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4 record.

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

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

12  
13 12<sup>th</sup> January 2026

14  
15 Before:

16  
17 The Honourable Mr Justice Roth

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

21  
22 BETWEEN:

23  
24  
25  
26 **INFEDERATION LIMITED (“Foundem”)**

**Claimant**

27  
28 - and -

29  
30  
31 **GOOGLE LLC & OTHERS (“Google”)**

**Defendants**

32  
33  
34  
35 **A P P E A R A N C E S**

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

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45  
46 Monday, 12 January 2026

47 (11.00 am)

48 THE CHAIR: Good morning. These proceedings, like all proceedings in this Tribunal,

1 are live streamed. If at any time it becomes necessary to refer to any confidential  
2 material, the live stream will be turned off but I hope that won't be necessary. An  
3 official transcript of the proceedings is being made and it is strictly prohibited for  
4 anyone to make any unauthorised recording or take any visual image of the  
5 proceedings, and doing so is punishable as contempt of court.

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

11 Yes, Mr Pickford.

12

13 Submissions by MR PICKFORD

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

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

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

24 MR PICKFORD: Yes.

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

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

1 divided into 9.1, 9.2 --

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

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

5 (11.04 am)

6 (Transcript delayed due to a technical issue)

7 (11.05 am)

8 MR PICKFORD: ...often overlapping problems with the Raff statements. First, they  
9 contain extensive commentary on Foundem's case and/or the documents, and that  
10 includes both on Google disclosure documents and other documents. Neither is  
11 permissible.

12 Second, they engage in advocacy and submission through seeking to speculate on  
13 Google's, or indeed sometimes the Commission's, motives, thoughts or actions, and  
14 they present or confirm alleged beliefs or understandings the witnesses claim to have  
15 had contemporaneously, when those beliefs are in fact not relevant to any issues,  
16 obviously so, for trial, and therefore such confirmation of their beliefs is merely a cloak  
17 for providing impermissible evidence.

18 And then the third aspect is that they contain substantial sections of opinion evidence,  
19 but they have no permission to adduce that evidence as expert evidence and it also  
20 falls outside the very limited exception articulated in particular in the case of Brendon,  
21 which allows fact witnesses to gloss their fact evidence with limited opinion evidence  
22 informed by their expertise when they are properly able to do so.

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

24 The essential problem with the so-called expert evidence is twofold. First, some of it  
25 goes to matters which the Tribunal never directed should be the subject of expert  
26 evidence -- and I'll show you the Tribunal's Order, which sets out the permissible scope

1 of the expert evidence in this case and it's basically an economic --

2 THE CHAIR: (Inaudible).

3 MR PICKFORD: Sorry?

4 THE CHAIR: This isn't expert evidence.

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

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

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

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

20 MR PICKFORD: Yes, well --

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

23 MR PICKFORD: That's right.

24 THE CHAIR: So in that sense, it's not expert evidence.

25 MR PICKFORD: Yes, but I mean, it may be that not a lot turns on this point of  
26 nomenclature but I think I'm going to have to tread quite carefully through this because

1 I think possibly something does and I'll have to consider that as I go through my  
2 submissions because certainly the Brendon exception that I was just talking about,  
3 that is very much going to the categories, Sir, that you say is all that Mr Raff, in  
4 particular, and to some degree Ms Raff, are seeking to advance. It's allegedly, as  
5 I understand it, a gloss -- a gloss from their expertise on their factual evidence. And  
6 we say --

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

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

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

23 THE CHAIR: Why is it the back door? I don't understand. It's not covered by expert  
24 evidence. The Claimant could have chosen to instruct an independent expert and they  
25 haven't. That's their choice. It might have had greater weight. You may say what he  
26 says is clearly not independent, self-evidently, if they've done it through an

1 independent expert who might have said something different, but the fact they chose  
2 not to have an independent expert, why does that make it inadmissible?

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

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

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

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

14 MR PICKFORD: Sorry?

15 THE CHAIR: Is Google serving?

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

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

19 MR PICKFORD: Well.

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

22 MR PICKFORD: But, Sir, in my -- it may be easier to understand this when we go to  
23 some of the more concrete examples. But, in my submission, it isn't fair for Google to  
24 be expected -- the proper steps that should have been gone through, if we were going  
25 to have expertise -- sorry, if we were going to have opinion evidence, non-traditional  
26 fact evidence, on a particular topic such as how Google's algorithms operate and their

1 effects, then in fairness, what should have happened is when the Tribunal was  
2 considering the topics on which it might want expert evidence, Foundem should have  
3 said, "Well, we're not going to put forward an independent expert, but we do advance  
4 opinion evidence on these particular areas within certain expertise that we have". And  
5 if they'd done that, then we could have decided how we were going to approach those  
6 topics.

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

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

22 MR PICKFORD: No, I'm saying responding to the type of evidence, the type of after  
23 the event, numerical reconstructions of that issue. What Google has done is put in  
24 fully PD-compliant fact evidence on how Google's algorithms operate. What it hasn't  
25 done is sought to create some elaborate mathematical modelling to say, "Here is  
26 a hypothetical situation from which I'm going to draw various conclusions". That is the

1 sort of thing that ordinarily an expert does; the sort of thing that one would expect to  
2 see in an independent expert report. Now, at the moment, I'm not taking any position  
3 on the independence or otherwise of Mr Raff, but it was a surprise to us that we were  
4 faced with that kind of evidence amongst others. I mean, this is obviously just one  
5 aspect of this PD application.

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

8 MR PICKFORD: Yes.

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

12 MR PICKFORD: Mr Raff, yes.

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

15 MR PICKFORD: I'm not sure that any unfairness would be removed, Sir. Obviously  
16 one of the core problems of unfairness would be removed. Had we gone back in time  
17 and Foundem done what I say Foundem should have done, which is rather than  
18 saying, "Oh no, we don't need any expert evidence other than on economics", had it  
19 said, "Actually, we think it would be helpful for the Tribunal to have expert evidence on  
20 this particular issue and we're going to have some mathematical modelling of the effect  
21 of Google's algorithms", at that point, I would have the opportunity to make the  
22 submission to the Tribunal, "We don't need to go down this road", for example. "This  
23 isn't going to be sufficiently helpful to the Tribunal, and the Tribunal should control it  
24 by not permitting this kind of expert evidence. It doesn't matter whether it's from  
25 an independent expert or a non-independent expert, it's still evidence of the type that  
26 we don't need." But obviously it's now a fait accompli that it's there if it's treated as

1 such by the Tribunal.

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

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

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

19 I've obviously anticipated quite a few of the arguments we're going to be coming on  
20 to, but in terms of the scale of non-compliance with other aspects of the PD, in  
21 particular just advancing argument by reference to documents, we say that this is  
22 a case -- even if, Sir, you're not with me on the -- what I'm going to call the "quasi-  
23 expert evidence" to try to differentiate it from Rule 55 expert evidence. Even, Sir, if  
24 you're not with me on the quasi-expert evidence issue in terms of striking it out, but  
25 you are willing to allow us some more time to consider it, there are very, very large  
26 parts of these statements that are, in essence, simply making submissions that are

1 advocacy. The technique that is adopted is to say things like, "I've always thought this  
2 and I said this at the time, that ...", and then we have a quote from something that's  
3 a previous Foundem submission.

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

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

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

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

23 Sir, if I then consider the framework in terms of the applicable legal principles, we set  
24 out the background to the introduction of both the Tribunal's Practice Direction and  
25 also the equivalent one, PD 57AC, in the CPR. I don't need to worry the Tribunal with  
26 those, so you'll --

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

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

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

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

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

13 So if I could go, please, to the authority of Mansion Place, which shows the purpose  
14 of the equivalent CPR PD, which I say is equivalent in purpose to that in this Tribunal.  
15 That's to be found in the Authorities Bundle, 9B.2, at tab 12, page 251. So the  
16 background isn't particularly important. There were cross-applications by the parties  
17 in respect of the witness statements that have been served. If we go, please, to  
18 paragraph 37, which is a couple of pages on at 259. Could I ask --

19 THE CHAIR: 37?

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

22 THE CHAIR: Yes.

23 MR PICKFORD: Thank you. Then, if we could go in the same bundle to tab 14, which  
24 is on page 296. This is the case of Greencastle, and I'm going to page 302.

25 THE CHAIR: Sorry, which tab is that?

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

1 | hard-copy bundles or electronic authorities?

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

3 | MR PICKFORD: Thank you. In which case, I will give you -- if it's helpful,  
4 | generally -- the tab references rather than just the (inaudible).

5 | Then one sees there at paragraph 22 -- if I could ask you, Sir, please, to read  
6 | paragraph 22 on page 302 again as to the purpose of Practice Direction 57AC.

7 | (Pause)

8 | THE CHAIR: Just paragraph 22?

9 | MR PICKFORD: Just paragraph 22. (Pause)

10 | THE CHAIR: Yes.

11 | MR PICKFORD: In my submission, those general statements, though they do refer to  
12 | PD 57AC, equally apply to the thrust and the purpose of the Tribunal's  
13 | Practice Direction, because they reflect common law which the Tribunal seeks to  
14 | follow, in any event. If we in fact go now to the Tribunal's PD, which is to be found in  
15 | Bundle 9A at tab 7.

16 | THE CHAIR: Yes. (Pause)

17 | MR PICKFORD: 3.1 sets out the core obligation that:

18 | "A trial/appeal witness statement must contain only --

19 | "(1) evidence as to matters of fact that need to be proved at trial or the hearing of the  
20 | appeal by the evidence of witnesses in relation to one or more of the issues of fact to  
21 | be decided at trial or on the appeal, and

22 | "(2) the evidence as to such matters that the witness would be asked by the relevant  
23 | party to give, and the witness would be allowed to give, in evidence in chief if they  
24 | were called to give oral evidence.

25 | "3.2. A trial/appeal witness statement must set out only matters of fact of which the  
26 | witness has personal knowledge that are relevant to the case ..."

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

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

5 That is something that should not be done.

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

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

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

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

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

24 MR PICKFORD: Yes.

25 THE CHAIR: So, I think -- is this right: you accept Foundem could have asked for that  
26 and if the Tribunal -- and that's done without notice, so it's done on what used to be

1 called an ex parte basis. And if the Tribunal would have said, "Yes, that's fine in this  
2 case, because we're satisfied that Mr Raff has got expertise", that could have been  
3 allowed.

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

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

14 THE CHAIR: What would the challenge be?

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

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

25 MR PICKFORD: Well --

26 THE CHAIR: -- witness. Obviously, it's not independent. Then, in Brendon, I think it

1 was an employee.

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

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

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

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

19 MR PICKFORD: Yes, and I beg your pardon because I obviously haven't been clear.  
20 My position is that admissibility is not ultimately the question. It may be that the  
21 evidence is admissible in the sense that it could be permitted under section 3 of the  
22 1972 Act, but it still may not comply with the Practice Direction, and that can still be  
23 a problem. The mere fact that you would otherwise be able to, but for the Practice  
24 Direction, provide such evidence at trial does not mean that the Practice Direction is  
25 then a dead letter just because we are within the scope of section 3. That's my  
26 submission.

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

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

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

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

17 What happens then is: step one, it needs to be admissible properly in common  
18 law -- I say that in order to even have an exemption from the Practice Direction under  
19 4.2, the first thing you need to do is comply with admissibility. Secondly, then you  
20 would need to consider, "Well, is it now appropriate to have a carve-out for it?"

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

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

25 THE CHAIR: Yes.

26 MR PICKFORD: Because I realise I obviously wasn't clear before, but I hope that sets

1 out what my position is on, on the scheme and the interaction between the two.

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

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

6 THE CHAIR: Yes.

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

11 THE CHAIR: Okay.

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

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

15 MR PICKFORD: Indeed.

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

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

19 THE CHAIR: Correct, but --

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

21 THE CHAIR: Yes.

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

24 THE CHAIR: Yes.

25 MR PICKFORD: And when one goes into the: "Well, don't worry, we didn't have to  
26 comply with the Practice Direction because this is quasi-expert evidence". Then that's

1 when one gets drawn into admissibility issues.

2 For the other part, which is the: "Making arguments by reference to previous  
3 submissions, et cetera" part, that's separate. In my submission, the correct place to  
4 start is in fact the Practice Direction.

5 I've shown you three, and extracts from four, and obviously the Tribunal will be familiar  
6 with the sanctions. We're not asking for anything other than to put in new Practice  
7 Direction-compliant statements. We're not saying that Raff shouldn't be allowed to put  
8 in evidence; we just like it to be properly confined.

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

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

11 THE CHAIR: It's effectively the same thing. Striking out those paragraphs, or putting  
12 in a new one without them; it's the same thing, isn't it?

13 MR PICKFORD: Continuing with the PD aspect for now, the Tribunal's Guide, which  
14 is to be found earlier in this bundle at tab 3. We're in Bundle 9A, tab 3, and I'm on  
15 page 88.

16 THE CHAIR: Yes.

17 MR PICKFORD: If I could ask the Tribunal please to read paragraph 7.61. (Pause)  
18 That's an elaboration, in effect, of the requirements in Rule 3 of the Practice  
19 Direction -- paragraph 3.

20 THE CHAIR: Yes.

21 MR PICKFORD: And it effectively forms the basis for the statement of compliance  
22 that the witness is required to give.

23 THE CHAIR: Yes.

24 MR PICKFORD: Now, I foresee, in the light of the indications, Sir, that you gave  
25 earlier, that you may be resistant to the next submission I'm going to make. I was  
26 going to take you to the Statement of Best Practice that accompanied the Practice

1 Direction in the CPR, because in my submission it covers the same ideas -- the same  
2 principles -- and effectively elaborates what is meant in one case by not arguing the  
3 case.

4 THE CHAIR: Well, I accept that --

5 MR PICKFORD: So --

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

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

10 THE CHAIR: Yes.

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

12 THE CHAIR: Sorry, 3.4 and 4.6?

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

16 THE CHAIR: Ah yes, 3.4.

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

18 THE CHAIR: 3.6.

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

20 THE CHAIR: Yes.

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

24 Under 3.6(4):

25 "... that is to say to set out matters of belief, opinion or argument about the meaning,  
26 effect, relevance or significance of that other evidence."

1 So those are examples of things that you are not supposed to do, in compliance with  
2 either Practice Direction, in my submission.

3 THE CHAIR: Yes, it's that statement about best practice is part of the BPC Practice  
4 Direction 57AC --

5 MR PICKFORD: Yes.

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

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

8 THE CHAIR: No.

9 MR PICKFORD: But it does provide insight into when the -- in just the way, Sir, that  
10 we very often in this Tribunal rely on authorities and jurisprudence in relation to a rule  
11 under the CPR, we say that often it is very helpful in understanding and elaborating  
12 on an equivalent rule in the Tribunal. It's obviously commonplace that the Tribunal  
13 approaches its rules in that way.

14 The core point that I'm making is that both sets of rules prevent including commentary  
15 on the case. 3.6(4), in particular, goes into a little more detail to explain "What does  
16 that mean in practice?" That's all it's doing. In my submission, that's equally applicable  
17 in terms of what one should understand by the equivalent rule in the Tribunal's Practice  
18 Direction.

19 THE CHAIR: Yes. Well, I said to you, I have sympathy for the point that they should  
20 not be arguing the case, and commenting, which is quite different from the point about  
21 opinion evidence based on expertise.

22 MR PICKFORD: That's a very helpful indication, Sir. I'll obviously take account of that  
23 as I go. I mean --

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

25 MR PICKFORD: Thank you. I apologise. The reason why I took you there is because  
26 I apprehended that there might have been a difficulty for me in referring to the

1 guidance that goes with PD 57AC from what, Sir, you said earlier on. I just wanted to  
2 make sure that it's --

3 THE CHAIR: I don't think it is relevant to this Tribunal, but I think the point's made in  
4 the Tribunal's Practice Direction. Yes.

5 MR PICKFORD: Very good.

6 So Foundem has three main strands of argument by which it seeks to justify the  
7 approach that it's taken:

8 One, as I understand it -- and obviously in his responsive submissions later on,  
9 Mr West can address it -- is that PD 2/21 is effectively irrelevant, insofar as the Raff  
10 statements cover what I'm going to call "quasi-expert" evidence, because the expert  
11 evidence is admissible under section 3 of the Civil Evidence Act 1972, and Foundem  
12 says that that provides a complete answer to this aspect of the application.

13 You'll have heard what I say structurally about that, which is: it doesn't. If what you  
14 want to do is say, "Aha, well, there's an exception here, because I've got this particular  
15 category of evidence that doesn't strictly comply with the PD, but don't worry, it doesn't  
16 matter", is you make the application under 4.2. He hasn't done that.

17 Secondly, there's the set of arguments that effectively there's some sort of  
18 dispensation not to apply PD 2/21 because of the length of time and the vigour with  
19 which the Ruffs have been involved. That's the point that, in particular, applies to  
20 Ms Raff's statement; that effectively they've been in this so deep for so long, we should  
21 allow them to make submissions and refer to documents effectively.

22 THE CHAIR: Is that one of their arguments?

23 MR PICKFORD: Well, in my submission that's the gist of it. Because when one goes  
24 through the table at the end that we produced for Annex A and Annex B, we say, "Here  
25 is Ms Raff quoting from previous submissions, providing advocacy, et cetera", and the  
26 response that is typically given is, "Ms Raff has been very heavily involved in this case

1 since the very beginning; she's entitled to explain her dealings with this case and  
2 submissions that she made over its history".

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

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

6 MR WEST: No.

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

9 MR PICKFORD: Well --

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

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

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

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

22 THE CHAIR: Yes.

23 MR PICKFORD: We've taken a pragmatic view, but we're not going to worry about  
24 those things, because they're relatively small. The problem is: at a certain scale, it  
25 becomes, in our submission, incumbent on us to put up or shut up in relation to  
26 a substantial problem that we see with the Claimant's evidence.

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

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

6 THE CHAIR: Yes.

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

9 THE CHAIR: Yes.

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

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

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

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

23 MR PICKFORD: Yes.

24 THE CHAIR: We've got them.

25 MR PICKFORD: Yes.

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

1 they believed it; they said it. It's in the documents. You can say, "Well, it's not  
2 appropriate to repeat it in your witness statement", but it doesn't actually make any  
3 difference, does it? Because it's there anyway. We've got those arguments. It just  
4 seems to be a bit of a waste of time.

5 MR PICKFORD: Well, Sir, it shouldn't be in the -- I mean, for a start, it is important  
6 that, as I understand it, certainly, we tried properly to comply with the Practice  
7 Direction.

8 THE CHAIR: Yes.

9 MR PICKFORD: In my submission, it's not an answer for another party to come along  
10 and not apply the Practice Direction at all.

11 THE CHAIR: Yes.

12 MR PICKFORD: And then just afterwards to say, "Well, we can say it all at trial". That  
13 is not the point. I mean, they should be complying with the Practice Direction. That is  
14 what the authorities make clear. It does cause potential problems for a witness  
15 statement to be littered with these sorts of points that are not Practice  
16 Direction-compliant, particularly when it comes to issues about cross-examination.

17 Because if there are points that we say really are just submission, and therefore they  
18 are matters that can be dealt with in submission, but they have been advanced as  
19 PD-compliant statements of fact, there's then a question about, "Well, are we  
20 supposed to be cross-examining on some of these points of argument, or are we not  
21 supposed to be cross-examining on them?"

22 There are practical implications of allowing a witness statement that, wholesale,  
23 doesn't really bother to properly comply with the Practice Direction. It's not I mean,  
24 obviously we would like to avoid this application. We say it's not really our fault that  
25 we've needed to bring it.

26 THE CHAIR: That's the second strand?

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

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

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

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

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

24 So in this case, the economic experts are supposed to be dealing with traffic analyses.  
25 That's what they are doing. But we've now also got Mr Raff's traffic analysis. The  
26 point I'm going to make in relation to that is that that is also impermissible. It's not

1 sufficient just to say, "Oh, don't worry; it's quasi-expert, it could be admissible".  
2 It could be, but it's avoiding the Orders, in effect, that have already been made that  
3 constrain the way in which such evidence should be produced in the Tribunal. (Pause)  
4 Sir, I anticipate I don't need to take you through Rules 54 and 55, which govern the  
5 Tribunal's control of evidence, including expert evidence. Or indeed the paragraph of  
6 the Guide which says similar things about the Tribunal controlling those.  
7 So if I could then start with paragraph 10 of the Tribunal's Order from March 2024,  
8 which you'll find in Bundle 6, tab 5, page 34.  
9 THE CHAIR: The Order of --  
10 MR PICKFORD: This is the Order of 26 March 2024.  
11 THE CHAIR: Yes. (Pause)  
12 Yes.  
13 MR PICKFORD: You'll see if you go, please, to page 34 of that, the provision that the  
14 Tribunal originally made for experts at paragraph 10. It contemplated three different  
15 areas of expertise.  
16 THE CHAIR: Yes.  
17 MR PICKFORD: Then what happened is -- if we go to Hausfeld's letter of  
18 17 September, some months later in that year, which you'll find in Bundle 3, tab 19,  
19 page 76. I beg your pardon, sorry.  
20 THE CHAIR: Just a minute, my bundle's just exploded. (Pause)  
21 Yes, I've got it. Thank you.  
22 MR PICKFORD: Thank you. Do you have page 76?  
23 THE CHAIR: Yes.  
24 MR PICKFORD: You see paragraph 2, Hausfeld says that:  
25 "Our client does not presently envisage engaging an expert on comparison shopping  
26 services / vertical internet search markets; and search engine optimisation [...]"

1 pursuant to paragraphs 10(b) and 10(c) of the Directions Order. [They don't consider]  
2 that such evidence will be necessary for the purposes of the First Trial."  
3 That was as far as categories (b) and (c) went.  
4 THE CHAIR: Just a second. (Pause)  
5 Yes.  
6 MR PICKFORD: Thank you. I don't think I need to take you to it, because the Tribunal  
7 will know then what happened. In the next Order it made, which was  
8 20 December 2024, permission was granted for expert evidence. The only field which  
9 it was granted was competition economics.  
10 THE CHAIR: Yes.  
11 MR PICKFORD: We say that the problem with Mr Raff's evidence is that, effectively,  
12 it's going back on the promise that we weren't going to have anything other than  
13 competition economics. We weren't going to have anything about search engine  
14 optimisation or vertical search, et cetera, because we now have what is quasi-expert  
15 evidence.  
16 Just to give you a taste of why I say it's effectively an expert report, just not by an  
17 independent expert, if we go to tab 4, page 45.  
18 THE CHAIR: Tab 4 of which bundle?  
19 MR PICKFORD: I beg your pardon, I misspoke. Bundle 4, tab 1.  
20 THE CHAIR: Can I put away the correspondence?  
21 MR PICKFORD: You certainly can for now. We won't be coming back to it for a while.  
22 THE CHAIR: Yes. I've found tab 4, which is an exhibit. Tab 4 of Bundle 4?  
23 MR PICKFORD: No, sorry. Tab 1 of Bundle 4.  
24 THE CHAIR: Right, which is Mr Raff's statement, AR3, yes?  
25 MR PICKFORD: That's right. If you go to [page] 45 and section 3.2.3.  
26 THE CHAIR: Yes, the modelling.

1 MR PICKFORD: We have "Modelling and simulation". Modelling and simulation is  
2 exactly the type of thing that one expects experts to carry out; it is not the type of thing  
3 that one expects to see in a statement of fact about the facts that a witness recollects.  
4 It's my submission that this could never be PD-compliant. This would have to be  
5 something that might perfectly be admissible if it satisfied the test for admissibility.  
6 That's a hurdle that has to be overcome. But if that is the way it's being presented,  
7 there has to be an application under 4.2 for it to be an exception to the requirements  
8 of the Practice Direction. It's not compatible with the Practice Direction.  
9 If I could ask you, Sir, please -- it's all marked "confidential". I don't think all of it  
10 actually is confidential; a particularly conservative view has been taken here. But if  
11 I could just ask you to flick through the next sort of eight pages just to see the nature  
12 of the --  
13 THE CHAIR: Yes, well, I have read it.  
14 MR PICKFORD: Thank you.  
15 MR WEST: Sorry to interrupt. I understand that this grey marking means that this is  
16 material which Google is trying to strike out, rather than it --  
17 MR PICKFORD: Oh, I beg your pardon. I misunderstood.  
18 THE CHAIR: I think the confidential is in yellow; is that right?  
19 MR PICKFORD: Right, okay. That's --  
20 THE CHAIR: And the grey is just, helpfully, for the Tribunal.  
21 MR PICKFORD: Thank you. Yes, I was a little -- yes. Okay. Well, that explains it.  
22 In which case, there is correspondence then with the evidence. That is an example of  
23 the nature of the evidence.  
24 THE CHAIR: Yes.  
25 MR PICKFORD: And you have my submission on what needs to happen in relation  
26 to that kind of evidence.

1 THE CHAIR: Yes.

2 MR PICKFORD: By definition, it can't satisfy the statement that has been given of  
3 compliance with the PD, because inherently it can never satisfy the PD.

4 THE CHAIR: Yes.

5 MR PICKFORD: The second point is: there is an argument that is raised by Mr West  
6 where they say that they have a "complete answer" to our application by reference to  
7 the fact that the evidence itself is admissible. I've made my submission on that, I think  
8 you have it already. We say admissibility is just the first step; you've got to show,  
9 firstly, it's admissible, in order to even get off the ground, to make an exception  
10 application under 4.2. It's not the answer in and of itself, because you can have  
11 something that's admissible, but you still shouldn't be allowed.

12 Indeed, the key point, probably, to make here is that it is argued by Mr West, or at  
13 least suggested, that because section 3(1) of the 1972 Act says that it is "subject to  
14 any rules of court made in pursuance of this Act", his argument is, "Aha, well, the PD  
15 isn't made 'under' the 1972 Act, therefore it's not relevant".

16 We say that that is wrong. We agree, of course, that it's not made under the Act; no  
17 one is suggesting otherwise. But the admissibility of evidence under section 3(1) is  
18 subject to any rules of court that themselves deal with evidence, including, we say, the  
19 CPR and the Tribunal's Rules. The authority for that is the case of Brendon, which  
20 you'll find --

21 THE CHAIR: (Inaudible) not clear what you're saying. I understand you're saying it's  
22 not PD-compliant.

23 MR PICKFORD: Yes.

24 THE CHAIR: Got that point.

25 MR PICKFORD: Yes.

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

1 MR PICKFORD: That's right.

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

3 MR PICKFORD: Yes.

4 THE CHAIR: In terms of is it admissible which is, in a sense, the antecedent point, I'm  
5 not clear what you're saying.

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

7 THE CHAIR: Leaving aside the PD and suppose I accept that it's not PD-compliant,  
8 is it admissible or not?

9 MR PICKFORD: I'm going to come to that in a moment. The point that I'm making is  
10 a response to Foundem's response to the point that I have just made that you need to  
11 make an application. What they say is admissibility under section 3(1) is effectively  
12 a trump card.

13 THE CHAIR: Well, don't waste time on that. Can we get on to admissibility because  
14 you keep saying you're about to get to it, but it's pretty fundamental.

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

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

17 MR PICKFORD: Okay. I'm happy to start with -- well, to start with the statute. So the  
18 statute is at Bundle 9A, tab 1, page 4. I think it's page 4.

19 THE CHAIR: Yes, I think it is.

20 MR PICKFORD: Yes. And we have section 3 of the 1972 Act at the top and 3(1)  
21 provides:  
22 "Subject to ... rules of court made in pursuance of this Act, where a person is called  
23 as a witness in any civil proceedings, his opinion on any relevant matter on which he  
24 is qualified to give expert evidence shall be admissible in evidence."  
25 Sir --

26 THE CHAIR: Yes.

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

3 THE CHAIR: Yes.

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

9 THE CHAIR: Yes.

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

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

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

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

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

23 MR PICKFORD: Well, the rules require that the parties are required to provide the  
24 witness statements that they be entitled to give as evidence-in-chief. The Practice  
25 Direction is, in my submission, part and parcel of the rules that cover the evidence that  
26 the parties are permitted to give.

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

4 MR PICKFORD: Sir --

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

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

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

23 THE CHAIR: I understand that, and we're on the first point. Namely, is it admissible  
24 because you submitted, I think rightly, that if it's not admissible, there could never be  
25 a Direction under paragraph 4.2.

26 MR PICKFORD: Yes.

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

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

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

11 MR PICKFORD: Exactly.

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

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

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

16 MR PICKFORD: Yes.

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

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

21 Sir, you've got beyond that.

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

24 Yes.

25 MR PICKFORD: And then if I could ask, please -- I don't know whether you've  
26 got -- did that include paragraph 672 of the quote?

1 THE CHAIR: Yes.

2 MR PICKFORD: Thank you. So that summarises where the judge in that case got to  
3 and is approved by Lord Justice Snowden. What we say is that you can gloss your  
4 fact evidence when the opinion is reasonably related to facts within your knowledge  
5 and the --

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

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

8 THE CHAIR: Yes.

9 MR PICKFORD: That's the question that's being considered: when can you gloss your  
10 evidence with some expert comment? And the answer is you can but it's got to be  
11 reasonably related to the facts -- that is the factual part of your statement -- and you  
12 have to have relevant expertise.

13 On the question of the expertise that is addressed earlier in this case by  
14 Lord Justice Snowden at paragraph 76 and there he quotes Lord Russell's judgment  
15 in R v Silverlock and if I could ask you, Sir, please, just to read that quoted judgment  
16 from Silverlock. (Pause)

17 THE CHAIR: Yes. You've not made any submission, as I recall from reading your  
18 written submissions, that Mr Raff doesn't have skill and expertise.

19 MR PICKFORD: Depends what in. We have made this submission -- I'll find it -- that  
20 he doesn't have any expertise in the workings of Google and Google's general search  
21 algorithms. We certainly do make that submission. My learned junior will give me the  
22 reference, but --

23 THE CHAIR: Would anyone, apart from Google, have expertise in that, given that  
24 they're kept secret?

25 MR PICKFORD: Well, possibly. People that might have some relevant  
26 expertise -- we'll start with an ex-Google employee. Potentially there might be an

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

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

3 how it works --

4 MR PICKFORD: Yes.

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

6 from that, as a matter of opinion.

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

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

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

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

11 really in a place to do that.

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

13 of --

14 MR PICKFORD: Yes.

15 THE CHAIR: -- how that arises.

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

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

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

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

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

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

22 expertise. That's a non-sequitur.

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

24 MR PICKFORD: I've asked my learned junior to find me the reference, but I believe

25 that we have said that.

26 The final point, Sir, is later on in the judgment, if we go back to paragraph 91, which is

1 following the section that we were looking at before.

2 THE CHAIR: Yes.

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

7 THE CHAIR: Yes. (Pause)

8 MR PICKFORD: And so --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 THE CHAIR: Yes, which paragraph?

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

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

23 THE CHAIR: Yes.

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

26 "A witness of fact may sometimes be able to give opinion evidence as part of his or

1 her account of admissible factual evidence in order to provide a full and coherent  
2 explanation and account."

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

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

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

11 MR PICKFORD: So, should I continue?

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

14 MR PICKFORD: Very good.

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

16 MR PICKFORD: Thank you.

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

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

22 We say that is wrong. This trial is concerned with whether Google abused its dominant  
23 position and what Google would have done differently in a counterfactual. In that  
24 context, it is highly likely that there will be subjects which Google can legitimately cover  
25 in its fact evidence, but which Foundem can't. We have adduced factual evidence  
26 from witnesses, for example, Mr Kim and Mr Cutts, who have a relevant understanding

1 of how Google's algorithms work.

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

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

11 THE CHAIR: Challenges to the admissibility?

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

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

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

22 We agree with that, but that is not our application because this is not an expert report  
23 under Rule 55; it's supposed to be a PD-compliant fact statement. You've heard the  
24 submissions that I make in relation to that.

25 I was then going to provide you with some examples of the parts of the statements  
26 that we say are expert evidence. So I was going to go through some of the lines of

1 the Annex, Annex B, of Mr Raff's statement that deal with expert evidence. It might  
2 be more convenient --

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

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

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

12 MR PICKFORD: Yes.

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

20 MR PICKFORD: Yes.

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

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

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

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

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

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

13 Okay, in which case --

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

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

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

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

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

20 MR PICKFORD: Yes. So this is the second strand. We'll put expert evidence to bed  
21 for the moment. We have some difficulty, I have to say, in understanding precisely  
22 what it is that is said to give the entitlement to the Ruffs to engage in what we say is  
23 simply commentary on the documents and argument. What one derives from what  
24 Foundem have said, is it's in some sense bound up with the fact that they have been  
25 involved in this litigation themselves against Google for a long time, that they have  
26 seen much of the disclosure already, and that they have made lots of submissions to,

1 for instance, the Commission and then thereafter the European courts on these  
2 issues. So those are the points that crop up --

3 THE CHAIR: I don't mean to interrupt you. I hope this might, rather than delaying,  
4 short circuit it. I'm, as I've said earlier, of some sympathy with your point that there are  
5 sections of, in particular Ms Raff and I think are much more limited except Mr Raff's  
6 statement that really are advocacy and submissions and shouldn't properly be there.  
7 There might be then argument whether this paragraph or that paragraph falls within  
8 that category or not. That's a matter I can take up in the first instance with Mr West.  
9 Then, helped by your list, you'll provide -- and I don't think we need further  
10 submissions; I think we can just leave it then for me to take a view.

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

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

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

23 It seemed to me that there were five points to make responsively to the general  
24 argument that the Ruffs were permitted to provide the kind of evidence that they have  
25 that's on this topic. The first of those was they have removed, at least some of, now,  
26 the paragraphs -- or proposed to remove some of the paragraphs that deal with

1 Google disclosure.

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

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

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

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

21 THE CHAIR: Those are quite different things. In every witness statement on matters  
22 that happened long ago, the witness will say, "I then wrote a letter, I got no reply".  
23 They won't remember all of that; they've obviously had to look at the documents to  
24 refresh their memory. That's absolutely normal. Otherwise, witnesses could give very  
25 little evidence, then will be shown the documents at trial and then will remember.

26 That's perfectly normal. There's complete difference, it seems to me, between

1 advocacy --

2 MR PICKFORD: Yes.

3 THE CHAIR: -- making arguments which can be made by your legal representative,  
4 and saying, "I then wrote this letter, in which I asked this question, I got no answer".

5 Perfectly proper to say that. "And then I wrote again, and again, I got no answer".

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

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

17 THE CHAIR: Yes.

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

24 Certainly, we have avoided doing that in our witness statements, because of our  
25 understanding that we're not supposed to approach our witness evidence in that way.

26 So in my submission, the context matters. If it's a relevant issue, that's one thing. If

1 | it's basically just doing -- to which you can provide genuine factual assistance through  
2 | your recollection, then I would accept it would be perhaps nitpicking to seek to take  
3 | points about that.

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

6 | MR PICKFORD: Yes.

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

9 | MR PICKFORD: If it's just that -- that's a --

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

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

15 | THE CHAIR: Yes.

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

18 | THE CHAIR: Yes.

19 | MR PICKFORD: -- that the whole essence of the Practice Direction, both 57AC and  
20 | 2/21, is to keep witnesses focused on the facts that they can actually recall and speak  
21 | to, rather than jumbling it up with references to the documents. That is a core purpose  
22 | of the Practice Direction.

23 | One can test whether it has been adhered to in this way. If you look at a passage and  
24 | say, "Is this something that an advocate could say by reference to anything other than  
25 | the witness evidence -- the documents, other argument?" Then it shouldn't be in the  
26 | witness statement.

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

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

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

10 (12.52 pm)

11 (The short adjournment)

12 (1.50 pm)

13 MR PICKFORD: Sir.

14 THE CHAIR: Yes, Mr Pickford.

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

20 THE CHAIR: Yes.

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

24 What we said was what we didn't accept, which is in the second part of the sentence,  
25 that because Mr Raff's comparison shopping service had interacted with Google, and  
26 he's been pursuing proceedings against Google for well over a decade, this renders

1 him an expert in the "operation of Google's algorithmic search penalties and Universal  
2 Search", which is what they referred to him being "expert" in. We're quoting from the  
3 Response there. So we said we didn't accept that.

4 THE CHAIR: Yes.

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

10 THE CHAIR: Have I got it?

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

12 Again, I can be very short.

13 THE CHAIR: Yes.

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

15 THE CHAIR: Yes.

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

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

19 MR PICKFORD: Oh, is it ...

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

21 MR PICKFORD: Oh gosh, yes, you're right. Okay, so it's page 5. Thank you very  
22 much, Sir. On page 5, there are statements, at paragraph 1.13 to 1.14, which if I could  
23 ask the Tribunal to read, they refer to Mr Hunt's plans to test various matters by  
24 reference to traffic data. And then there's one other bit I'd like to show you after that.

25 (Pause)

26 THE CHAIR: Yes.

1 MR PICKFORD: Then if you then turn to page 12, you see “Mr Hunt's abuse data  
2 requests by topic”, section 3.

3 THE CHAIR: Yes.

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

6 THE CHAIR: Yes.

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

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

13 THE CHAIR: Yes.

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

17 THE CHAIR: Yes.

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

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

23 MR PICKFORD: Yes.

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

1 MR PICKFORD: It's -- so?

2 THE CHAIR: Just tell me what it is.

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

5 THE CHAIR: 146?

6 MR PICKFORD: 146.

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

8 MR PICKFORD: Yes. So that's 3.2.5:  
9 "A Real-World Example: Foundem's Google Search Traffic vs Twenga's."

10 THE CHAIR: Yes.

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

15 THE CHAIR: Yes.

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

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

24 THE CHAIR: Yes.

25 MR PICKFORD: It goes all the way through to the end of -- I think, what is row 11 in  
26 the table. I'm just going to have to look that up to tell you what the paragraph is that

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

2 THE CHAIR: Well, some of the section is not about traffic analysis; it's about the  
3 character of Foundem's site compared to another site.

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

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

6 MR PICKFORD: The way we divided it up was if -- I'm slightly improvising at the  
7 moment because my notes are by reference to the rows in our table. I didn't go  
8 through the statement and there is a section, you're right, that we don't criticise as  
9 being problematic for reasons of analysing traffic, and one sees that in the table.

10 All I'm seeking to demonstrate at the moment is that there's a significant part of this  
11 witness statement, and it's that that's dealt with in rows 8, 9 and 11 of our table, that  
12 is concerned with analysing traffic. And obviously in the document we're going to  
13 provide you with by the end of Wednesday, we'll make it extremely clear what are the  
14 traffic bits.

15 THE CHAIR: Yes.

16 MR PICKFORD: And the submission that I make is that there is a real practical  
17 problem here, which is if -- the Tribunal has made an Order for expert evidence, in the  
18 ordinary sense, from the economists, the economists are going to be grappling with  
19 traffic analysis. It didn't make an Order for two experts on the Claimants' side.

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

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

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

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

24 THE CHAIR: Thank you. Yes.

25

26 Submissions by MR WEST

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

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

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

13 MR WEST: Yes.

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

24 MR WEST: Well, I'll have to be given an opportunity to investigate exactly what  
25 Mr Hunt is doing but my principle submission is that what he will not be doing is  
26 investigating how penalties operated as a technical matter. He may be looking at the

1 effect of penalties on traffic, but what Mr Raff is intending to demonstrate is how  
2 penalties operated so as to generate the rankings that they did and he explains in his  
3 evidence how it is that they operated, for example, in relation to long-tail queries.  
4 That's a matter, in my submission, which Mr Hunt is unlikely to be addressing.  
5 Otherwise, as I say, I'll have to take instructions on precisely what he is addressing.

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

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

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

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

24 MR WEST: I see that but --

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

1 over the next week.

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

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

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

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

16 THE CHAIR: Yes.

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

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

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

25 That takes me to the Civil Evidence Act.

26 THE CHAIR: Well, there is a difference, isn't there? This is dealing with matters of

1 fact of which the witness has personal knowledge. It's not opinion evidence. It seems  
2 to me there is two different stages of this. One is, is this admissible as a matter of  
3 law? And that's the Civil Evidence Act and Practice Direction cannot change the law  
4 and indeed the Practice Direction only applies in the CAT. The Practice Direction 57A  
5 only applies in the BPC. It doesn't apply in the rest of the King's Bench Division.  
6 So where admissibility is more fundamental, on the question of whether your client  
7 could give opinion evidence on matters which are within his expertise and whether  
8 that would be admissible as a matter of law, I am with you, and you needn't address  
9 me on that. I've heard Mr Pickford's submissions on that. Provided he has got the  
10 expertise and seeing what he has said in his witness statement, it seems to me that  
11 he does.

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

24 MR WEST: Well, my primary submission is that it does. If you're against me on that,  
25 and the position is that we should have sought an exclusion or variation of the terms  
26 of the certificate of compliance, then, in my submission, the court can approach any

1 question of exclusion on the basis that the sanction to be applied is one for a failure to  
2 seek a variation of the wording of the certificate of compliance. In my submission, if  
3 the Tribunal is of the view that it would have granted that application, or may well have  
4 done, that would clearly be relevant to the sanction to be applied.

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

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

12 THE CHAIR: Yes.

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

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

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

1 He said at 9:

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

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

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

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

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

18 The judge goes on to say:

19 "I shall therefore address the questions raised by Mr Hayman by reference to the  
20 authorities upon which Mr Dhillon has relied, [that is, the authorities on admissibility]  
21 which I do not regard as overtaken by the new Practice Direction. The Practice  
22 Direction is obviously valuable in addressing the wastage of costs incurred by the  
23 provision of absurdly lengthy witness statements merely reciting the contents of the  
24 documentary disclosure and commenting on it, which is expressly abjured by the  
25 statement which is now required under paragraph 4.1 ... But it was not in my judgment  
26 intended to affect the issue of admissibility."

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

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

11 What is notable there is that it doesn't appear to have been suggested anywhere that  
12 in order for this expert evidence to be admitted under the Civil Evidence Act, the  
13 claimant had to require an exemption from the requirements of the Practice Direction.  
14 Instead, having come to the conclusion that the law and the admissibility was not  
15 changed by the Practice Direction, the Practice Direction was simply put to one side.  
16 The question was addressed as one of admissibility. So in my submission, this  
17 judgment suggests that there is no prohibition, certainly in the High Court Practice  
18 Direction, and I would suggest the position must be the same in this Tribunal upon  
19 a factual witness statement, including evidence which is properly admissible under the  
20 1972 Act, and that there isn't any requirement to obtain a derogation in order to do  
21 that.

22 The basis for that is the one that I suggested previously, namely that the Direction  
23 allows the witness to give evidence he could have given in evidence-in-chief, and that  
24 that same provision ... (Pause)

25 It might just be worth looking briefly at the material which it sought to exclude, just so  
26 the court has a flavour of the type of material at issue, not by way of cherry-picking,

1 but just so the court has some understanding of what the material is which Google is  
2 seeking to exclude. As I say, one topic addressed by Mr Raff is the operation of search  
3 penalties. Bundle 4, tab 1 at paragraph 107.

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

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

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

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

23 One of the factual issues to which all of this goes is whether Foundem continued to be  
24 subject to a penalty between its whitelisting from Algorithm A in 2009, and it's been  
25 subject to the Panda penalty beginning in, I believe, 2011. There was a dispute  
26 between the parties as to whether some other penalty applied over that period, and

1 that is a matter addressed by Mr Raff by analysing the rankings which Foundem  
2 obtained and seeking to explain why those rankings suggest that there was a further  
3 penalty which applied over that period.

4 THE CHAIR: He does give opinion evidence.

5 MR WEST: Yes.

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

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

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

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

13 THE CHAIR: Yes.

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

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

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

26 THE CHAIR: Yes, but -- and that's what you say the MAD Atelier case covers. Yes,

1 I see. That deals with, on that view, all the sections that are opinion evidence.

2 MR WEST: Indeed.

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

4 MR WEST: I do accept that, yes.

5 THE CHAIR: Yes.

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

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

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

21 Many of the examples of material which it sought to strike out that consists of material  
22 of that kind. Could I just show you one example. It's in Ms Raff's statement which is  
23 Bundle 4, tab 3, starting at page 290. (Inaudible) page 21, at page 310 of the bundle.  
24 You'll see what this passage describes. It describes that Ms Raff submitting  
25 a reconsideration request after Algorithm A had struck the site --

26 THE CHAIR: Well, can I interrupt you? This was what I was indicating to Mr Pickford,

1 that saying, "We wrote; we got no reply. We then wrote again; we got no reply", seems  
2 to me quite unobjectionable.

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

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

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

9 That's fine, it seems to me.

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

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

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

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

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

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

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

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

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

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

12 Similarly, paragraph 117. The suspicion, so her speculation of what -- that's not  
13 evidence of fact. As I say, there are a number of examples of that. (Pause)

14 I think it's only a part of the many aspects here which are objected to, but there are  
15 a number of places where it did seem to me that she is really speculating about what  
16 Google was doing, and that's not evidence of fact.

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

19 THE CHAIR: Yes.

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

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

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

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

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

19 MR WEST: That's correct. But Google contends in its defence that the Compliance  
20 Mechanism has somehow been approved by the Commission because the  
21 Commission didn't bring infringement proceedings in relation to the Compliance  
22 Mechanism. So the point the witnesses here are making is that the Commission  
23 cannot have approved the Compliance Mechanism because it is, in substance, the  
24 same as certain Commitments offers that Google made, which weren't accepted by  
25 the Commission. Now --

26 THE CHAIR: If all that's being said is Compliance Mechanism is the same as certain

1 | Commitments, that were not accepted, the Commitments documents will be in  
2 | evidence; the Compliance Mechanism will be in evidence; so that's a submission.  
3 | When you say it can't have been approved, that's exactly a piece of submission, isn't  
4 | it? It's not for a witness of fact to be saying that.  
5 | MR WEST: Well, (inaudible) it's within her personal knowledge.  
6 | THE CHAIR: Well, it's not her personal knowledge why the Commission accepted the  
7 | Compliance Mechanism; it's only in the Commission's knowledge. She can speculate.  
8 | MR WEST: The fact that the Commission didn't accept the suggested Commitments  
9 | is a matter within her personal knowledge. If none of that --  
10 | THE CHAIR: Well, that's a matter of record that the Commission didn't accept the  
11 | Commitments, and the Commitments proposed is a matter of record. What she's  
12 | saying is here are details of the Commitments; she's just reciting from documents.  
13 | Then she says, "The Commission didn't accept them". Well, she doesn't have to give  
14 | personal evidence of that because that's well known. Indeed, I think it may even be  
15 | in the Decision that there were various discussions on Commitments at various stages.  
16 | Then the Compliance Mechanism is in the Decision. If what she's doing is saying,  
17 | "Well, as a result of that, I consider that the Commission could not have accepted the  
18 | Compliance Mechanism as resolving the matter", that's a submission.  
19 | MR WEST: That is a submission.  
20 | THE CHAIR: It's not evidence. It did seem to me that the whole of that last section,  
21 | until about the quote from the General Court is just what we're seeking to avoid in  
22 | these witness statements. It's all matters that you can say to this Tribunal at the trial.  
23 | MR WEST: In my submission, that doesn't mean it's automatically excluded from the  
24 | witness statement evidence, if it consists of matters within the witnesses' knowledge.  
25 | If it's not disputed that the documents say what they say, then none of this will be in  
26 | dispute.

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

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

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

17 THE CHAIR: Yes.

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

20 THE CHAIR: No, I just want to I don't want to go through it paragraph by paragraph,  
21 which would not be proportionate or sensible or practicable, but to get just your  
22 submission on the point I'm making, namely that under this category, it seems to me  
23 that is what the Practice Direction is seeking to exclude, and avoid lengthy witness  
24 statements that quote extensively from contemporary documents or say things which  
25 are "extensively" from matters that are public record. Not because it's controversial,  
26 but just because it produces excessively long witness statements and leads to

1 cross-examination of the witness and matters that really don't fall within the scope of  
2 cross-examination.

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

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

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

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

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

22 MR WEST: Well, it's my submission that the two are not necessarily mutually  
23 incompatible. Something can be both a matter of record within the witness's  
24 knowledge and a proper matter of submission. But I understand your Lordship to be  
25 broadly against me on that submission.

26 THE CHAIR: Yes, I am, because I think argument on what conclusions or inferences

1 can properly be drawn is distinct from what is factual matter within the witness's  
2 knowledge. It's her view, but it's not her knowledge.

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

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

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

10 139 goes on to speculate as to what the Commission might have done if they had  
11 known something which she thinks they didn't know. That seems to me speculation,  
12 and not evidence of fact. That's the sort of distinction that I'm making.

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

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

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

22 THE CHAIR: I think your original proposal was that this should be determined on the  
23 papers. I think that was Foundem's original proposal. I think it's been helpful to have  
24 an oral hearing. There have been some important issues of principle, especially on  
25 what we can loosely describe as expert opinion evidence, namely, evidence that  
26 clearly could have been provided by an independent expert, but which Foundem has

1 chosen to do through Mr Raff in particular -- in fact, only through Mr Raff; I think it's  
2 not suggested that Ms Raff does that -- on which Mr Pickford's made extensive  
3 submissions, and you have responded.

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

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

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

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

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

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

26 MR WEST: Can I just take instructions in case there are any (inaudible).

1 Can I just clarify what your Lordship has in mind, both in terms of content and timing  
2 for the respective lists to be provided of the paragraph numbers. Does your Lordship  
3 have in mind that that should reflect the existing schedule, or do the parties have the  
4 right to change their positions as set out in the schedule?

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

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

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

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

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

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

21 THE CHAIR: I think there's no alternative, regrettably, from my point of view, to me  
22 then going through them paragraph by paragraph, basically saying yes, no, rather like  
23 in our recitals, binding recitals judgment, where we set out some general principles  
24 and then we listed all the paragraphs that were relevant, as it were.

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

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

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

5 THE CHAIR: Yes.

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

7 THE CHAIR: Yes.

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

11 THE CHAIR: Well, if --

12 MR PICKFORD: -- we need it.

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

14 MR PICKFORD: Yes.

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

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

19 THE CHAIR: Yes.

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

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

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

24 THE CHAIR: Yes. Well, if that makes a big difference to you. For end of Monday.  
25 Yes. I think that would be practical. And as I say, I don't need long arguments or  
26 indeed any arguments about what goes where, because I can refer back to the

1 | schedule where you set out your position on particular paragraphs.

2 | MR WEST: And we also have to prepare a note about what Mr Hunt is looking at.

3 | Should we also aim to submit that by Monday?

4 | THE CHAIR: Yes. The traffic analysis. And I think I have made it clear and I'm not

5 | sure you have particularly pushed back against that, that if he is going to do this sort

6 | of thing, it's not right that Mr Raff should do it as well or in a different way.

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

8 | THE CHAIR: Yes.

9 | MR WEST: -- what the position is.

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

11 | THE CHAIR: But I think you're entitled to reply, particularly on the MAD, however it's

12 | pronounced.

13 | MR PICKFORD: The MAD Atelier case.

14 | THE CHAIR: Atelier case, yes.

15 |

16 | Reply submissions by MR PICKFORD

17 | MR PICKFORD: Well, so in particular, there were two points that I wanted to address

18 | the Tribunal on. One was that there was a submission made by Mr West as to

19 | a particular way in which 3.1(1) and 3.1(2) of the PD interacted and if I could respond

20 | on that, please, first. That's at 9A, tab 7 and it's on page 117.

21 | THE CHAIR: Yes.

22 | MR PICKFORD: Our reading of the operation of 3.1 is different from Mr West's. So,

23 | as I understood it, he effectively treats the "and" at the end of 3.1(1) as an "or" so that

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

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

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

1 refers to "the evidence as to such matters" and so it's referring back to (1) and (1)  
2 requires that the evidence is to "as to matters of fact that need to be proved at trial".  
3 So what (2) is doing is narrowing (1) and putting a further condition on it. So the first  
4 thing is it has to satisfy (1). It must be evidence as to matters of fact that need to be  
5 proved at trial. And then secondly, by (2), it can only be as to such matters where the  
6 witness would be able to give that or allow to give that evidence if they were giving it  
7 in chief.

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

9 MR PICKFORD: In (1).

10 THE CHAIR: Yes, I understand.

11 MR PICKFORD: So they're to be read cumulatively and the effect of (2) is to narrow  
12 (1) and that answers Mr West's point that he says, "Oh, it doesn't have to be matters  
13 of fact." It does.

14 The second point -- please stop me if I'm labouring it -- Mr West mischaracterised my  
15 submission about the interaction between admissibility and the Practice Direction. He  
16 did it previously and he did it in his submissions. Because the Tribunal may be writing  
17 a judgment about this, I just want to be very clear what my submission is. He said that  
18 my argument is that to be admissible, an exemption from the Practice Direction must  
19 be obtained. That is not my argument. It's never been my argument. It's effectively  
20 the wrong way round.

21 My argument is that step one is that the Practice Direction requires you to advance  
22 Practice Direction-compliant evidence and that is evidence of fact. If you want to go  
23 and produce something which is opinion evidence, then you need to get an exemption  
24 from the Practice Direction under 4.2, as I said before, and as part of that, obviously if  
25 you're relying on producing opinion evidence, it must be admissible opinion evidence  
26 and so you also need to satisfy the common law requirements and section 3(1) of the

1 Civil Evidence Act 1972. That's how I say it works. And that's my submission and  
2 that's what it's always been.

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

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

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

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

24 MR PICKFORD: I was addressing you on that before lunch. My position on that is  
25 that there is a proper procedure that they should have followed. We followed it. When  
26 we wanted to rely on a witness statement that we felt was never going to be able to

1 satisfy the Practice Direction, we jumped through the right hoops and so --

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

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

6 THE CHAIR: Yes.

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

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

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

18 THE CHAIR: So you did make an application?

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

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

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

25 THE CHAIR: Yes.

26 MR PICKFORD: Sorry. I've just been corrected. It wasn't a pre-Practice Direction

1 statement, but the Practice Direction didn't apply to it because it wasn't a trial  
2 statement.

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

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

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

17 If the Tribunal rejects that primary case and says, "Well, we're going to seek to try and  
18 assist the Ruffs here in some way", and I say that they shouldn't, the Tribunal  
19 shouldn't, then it will obviously have to consider how it could fairly do what Mr West is  
20 asking of it, which is to effectively grant the application at the same time as considering  
21 our strike-out application and that might well mean hearing from us on what we would  
22 need to do in order to respond to it. But in my submission, that's really all too late now.  
23 We're in January. We've got the expert evidence deadlines coming up in February  
24 and March. We're then into PTRs a month or so after that. We begin in June. We  
25 shouldn't be having to worry about further areas of expert evidence that were not  
26 previously canvassed before, is my submission.

1 THE CHAIR: Can I ask you this?

2 MR PICKFORD: Yes.

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

4 MR PICKFORD: Yes.

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

7 MR PICKFORD: Yes.

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

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

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

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

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

23 MR PICKFORD: Yes.

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

25 MR PICKFORD: Yes, to be clear --

26 THE CHAIR: -- aside from the modelling.

1 MR PICKFORD: To be clear, the modelling isn't the traffic analysis. The traffic  
2 analysis is the part that begins [at] 3.2.5, from recollection. It begins with an analysis  
3 of traffic per se. Then prior to that, and I think it's 3.2.3, there is a mathematical  
4 modelling exercise of how Google's algorithms, and in particular penalties, take effect.  
5 Not as regards traffic, but just in terms of in and of themselves. There's a whole  
6 section there of mathematical modelling.

7 We have not responded to that in kind. We have not said, "Here is our position on the  
8 true mathematical modelling that you would have to engage in if you wanted to do  
9 what Mr Raff is trying to do". We've just made some extremely high-level comments  
10 about the way in which our algorithms operate.

11 Now, had we stepped back in time, and had there been an application six months ago,  
12 or 12 months, ago by Foundem for expert evidence, whether it's from them or from  
13 whoever, on a modelling exercise of how penalties work, then we'd have had to  
14 consider, there, "Well, do we agree that that's helpful, or do we think that that's really  
15 unhelpful?"

16 We would have made submissions to the Tribunal about whether we were prepared  
17 to agree to that area of expert evidence or not, and we would have probably said,  
18 I imagine -- given that we don't haven't put in any evidence of our own on this -- we  
19 don't think that's very helpful.

20 So we say, it's just really too late now to be trying to reconstruct a set of applications  
21 that really should have been made in the past, responsibly, to this application, now.

22 THE CHAIR: Yes.

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

25 MR WEST: Yes.

26 MR PICKFORD: Obviously, I'm conscious that the other Claimants are not here, so

1 I will make sure that they are aware of what I'm about to say. We have alerted the  
2 other Claimants over the weekend to an authority that was in the bundle for this  
3 hearing, that actually we say it would be very helpful for everyone to look at for  
4 tomorrow's hearing.

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

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

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

14 MR PICKFORD: Yes.

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

16 MR PICKFORD: There are.

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

18 MR PICKFORD: Yes.

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

20 MR PICKFORD: Yes.

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

22 MR PICKFORD: The position on the amendment is: substantively, it is not resisted at  
23 all. There has been negotiation between the parties as to the particular conditions.  
24 I can just turn around now to find out what I'm permitted to say on that, because I know  
25 some of it's been without prejudice. My understanding is it's incredibly narrow what  
26 remains between the parties on that.

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

2 MR PICKFORD: Can I just take very quick instruction? (Pause)

3 Yes, there is only one matter remaining, which is costs. Everything apart from costs

4 is now agreed on that. So that means, apart from costs, the only point for tomorrow

5 then in any substance is the scope of trial 1.

6 THE CHAIR: You can explain to me how the amendments got resolved tomorrow;

7 I won't try and work my way through the negotiations, and then to deal with costs, and

8 concentrate on the point about the scope of the trial, which is the main dispute. That

9 seems right.

10 MR PICKFORD: Indeed, it is.

11 MR WEST: If I could rise, Sir, I don't intend to make any more submissions, but I don't

12 agree with my friend's characterisation of his evidence in response. Mr Cutts's reply

13 evidence is in the bundle.

14 THE CHAIR: Yes.

15 MR WEST: I would invite the court to read it, and it does respond in detail to Mr Raff's

16 evidence. That, of course, gives rise to one question, which is: what would happen to

17 Mr Cutts's responsive evidence if Mr Raff's evidence were to go, and in my submission

18 it must follow that that evidence would go as well, although Google don't seem to have

19 accepted that.

20 THE CHAIR: Yes.

21 MR WEST: Also much of that evidence is, of course, evidence which could be

22 described as falling under the Civil Evidence Act, for which, of course, no exemption

23 was sought.

24 THE CHAIR: Yes.

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

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

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

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

5 THE CHAIR: Thank you.

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

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

9 (3.14 pm)

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

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### Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?