, rather than giving a reasoned ruling on each disputed passage, I consider that the

practical course is to allow them to remain. Moreover, some of the passages to which Google objects concern the state of mind of Mr or Mrs Raff at the relevant time, or summarise steps taken in the course of the Commission's investigation: those matters may or may not be material, but I do not think that they should be excluded as clearly in contravention of PD 2/2021.

59. Adopting that approach, and having read the detailed comments from both sides, helpfully set out in schedules, I consider that the following passages should be excluded:

Mr Raff's witness statement

Paras 13; 103-104; 144-145; 178 (last sentence only); 180-183; 187 save for the first sentence; 194; 204-207; 209 (2nd-3rd sentences only); 210-216; 222 save for the first two sentences; 223—228; 230-238; 245; 249 save for the first two sentences; 251-257; 270; and 271 (first two sentences and last two sentences).[2]

In addition, paras 169-173 should be excised as dealing with Product OneBoxes which are not an issue in the proceedings following the Tribunal's ruling: see [2025] CAT 83.

Mrs Raff's witness statement

Paras 49 (save for 1st sentence); 53(c) (last sentence only, beginning "Of course,…"); 82; 92; 117; 120 (save for 1st sentence); 121 (1st two sentences down to fn 52); 126; 139; 150 (last two sentences); 151; 167-173; 176-189, 203 (save for 1st sentence); 208-222.

E. DISPOSITION

60. Foundem should serve replacement witness statements from Mr and Mrs Raff, conforming to the ruling in this judgment, within 7 days.

[2] As set out at paras 32-33 above, section 3.2.5 of Mr Raff's statement is also to be excluded.

61. Within 21 days thereafter, Google should serve a replacement reply witness statement from Mr Cutts so as to amend those parts (in particular Parts 2-3 and 5) insofar as they respond to passages in Mr and Mrs Raff's statements that have been removed, and amending his references to both Mr and Mrs Raff's witness statements to reflect the paragraph numbers in their replacement statements.

Sir Peter Roth
Chair

Charles Dhanowa CBE, KC (Hon)
Registrar

Date: 4 February 2026