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5

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

Case No: 1589/5/7/23(T),
1424/5/7/21(T), 1596/5/7/23

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP
12 (Remote Hearing)

21st May 2026

15 Before:

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17 The Honourable Mr Justice Roth
18 Dinah Rose KC
19 Alasdair Smith

20
21 (Sitting as a Tribunal in England and Wales)

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24 **BETWEEN:**

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27 **INFEDERATION LIMITED (“Foundem”)**
28 **KELKOO.COM (UK) LTD & OTHERS (“Kelkoo”)**
29 **WHITEWATER CAPITAL LIMITED (“Ciao”)**

Claimants

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31
32 - and -

33
34 **GOOGLE LLC & OTHERS**

Defendants

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38 **A P P E A R A N C E S**

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41 Colin West KC (instructed by Hausfeld) on behalf of Foundem
42 Brendan McGurk KC and Julianne Kerr-Morrison (instructed by Herbert Smith
43 Freehills and Bristows) on behalf of Google
44 Daniel Jowell KC and Sarah Love KC (instructed by Linklaters LLP) on behalf of
45 Kelkoo & Ciao Claimants
46

47 Digital Transcription by Epiq Europe Ltd
48 Lower Ground, 46 Chancery Lane, London, WC2A 1JE
49 Tel No: 020 7404 1400
50 Email: ukclient@epiqglobal.co.uk

Thursday, 21 May 2026

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(10.34 am)

Housekeeping

THE CHAIR: Good morning. These proceedings, like all proceedings in this Tribunal, are being live streamed. I start, therefore, with a warning for those who are watching on the live stream: an official recording of the proceedings is being made, and it is strictly forbidden for anyone to make any unauthorised recording or take any visual image of the proceedings, and to do so is punishable as a contempt of court.

We've noted that in the materials we've got, there are certain passages that are marked as confidential. We trust that counsel, in the usual way, will be careful not to read out any material or references that are so highlighted, but just direct us to those passages.

If at any point we need to go into camera, and it's possible that that may be necessary, we feel, regarding in particular one application, then the live stream will be turned off.

Thank you to all the parties and counsel for the discussions. You've had the efforts to reach agreement on various matters, which, in part, have been productive, and we appreciate that. If I can start with one of those, which is on AdWords. We've got a draft consent order before us. I just wondered whether, on the recitals, and this is a matter for the parties.

I know this was sent in last week, but I wasn't here to deal with it. We can slightly abbreviate the timing for the further pleadings. I don't know if you've got a copy of it, Mr West, you may have it, but you can serve, obviously, your amended particulars of claim pretty much straight away. On that basis, if Google could do any amendments to the defence within seven days rather than nine days, and Foundem has 14 days

1 rather than 16. In other words, bring everything forward by two days. My calculation
2 means that you'll get the final pleading by 12 June, and I think that's desirable.

3 These are undertakings, so it's not a matter for the Tribunal already; you've got to
4 agree. Is everyone happy with an amendment to seven instead of nine, 16 down to
5 14, 23 down to 21?

6 MR MCGURK: Yes.

7 THE CHAIR: Well. In fact, we can make that amendment here. I think we've got
8 a word copy of the order, and it'll be issued today. That deals with that.

9 We know we have an agenda which you've agreed, which we will largely follow, but
10 we have certain other matters, and the order may be slightly different.

11 The trial timetable, we thought it sensible to look at first. We've got two alternatives.

12 We cannot sit on Fridays; one member of the Tribunal is not available on Fridays
13 because of other professional commitments. On that basis, it seems to us that the
14 Claimants' proposal cannot be accepted, and the Google proposal seems to us to
15 work well. Everyone has reserved week six, we do finish by the end of July, and
16 I think that's what we'll do.

17 One matter on that timetable: Thursday, 23 July, non-sitting. You're proposing to
18 submit your written closings by 10.00 am that morning. We're not sitting the previous
19 Friday, so you've got that day. I suspect people may be working that weekend. If we
20 could have it by 5.00 pm on the 22nd, rather than 10.00 am the next morning, that
21 will save you all one night of work, and it will help us. So can we say 5.00 pm on the
22 22nd? Is that all right? On that basis, we'll adopt the Google proposed timetable.

23 Next, we thought it's appropriate to look at the list of headline issues that you have
24 prepared. One needn't get too hung up about exactly how these are phrased. This
25 is not an official pleading; it's not a document that will really feature in the judgment;
26 it's really to assist us in seeing what's necessary and what's within the trial.

1 So quite how one phrases it -- for example, there's a question, clearly, of whether
2 Google can show justification, whether one puts that, that can be framed in different
3 ways. We've got, on this document, 4.1.1.2, and then we've got an alternative 4.1.4,
4 and we've got 4.1.8. They're all talking about "justification". I really don't think that
5 that's something we need to spend time disputing: what particular formulation is
6 necessary.

7 As opposed to the things that are important, namely, point 6 and 7, which is
8 a question of what's within the scope of the trial. Now, that is important, but unless
9 someone wants to push on this point, I wasn't proposing that we will really look at the
10 alternative wordings under paragraph 4.

11 MR McGURK: If I may, we sought to narrow issue 4 further last night. We sent to
12 Hausfeld a revised headline.

13 THE CHAIR: Sorry, just for the purpose of the transcriber, who's not present, can
14 you identify who you are and who you represent?

15 MR McGURK: Brendan McGurk, counsel for Google.

16 THE CHAIR: Yes. Thank you, Mr McGurk.

17 MR McGURK: You have been looking, I think, at the draft headline list of issues at
18 tab 5 in the core bundle. We sent to Hausfeld last night a further revised version
19 which narrows the issues, I hope, even --

20 (10.41 am)

21 (Audio error)

22 (10.42 am)

23

24 Discussion of PCR regarding Kelkoo and Ciao

25 MR MCGURK: It's 655 of the supplemental.

26 THE CHAIR: 644?

1 MR MCGURK: 655.

2 THE CHAIR: Of the supplemental bundle? (Pause)

3 Yes.

4 MR MCGURK: You'll see, if you've got that --

5 THE CHAIR: Yes.

6 MR MCGURK: -- we have accepted Foundem's proposals under 4.1. We

7 suggested a very slight tweak to 4.1.2, which we think actually reflects Foundem's

8 pleadings. We hope that's not controversial, but I'll allow Mr West to indicate

9 whether it is.

10 4.1.4, we've proposed a further alternative, and I said I'd explain why this matters.

11 What was originally proposed by Foundem was the question: was its site demoted

12 on grounds which are characteristic of CSS, or for reasons of quality?

13 We say that is a false opposition. If it had been left there, we might not have worried

14 too much for the reasons you've given, Sir, but at paragraph 39 of Mr West's

15 skeleton, he has made clear that he wants the Tribunal today to rule that my clients

16 cannot pursue a defence based on Foundem being demoted on reasons of quality.

17 Now, if this isn't going to be contested, I needn't take you through the pleadings. But

18 if it is, I will. How I hope we might be able to cut through it is that I've proposed some

19 drafting that preserves Mr West's position. If he says there is some procedural

20 reason why we're barred from running this defence, then in circumstances where

21 there's no application to strike today, we have drafted a new 4.14, which allows them

22 to take the point at trial if he is so advised.

23 I may say no more than that if that's agreeable, but if it's not, then it does matter to

24 my clients today to know that a case that's been central to their defence for years is

25 something they can continue to pursue to trial.

26 THE CHAIR: Yes. When was this sent through?

1 MR MCGURK: Last night, Sir.

2 THE CHAIR: Last night? Yes. Well, Mr West, are you able to respond now, or
3 would you like to do it a bit later?

4 MR WEST: Well, in relation to the wording points, this is a constructive proposal.
5 We only received it late last night --

6 THE CHAIR: Yes.

7 MR WEST: -- so I will need to take instructions.

8 In relation to 4.14, can I make clear my position is that I'm not seeking to strike out
9 any element of Google's case today. I accept I haven't brought an application; that
10 was quite deliberate. But I did think it appropriate, and Foundem considered it
11 appropriate to bring to the Tribunal's attention at this PTR, the fact that we will be
12 contending at the trial; that a part of Google's case is not open to it because it's
13 contrary to binding recitals, and if that may have an impact on the evidence, for
14 example, which is going to be called, or the disclosure, then, as I say, we thought it
15 appropriate to bring that to the Tribunal's attention.

16 If the Tribunal's view is, "Well, those are all matters for trial, and there's nothing we
17 can really do about that today", then I'm not going to press it upon you. But as I say,
18 our position is that they are trying to argue a case which is directly contrary to the
19 recitals in the Decision that were found to be binding in the preliminary issue
20 judgment. As I say, that's why we thought it appropriate to raise it at this PTR.

21 THE CHAIR: Yes. I mean, at the moment we're just looking at the proposed
22 wording of 4.1.4. We're certainly not in a position to decide -- and that may involve
23 substantial argument -- whether part of what Google is seeking to argue is open to it
24 or not today. I think that will be a matter for trial, or if necessary, a further hearing.
25 But the real question is whether you think this wording encapsulates the point that
26 you are seeking to raise.

1 MR WEST: Well, as I say, I'll have to take instructions on the wording, but I'm sure
2 we can come up between us -- in view of what the Tribunal has just said -- between
3 myself and Mr McGurk, with a form of wording which parks the point for trial, as the
4 Tribunal has indicated it is minded to do.

5 THE CHAIR: Yes. I mean, it is a very different point from the question, "On what
6 grounds was Foundem's site demoted?" That's a factual question, and the point
7 you're making is more a legal and procedural point.

8 MR WEST: Yes, but the reason it was in square brackets was because the point we
9 were seeking to raise is whether it's open to Google to say that Foundem's site was
10 demoted for reasons of quality, or whether that's been resolved by the decision.

11 THE CHAIR: Well, it may be that the wording you've just articulated, albeit on your
12 feet, "Is it open to Google to say ..." maybe the appropriate wording for the issue.
13 But perhaps you can put your heads together, ideally over the -- well, this only
14 concerns Foundem, does it?

15 MR WEST: Yes.

16 THE CHAIR: Probably this hearing will run into the afternoon, we suspect, so we're
17 able to do it over the lunch adjournment. What we're proposing to do is that we will
18 deal with the application concerning redactions and privilege last, because it doesn't
19 concern Kelkoo and Ciao, so that many people here on the Kelkoo and Ciao legal
20 team can depart. We envisage that might spill into the afternoon, but you will still be
21 here for that. That will give you the opportunity to try and resolve this.

22 MR WEST: Yes. That's, I think, what the parties had informally arranged between
23 themselves.

24 THE CHAIR: Yes, good. You can confirm about 4.1.2. That takes us then to the
25 more substantive questions, which are issues 6 and 7.

26 6, as I understand it, concerns the period when neither Algorithm A nor Panda

1 applied to Foundem, but Foundem said there may be other penalties that applied.
2 I think it's been described as the "interim period", from December 2009 till April 2011.
3 That is issue 6. The question is whether that is part of this trial 1 or not, as
4 I understand it.
5 MR WEST: Yes.
6 THE CHAIR: What do you want to say about that, Mr West?
7 MR WEST: Well, my position is that it's part of Trial 2, but if the Tribunal considers
8 that it's part of Trial 1 then it's part of Trial 1. As you say, Foundem's position is that
9 it appears to have continued to be penalised over the interim period, albeit to
10 a lesser extent, by around 30 per cent, Foundem thinks, rather than 90 per cent.
11 Google's position is that there was no such further penalty, and its disclosure
12 exercise has not identified any such further penalty, although Google gives evidence
13 at an earlier stage of the case to say it did not have comprehensive records -- that's
14 Mr Kwok's second witness statement in tab 38.
15 The question is whether that allegation about a further penalty is a separate abuse
16 which has to be proven on a standalone basis, or whether it's really a matter of
17 causation and quantity.
18 The abuse found in the Commission Decision runs on a continuous basis from
19 January 2008 to June 2017, so it covers the whole of the interim period. So there's
20 no question that Google was committing the abuse at that time. The abuse and the
21 Commission Decision is not limited to Algorithm A and Panda; those are given as
22 examples. Indeed, in the preliminary issue judgment, the Tribunal held that the
23 Commission Decision also extended to manual penalties.
24 My position in a nutshell is that Foundem's case on this point is not really a separate
25 abuse to that found in the Commission Decision, but rather it concerns the question
26 of whether the abuse in the Commission Decision applied to Foundem over the

1 interim period.

2 Now, I accept that in Foundem's response to a request for further information, it
3 described this claim as a standalone claim. But in my submission, that doesn't tie
4 the Tribunal's hands in relation to procedural questions. We say, on analysis, this is
5 a follow-on claim because it's the same abuse.

6 THE CHAIR: But the issue that we are going to determine at this trial, I think, was
7 defined as whether Google abused its dominant position on each of the relevant
8 markets, and if so, in what respect and over what period. Isn't this an "in what
9 respect" question?

10 The decision shows that it did so through Algorithm A and Panda. You say there are
11 other respects; you may be right, you may be wrong, but isn't that really within the
12 scope of what we're trying to determine at Trial 1?

13 MR WEST: Well, that is the issue between us, and I say it is possible to view this as
14 a question of causation and quantum. I do also make the point that when we get to
15 Trial 2, the Tribunal will have before it expert evidence about the traffic which an
16 unpenalised site would be expected to have generated. That may be of assistance
17 to the Tribunal in answering the question whether the traffic which Foundem in fact
18 obtained in the interim period is at the level one would have expected an
19 unpenalised site to have obtained. That is not evidence which is before the Tribunal
20 at trial 1.

21 THE CHAIR: That was your choice; you haven't put it in.

22 MR WEST: In a sense, that's correct. Yes, the expert evidence for trial 1 takes the
23 position that questions of abuse have been resolved -- decision period, and it's only
24 questions of counterfactual which arise.

25 We also see the further penalty claim is really all about damages. What it really
26 goes to is whether the traffic which Foundem obtained in the interim period is

1 a reliable indicator for the traffic that Foundem would have obtained if it had not been
2 penalised. Foundem of course says it isn't, because it says that it was not
3 unpenalised in that interim period.

4 We say that what this is all directed at is the question of causation and quantification
5 of damages. However, as I say, it's really a procedural question for the Tribunal
6 whether it thinks it's more appropriate to address this under Trial 1 and Trial 2. If the
7 Tribunal is of the view that this really should be tackled in Trial 1, then of course we
8 will do so.

9 THE CHAIR: I don't know how Foundem is approaching this, other than the traffic
10 data you just mentioned. You say, I think, that disclosure from Google hasn't
11 revealed any other penalties, but at the same time Google accepts it hasn't got
12 complete records, so that's not determinative. On what basis is Foundem going to
13 substantiate its argument that there were other penalties?

14 MR WEST: Well, there are various other evidence before the court in Foundem's
15 evidence. For example, an analysis has been done of how Foundem tended to rank
16 on Google for certain keywords as compared to rival search engines, Yahoo and
17 Bing. Foundem says if you look at that analysis, it's systematically ranked lower on
18 Google than on Yahoo and Bing. We suggest that it was continuing to be penalised.

19 THE CHAIR: Yes.

20 MR WEST: And there are various -- I don't propose to go through them all -- points
21 of that nature, on which Foundem relies to suggest that it did continue. For example,
22 pairing its traffic in the interim period with the traffic obtained before it was penalised
23 by Algorithm A. So there are various analyses that we have carried out and rely on
24 before the Tribunal.

25 THE CHAIR: I can see that, obviously, it has an impact on quantum, but it is sort of
26 conceptually distinct, the question of whether one can rely on traffic in that period as

1 a clean period or not comes into the quantum question. But whether there was
2 a conduct of Google that was adversely unlawful conduct that was adversely
3 affecting Foundem without looking at the degree of effect, but whether there was
4 anything actually being done that could found the quantum claim, that is, in a sense,
5 the purpose of Trial 1. Also then to then assist the quantum exercise, because if
6 there was nothing in that period, then it may help quantum because it's a clean
7 period, and it also means there is no damage for that period. If there was
8 something, again, it affects the way you approach quantum.

9 MR WEST: Except that it would mean necessarily no damage because, of course, if
10 Foundem had not been penalised from 2006, they'd have achieved significantly
11 higher (overspeaking).

12 THE CHAIR: Yes. Fair point. So there might have been a continuing effect. Just
13 a moment. (Pause)

14 Mr McGurk, would you like to respond to that?

15 MR MCGURK: Yes, thank you, Sir.

16 Since the other penalties abuse has been introduced into the pleadings, we've
17 understood it as an abuse claim and therefore a matter for trial 1. Most recently in
18 Foundem's reply, paragraph 2(e), they have made clear they're maintaining their
19 follow on and standalone claims as articulated in the response to the RFI in full. And
20 I wanted to show you the response to the RFI. It's in the supplementary bundle.
21 Page 292 is where we should start the response to request 2, and paragraph 5 to 7
22 refer.

23 You may recall this document. It is the most crisp delineation of Foundem's
24 follow-on and standalone claims. You'll see there's a compendious recital of all of
25 the claims brought under paragraph 5.

26 You'll see just pausing at 5(c) and (d) the two other penalties abuses pleaded: the

1 "without objective justification" variant and the "discrimination" variant.

2 Then turning down to paragraph 6 and 7, paragraph 6 lists three follow-on claims,
3 none of which relate to the other penalties abuse claims. Then paragraph 7 lists out
4 the other standalone claims and you will see paragraph 7(c) identifies the other
5 penalties without objective justification and other penalties discrimination claims as
6 standalone claims.

7 So Foundem's case on the other penalties abuses could not be clearer on the face of
8 their own pleading. They're pursued as standalone claims, and that is precisely what
9 falls to be determined at trial 1. Now today is the first time Mr West has
10 acknowledged that the response to the RFI might be a problem for his position on
11 this.

12 The only other point to raise is that even if he were to today or at some future point
13 seek to amend, to try and recast these long-articulated standalone claims as
14 follow-on claims, so the points you've already put to Mr West would recur because,
15 as Foundem have acknowledged in their skeleton and in correspondence, there is
16 still an issue as to whether an identified other penalty in fact impacted on Foundem
17 at all, which would be necessary to establish that particular cause of action.

18 There's four points on that. I'll deal with them briefly. As Mr West rightly recognises
19 at paragraph 5 of his skeleton, the abuse found in the decision is a discrimination
20 abuse. It follows that, on any view, the other penalties without justification claim has
21 to be a standalone claim. It's outside the four corners of the Decision. In turn that
22 means the other penalties without justification claim is, on any view, a Trial 1 claim.
23 So it would be an ambitious application to apply to amend that, to somehow formally
24 recast it as follow on.

25 Second, on the other penalties discrimination claim, that simply can't be recast as
26 follow on and a matter for Trial 2 because it presupposes the establishment of

1 a number of facts which would need to be addressed at Trial 1.

2 First of all, the Commission does not identify any other penalty that impacted on
3 Foundem's CSS, let alone any other verticals. So the penalty that is sought to be
4 impugned and to have this 30 per cent or whatever effect would have to be
5 identified. Now Foundem has, of course, pleaded a number of other penalties that
6 were identified in the disclosure. But what it has not done in its pleading is to
7 suggest that any of them applied and affected it. It's had the penalty server data and
8 it is not pleaded a case, and it has not sought to articulate such a case in evidence
9 either. So the identification of the penalty in question would have to be undertaken
10 at Trial 1.

11 Second, it would have to be established, as a matter of fact, how that other penalty
12 operated. The Decision, not having identified one, does not address how any such
13 algorithm operated. It doesn't identify the signals upon which it bit. And, in
14 particular, having not identified any penalty, it cannot be said of this alleged other
15 penalty that it was, crucially for purposes of the Decision, prone to demote rival
16 CSSs due to their inherent characteristics. And if they can't say that, again, they
17 can't recast it as a follow-on claim within the scope of the decision. It would have to
18 be pursued at Trial 1 as a standalone claim.

19 Third, it would have to be established that this unidentified penalty, in fact, impacted
20 on Foundem's website. That's acknowledged, as I say, in correspondence in
21 Mr West's skeleton, and that's a Trial 1 issue.

22 Fourth, it would have to be established in relation to the other penalties
23 discrimination claim that the penalty or algorithm so identified at Trial 1 had
24 a differential impact as between Foundem and Google, and then we'd also have to
25 have the debate about whether it was objectively justified differential treatment.

26 So these are all matters of liability, which is why even if they tried to amend and

1 recast as a follow-on claim, all these substantive issues are Trial 1 issues and
2 therefore substantively a standalone Trial 1 claim.

3 So for those reasons we say issue 6 on other penalties relates to an abuse. It's for
4 Trial 1 and should be maintained.

5 THE CHAIR: Yes, thank you.

6 Mr West.

7 MR WEST: In substance, we don't accept that it's necessary for Foundem to identify
8 what the further penalty is, and it may be sufficient, and we say it would be, for
9 Foundem to identify that it's likely to have been subject to such a further penalty.

10 Mr McGurk seeks to suggest that the burden of proof is one which would never be
11 surmountable, for example, to show in relation to a penalty whose existence they
12 deny the precise grounds on which it operated, and, of course, in the interim period
13 Foundem had, of course, just been whitelisted by Google out of Algorithm A, which
14 suggests that Google was accepting that there weren't quality issues with Foundem
15 sites. So I don't accept that we need to establish all the matters which Mr McGurk
16 says we do.

17 THE CHAIR: Yes. Thank you. (Pause)

18 Well, I'm sorry, Mr West, we're against you on that. We think it clearly goes to
19 liability and not any issue of degree of effect, and it is in Trial 1. On that basis,
20 subject to anything further you may wish to say, the formulation in the list of issues
21 that -- 6, it doesn't really matter whether you call it "abuse" or "penalty claims" -- we
22 know what we mean -- should be -- that's in Trial 1.

23 MR WEST: Yes. There's no dispute about the wording.

24 THE CHAIR: Yes. It probably should be "further penalty claims", really.

25 Issue 7, this is quite different. I think this is about the other aspects of the Foundem
26 comparison service.

1 MR WEST: Yes. So in addition to its comparison shopping service we ran a number
2 of other what are called "verticals" or "vertical search engines" such as travel. These
3 other verticals were also deprived of traffic by Google's penalties in the same way as
4 was found on comparison shopping service, and they have, as a result, ceased
5 operating. So we refer to this part of our case as "other verticals".
6 Foundem's case on this point is pleaded in two alternative ways. Firstly, as
7 a separate abuse directed at those verticals, and secondly, as what one might call
8 "collateral damage", in the sense that the penalties which apply to Foundem's
9 comparison shopping service had the effect also of damaging the other verticals
10 because they apply to Foundem's whole domain, and the other verticals were run as
11 part of the same overall domain or website.
12 I can show you that alternative plea that's in the supplementary bundle, tab 2,
13 page 75 of the bundle page. The alternative pleading in relation to Algorithm A is
14 paragraph 66C:
15 "Alternatively, and in any event, the application of Algorithm A to Foundem's
16 webpages on a sitewide basis had the necessary consequence of decreasing
17 generic search traffic from Google's general search results pages to Foundem's
18 other vertical search services."
19 The equivalent in relation to Panda is on page 101, paragraph 94B, essentially the
20 same plea, but in relation to Panda.
21 Of course, these alternative pleas were formulated prior to disclosure and other
22 evidence, and it now appears from the disclosure that it's the latter, the alternative
23 plea, which fits the facts in the sense that there wasn't a separate penalty directed at
24 Foundem's other verticals, and so instead they were affected by the penalty directed
25 at its CSS, and in that sense, we're a collateral damage. In my submission,
26 therefore they are properly a matter for Trial 2 because it's not being said there is

1 a separate infringement in relation to these other verticals, but rather the damage to
2 Foundem, including damage to its other verticals, by reason of the same
3 infringements concerning its CSS.

4 The only reason I raise this at all -- because we say this shouldn't be on the list of
5 issues -- is to prevent it being said that by not proving a separate abuse, Foundem
6 has somehow abandoned its case concerning other articles. In fact, we've always
7 had an alternative plea, which I say is a matter for Trial 2, but there's no Trial 2 list of
8 issues.

9 Google's position on this point -- Mr McGurk will no doubt tell you -- but it appears to
10 be that if Foundem wishes to proceed in that way, it has to amend its claim to
11 proceed to delete the first alternative, and so it seems Google is saying we need to
12 pay some kind of costs penalty. But, in my submission, that isn't correct. There's no
13 need for an amendment, because an alternative plea, by its very nature,
14 countenances the possibility that only one or other of those claims in fact applied.
15 And in relation to costs, the costs concerned the claim under the same costs,
16 whether the claim is pursued in one version or the other, and we are concerned
17 about the potential effect of the inequality of arms which exists between the parties if
18 we get into questions of interim awards of costs. I say there's no need for that, and
19 the proper approach is simply to say that since Foundem is pursuing its alternative
20 case, that's a matter for Trial 2.

21 THE CHAIR: Yes. So just so I'm clear -- I think you've said this -- it is the alternative
22 case that you're now relying on?

23 MR WEST: That is what is consistent with the disclosure (overspeaking).

24 THE CHAIR: And so not the primary case.

25 MR WEST: That doesn't appear to have been (overspeaking).

26 THE CHAIR: Yes. So if one looks at the wording of paragraph 7 in the list of issues,

1 | did Google Commission abuse in relation to Foundem's other vertical search
2 | services such as travel, that's not really then an issue anymore. Is that right? It's no
3 | longer an issue because that's not the case you're putting. You're going to be saying
4 | by reason of the abuse that was found, this had the effect of damaging Foundem's
5 | other vertical search services as much as its shopping service?
6 | MR WEST: Yes. Our position is that issue 7 should not be on the list.
7 | THE CHAIR: Should not be on the list.
8 | MR WEST: Certainly, that Google should not seek to impose any sort of financial
9 | penalty on them.
10 | THE CHAIR: Yes, because you're not going to pursue that as a separate abuse.
11 | You're going to rely on the alternative case.
12 | MR WEST: Yes.
13 | MS ROSE: So, to be clear, you are not now maintaining the allegation at 66B. Is
14 | that right?. You're only maintaining 66C? (Pause)
15 | MR WEST: I think what I'm not (inaudible) of course, incorporates various recitals.
16 | I need to check exactly what those are and whether we rely on any of them in
17 | relation to 66C. I think what we're saying we're not seeking to show is that there was
18 | a separate abuse directed at other verticals.
19 | MS ROSE: Because, as I read 66B, you're saying that the facts that you've relied on
20 | in relation to Panda and Algorithm A, in relation to shopping, are likely to be equally
21 | applicable, equally relevant, in relation to vertical search. I understand that to be
22 | a plea of a separate abuse using the same algorithms, applying them to other forms
23 | of vertical search. But now you're saying, "No, it's a site wide application".
24 | MR WEST: Whether we still rely on some of the other sites or alternative case,
25 | I need to check that. But I think we're agreeing that --
26 | MS ROSE: You're not saying that there was a freestanding application of the

1 algorithm to the other vertical searches, to the web pages?

2 MR WEST: That's right. And, indeed, verticals other than CSS, if they're standalone
3 travel sites they didn't tend to be impacted. So it doesn't seem that there was such
4 a separate abuse.

5 MS ROSE: Okay. Don't you think it would be helpful for that to be tidied up in the
6 pleading? Because at the moment it is a bit unclear having those two paragraphs,
7 particularly if you're saying you might be relying on some --

8 MR WEST: I've got no objection to clarifying in the pleading. I am concerned that
9 there may be said to be costs consequences that flow from that which I would
10 (overspeaking).

11 MS ROSE: I suppose it may be, but --

12 THE CHAIR: I get particularly confused if we look at the next one on Panda,
13 94A and 94B, on page 112, and the point that Ms Rose just made, because we've
14 got the final sentence of 94A which does appear to me to be part of the alternative
15 case, in a sense. It was applied to Foundem's entire website. Then we've got
16 alternatively. So it's a little bit confusing.

17 MR WEST: Yes, I see the point. I'm certainly not opposing a suggestion that what
18 I called to be reduced in some form to the pleading.

19 THE CHAIR: Yes. I mean, I think if you're about to serve a new pleading because of
20 AdWords, and you've got a couple of days to do that, if you can tidy up those two
21 paragraphs. Then we obviously have to hear from Mr McGurk. But if one's talking
22 about what was the effect of the abuse, that does get one into Trial 2 territory, and
23 that's really what you're saying.

24 MR WEST: (Inaudible).

25 THE CHAIR: Yes. Mr McGurk, what do you want to say, given that discussion?

26 MR MCGURK: That discussion has been very helpful. It's been probing something

1 we've been trying to understand in very recent correspondence, namely, are you
2 maintaining your primary case in relation to these two other verticals abuses? We've
3 had mixed messages. I just wanted to go back to the RFI just to show you where
4 this comes from.

5 THE CHAIR: Well, I've looked at that and I see that. But given where we are now.

6 MR MCGURK: Given where we are, we've always understood 66B, 94A as
7 standalone claims. We wrote a couple of nights ago and the problem with the
8 response we got was that it was saying two things. It's at tab 44 of the supplemental
9 bundle. It may have been clarified in the discussion we had, but we need to be
10 absolutely clear about this. (Pause)

11 THE CHAIR: What tab, sorry?

12 MR MCGURK: It is tab thirty-seven. (Pause)

13 THE CHAIR: Thirty-seven. Just a minute.

14 MR SMITH: Page number?

15 THE CHAIR: 617. (Pause)

16 MR MCGURK: Do you have that letter from the 19 May?

17 MS ROSE: I do now.

18 THE CHAIR: Yes, we do.

19 MR MCGURK: So this was in response to a letter where we were respectfully
20 saying, "are you maintaining the standalone claims at 66B and 94A for the Algo A
21 and Panda abuses in relation to other verticals or not?" In the answer you get,
22 page 617, paragraph 4 says:

23 "Your letter appears to suggest that Foundem may no longer be pursuing these
24 claims in whole or part, and this may have cost implications." [as read]

25 This is not the position. And then if you turn over to paragraph 6 -- and this is part of
26 our continuing confusion -- they say:

1 "The greater focus referred to in paragraph 5 above does not mean that any of the
2 claims in question are not being pursued." [as read]
3 le, we're maintaining the standalone abuse and the alternative case in 66C and 94B.
4 You see, again, paragraph 14B, they were maintaining the other verticals claims "on
5 the pleaded basis that these were affected by the established or alleged abuses
6 concerning Foundem CSS" [as read].
7 So we read that as the alternative position. And, in contrast, what we were being
8 told was being maintained in paragraphs 4, 5, 6. So there was the confusion. If it is
9 being said today that the primary standalone case in 66B and 94A are being
10 withdrawn, that needs to be made expressly clear. That's all we were trying to
11 establish, because --
12 MS ROSE: I think he has said that.
13 MR MCGURK: And that's helpful.
14 THE CHAIR: Is that right? I mean, it may not be precisely as expressed in those
15 paragraphs, but there is no primary case --
16 MR WEST: Just on this --
17 THE CHAIR: -- it's just the consequential case.
18 MS ROSE: Regardless of the letter. I mean, your position is that you are
19 withdrawing that primary case.
20 MR WEST: Well, we're not pursuing it.
21 MS ROSE: What's the difference?
22 MR WEST: I need to be very careful about the potential costs consequences if it's
23 being said that I'm withdrawing the claim. But the position is in fact explained clearly
24 in paragraph 8, which my learned friend didn't show you.
25 THE CHAIR: Well, whether it's explained there or not --
26 MS ROSE: There was no separate penalty directed specifically at these other

1 verticals.

2 THE CHAIR: I mean, it has been clarified; you're not pursuing it. Whether you
3 withdraw it or don't pursue it seems to me a distinction without much of a difference,
4 really. It's no longer an issue between the parties, and it's a claim you had pursued.
5 We're not concerned now about cost consequences and there's no application about
6 costs and that can be dealt with separately. But I think we understand the position.
7 If it's not pursued as a primary case of a separate abuse then I think, unless
8 Mr McGurk is going to push back against that, we are with you that then it comes
9 into Trial 2. Because it's the degree of effect of an abuse that we're concerned with,
10 and you will make the position clear by amending the pleading.

11 Is that right, Mr McGurk? On that basis, you accept, then it goes to trial 2.

12 MR MCGURK: Yes, that's very helpful. As long as it's being said that it is a pure
13 consequential effects case, i.e., the other verticals were impacted because of the
14 abuse done to the CSS.

15 THE CHAIR: Yes, because the abuse was -- what was done wasn't done specifically
16 to the CSS, it was done to the website. It was, of course, one piece of conduct
17 which affected all these things.

18 MR MCGURK: Yes. What I'm concerned to preserve the position on is that we don't
19 get to Trial 2 and something that was in some way foundational, in relation to
20 establishing the case on effects, is then sought to be resurrected in order to make
21 the effects case good. So that's why I say if it is a pure consequential effects case,
22 I'm content with that.

23 MS ROSE: That is our understanding.

24 MR WEST: That, indeed, is my application in relation to -- it's not an application, but
25 my position in relation to the (inaudible).

26 THE CHAIR: Right. Well, then in that case issue 7 in the list drops out.

1 MR WEST: I think those are (inaudible) --

2 THE CHAIR: The only substantive point, subject to you --

3 MR WEST: My learned friend's (inaudible) last night took out issue 8. I think that
4 must have (inaudible) --

5 THE CHAIR: The AdWords, which is gone, yes. No, thank you.
6 We will, of course, at some time, as usual, take a short break, but I think not yet.
7 The next thing I wanted to just raise, because it's mentioned in the skeletons, that we
8 will be getting a chronology and a list of dramatis personae, with the openings. Don't
9 get hung up about quite how things are described in the chronology. It can give rise
10 to a lot of inter-party correspondence. It's really just a convenient checklist. So
11 nothing hugely turns on the descriptions, but we just want to know the key dates in
12 order.

13 MR WEST: Chronology has substantially advanced, but it hasn't been put
14 (inaudible).

15 THE CHAIR: Yes. So that's just if --

16 MR WEST: That slightly less but it isn't (inaudible).

17 THE CHAIR: Yes, thank you. That's very helpful.
18 Then we go on to factual evidence. How many Google witnesses are there,
19 Mr McGurk, altogether?

20 MR MCGURK: Well, there were nine, and now there are eight, in light of the
21 AdWords withdrawal. We had, given that it was only Foundem's claim, asked them
22 in light of the withdrawal of the AdWords claim whether they intended to call
23 Ms Dorfman and Mr Callaghan to give evidence at trial, and they indicated they
24 would not need to. We put the same point to Kelkoo, who didn't have an AdWords
25 claim, assuming that they might take the same approach, but they've indicated that
26 they do need Ms Dorfman at the trial. So we are down to eight witnesses, as things

1 stand.

2 THE CHAIR: Right, thank you.

3 Then, it will be helpful, if we could be supplied with passport-like photos of the
4 eight witnesses.

5 Then there's the question of your application for witnesses to give their evidence
6 remotely. That was flagged in your skeleton argument regarding two witnesses who
7 no longer work for Google. But we saw from a document that came this morning that
8 it's now three witnesses.

9 MR MCGURK: Yes. Can I explain that?

10 THE CHAIR: Yes.

11 MR MCGURK: So when AdWords went and we clarified the position in relation to
12 Mr Dorfman and Mr Callaghan, we thought that the same position would follow with
13 Kelkoo. That is not the case. We were at that stage without time estimates for time
14 needed for cross-examination for each of the witnesses. That was provided
15 yesterday by Linklaters.

16 Mr Kalyanpur is only going to be needed for 15 minutes. So flying from California for
17 that length of time seems disproportionate.

18 Mr Ginsberg, who's no longer at Google either, is based in New Zealand and it's
19 been indicated that he's only needed for an hour.

20 But the position in relation to Mr Dorfman was only clarified yesterday, through
21 a combination of Kelkoo indicating that they did need to have her attend for
22 cross-examination, but that they would only need her for 15 minutes. She's also
23 US-based and would have to fly to the Tribunal for the sake of 15 minutes in person
24 cross-examination. Again, we think that's disproportionate. We hope the Tribunal
25 agrees.

26 So we've upped from two to three for the purposes of seeking approval for the video

1 conferencing arrangements.

2 THE CHAIR: Yes. So is there any objection to -- we'll come on to the arrangements
3 for the witnesses -- but to the principle that they will be cross-examined by video.

4 MR WEST: No.

5 THE CHAIR: Thank you. Then we're content with that. As far as the arrangements,
6 is a solicitor from your firm, which we believe has offices in both the US and certainly
7 Australia, going to be present with these people when they're giving evidence?

8 MR MCGURK: I would assume so. And if the Tribunal so directs, it will happen.

9 THE CHAIR: Yes, I think that is necessary.

10 MR WEST: That's absolutely agreed.

11 THE CHAIR: Equally, the Claimants, if they wish to have a solicitor present in the
12 room, are entitled to do so. Whether you wish to do so is a matter for you.

13 MR WEST: We will give that consideration. I mean, it is of course important that
14 these witnesses -- if they're giving remote evidence -- will have access to the
15 documents, because it may well be that documents will be put.

16 THE CHAIR: Yes.

17 MR WEST: I should also mention that although we have given approximate
18 estimates -- 15 minutes and one hour and so on -- they are only approximate. It's
19 quite possible they could be longer than that.

20 THE CHAIR: Yes. Well, we're not holding you to the 15 minutes, but the point
21 being, it's not extensive. Well, in any event, you're not objecting to the remote.

22 MR WEST: No.

23 THE CHAIR: We don't have a problem with it, but -- yes.

24 MR MCGURK: I'm so sorry to interrupt. I'm reminded that there are no "solicitors" in
25 America; there are "lawyers".

26 THE CHAIR: Lawyers, yes.

1 MR MCGURK: If the requirement is put in those terms, we can comply with it. And if
2 not, not.

3 THE CHAIR: An independent lawyer.

4 MR MCGURK: Yes.

5 THE CHAIR: Yes, that's the point. I imagine it may be a lawyer from, I think the firm
6 is now called HSF Kramer, who will be there.

7 That then takes one to the point that Mr Ciao mentioned about access to documents.
8 They'll obviously have a copy of their statement, but they will either need to be
9 supplied with a cross-examination bundle, but it may be -- I don't know if you're in
10 a position to do that -- or they'll have access to the Opus. They will need help
11 operating that.

12 MR MCGURK: I think probably the solution is to have access to the Opus bundle.
13 Perhaps a lawyer who's there can assist with --

14 THE CHAIR: Yes.

15 MR MCGURK: -- familiarising the witnesses beforehand.

16 THE CHAIR: Yes. Well, maybe that's something you can discuss, out of the
17 hearing, how that aspect is handled.

18 Secondly, they must be supplied with, if they're going to swear an oath and not
19 affirm, a copy of whatever religious text they're going to take the oath upon. That's
20 something to check with them in advance and make sure that a copy is provided.

21 Subject to that, the order is to be amended to say that an independent lawyer must
22 be in attendance, that the Claimants have a right to have their own lawyer in
23 attendance as well, if they so wish. Subject to that, I think we can incorporate those
24 amendments, we'll will make that order.

25 We note that we've been asked to sit, I think it's "slightly early", as the wording used
26 in your solicitor's letter, for the New Zealand witness, and "slightly later" for the

1 Californian witnesses. We don't have a problem with that, except sitting early on
2 Mondays, because one member of the Tribunal is travelling in from some distance
3 on Monday morning. If the New Zealand witness could not be on the Monday
4 morning.

5 MR MCGURK: That's understood. Possibly to wrap this up, in light of the fact that
6 we've got the indications as to how long each of the witnesses are going to be
7 cross-examined for, and bearing those indications you've just given in mind, we were
8 hoping to finalise our running order with our witnesses and provide it to the
9 Claimants early next week.

10 One thing to note that you may have picked up on: Mr Goodrow had not been due to
11 come and give evidence until the 7th and 8 July; he was involved in other
12 proceedings. Those proceedings have settled, so his availability is better. Hopefully
13 that makes for a cleaner running order, but as I say, we're going to finalise the
14 practical arrangements with the witnesses, bearing in mind what the Tribunal has
15 just said, and offer it to the Claimants early next week.

16 THE CHAIR: Good. Excellent. That's very helpful, thank you.

17 Is there anything else on your application for remote witness evidence?

18 MR WEST: No, thank you, Sir.

19 THE CHAIR: Experts. The joint statement. I think that must be quite advanced,
20 given its due by the end of next week. We're not enthusiastic, I have to say, about
21 a very long joint statement, but we recognise it might be a bit late to impose a page
22 limit if they are so far advanced on it. If they could just be given the message that
23 this is there to help the Tribunal; very long joint statements are less helpful than
24 shorter joint statements. I think that's all we can say at the moment.

25 We've been asked about hot tub. We think it's very likely that there will be hot
26 tubbing of the two experts. We will confirm that before trial, but you should work on

1 the basis that there will be a hot tub, and then, of course, the right to cross-examine
2 afterwards. We will send a list of the broad areas that will be covered in the hot tub.

3 MR MCGURK: Thank you, Sir. Will we have an opportunity to comment on the
4 proposed areas that might be subject to the hot tub? I ask because we've tried to
5 ask the Claimants what they thought would be appropriate in this case for a hot tub --

6 THE CHAIR: Yes.

7 MR MCGURK: -- not least given where we are, the JES doesn't land until next
8 week. We'll have three and a half -- four weeks left to trial.

9 THE CHAIR: Yes.

10 MR MCGURK: And as you might anticipate, the cross-examination scripts, facts and
11 experts, are pretty well advanced. So it would be helpful to understand how the
12 Tribunal might be thinking in terms of topics. At the moment we don't seek an order
13 for concurrent evidence; the Tribunal has indicated that it is of a different view. But if
14 we were able to make some further comments on the topics proposed for concurrent
15 evidence, we would be enormously grateful.

16 THE CHAIR: Yes, you can make comments. Whether we will follow them is
17 a matter for us. We don't normally make an order for concurrent evidence, as it
18 were; we just tell the parties that that's how we will proceed. It's fair to give you as
19 much advance notice, but we think given the nature of the evidence here, it's very
20 suitable for concurrent evidence.

21 MR MCGURK: Well, we certainly can see that if the Tribunal is so minded to have
22 concurrent evidence, the quantitative matters pursued by the two experts, highly
23 technical as it is, might lend itself to concurrent evidence. If that's what the Tribunal
24 has in mind, we would be perfectly content with that subject to the time we would
25 have cross-examination.

26 But the three other broad topics that arise in relation to the expert reports that you've

1 | seen -- definition of a CSS, competition on the merits, and so on -- abut very closely
2 | some of the factual and legal issues in the case. We would suggest that those
3 | matters are going to require cross-examination, so if time is made available for
4 | counsel to cross-examine on those more legal and factual matters, we would push
5 | for that delineation.

6 | THE CHAIR: Yes. You shouldn't be cross-examining experts on legal matters
7 | because they're economists, and not --

8 | MR MCGURK: Quite right. It's just the nature of some of the topics that they are
9 | covering do share a border with equivalent legal issues, and counterfactuals is
10 | another one of course. So that's what I wanted to say about that.

11 | THE CHAIR: Yes. Well, you will have time to cross-examine, we will make sure that
12 | that's always allowed. Generally, the experience is the cross-examination is
13 | considerably shorter following the hot tub.

14 | MR MCGURK: Well --

15 | THE CHAIR: That's one of the great benefits of a hot tub, and I think that's been the
16 | universal experience of Tribunals that have carried out this exercise.

17 | MR MCGURK: We are just conscious that Mr Hunt has had two reports, and Noble,
18 | one. That is what it is, but there is an awful lot more on Mr Hunt's side that we will
19 | have to deal with when we get there.

20 | THE CHAIR: Yes.

21 | MR MCGURK: I just wanted to lay a marker down on that.

22 | THE CHAIR: Yes, that's understood. As I say, we'll let you know in due course.

23 | Right, the last thing on expert is the Tribunal-appointed expert, who's not an
24 | economist, of course, dealing with data science. You've been sent the protocol that
25 | we propose to adopt, and I hope you've had a chance to look at that. Are there any
26 | observations on that; does anyone want to submit that it should not be followed in

1 that way?

2 MR JOWELL: We are content with the protocol. We would raise the issue of costs,
3 of who is to pay for that expert. We would propose that it's split 50/50 between
4 Claimants and Defendants, and as between Defendants, again, 50/50, as between
5 Foundem and -- Kelkoo, Ciao and Foundem.

6 THE CHAIR: Yes. Well, it's either that, or it goes as the costs in the case, as it
7 were, the outcome of the case.

8 MR JOWELL: Yes, I see.

9 THE CHAIR: Which is, I think, the normal position. If the case isn't a simple
10 one-way cost order, it's dealt with that way. I think you've been informed of the fees,
11 and no one objected to those. Thank you.

12 Mr West, anything you want to say about the protocol?

13 MR WEST: On the protocol, this is the first I've heard about the discussions about
14 costs.

15 THE CHAIR: Yes. Well, the costs are borne by the parties, not by the Tribunal. And
16 it's just a question of how they are born. It can be dealt with, really, when we deal
17 with costs at the end of post-trial.

18 Anything about the protocol?

19 MR MCGURK: Yes, Sir, a few things, but just picking up on costs, we were going to
20 ask about remuneration. We're content either with costs in the case or some sort of
21 50/50 split.

22 THE CHAIR: Yes.

23 MR MCGURK: In relation to the protocol, it was very helpful and the following
24 observations are just really to seek clarity, and for the avoidance of doubt points.

25 In relation to paragraph 1, you note that one month before the start of the trial -- will
26 be sent parties' witness statements. That one month falls, I think, this Friday.

1 THE CHAIR: Yes.

2 MR MCGURK: We wanted just to understand whether the Tribunal had in mind
3 deploying the CRO we have all been signing -- the undertaking that we've been
4 signing -- and carry that over for Professor Ounis to sign.

5 THE CHAIR: I think you were told that we propose the same undertaking as the
6 experts signed, unless you wish to make any amendment to that? I mean, this was
7 drafted, as you might imagine, some days ago. It may be, it won't be, tomorrow,
8 because obviously Professor Ounis has to sign the undertaking first, and he won't be
9 sent anything until he's signed it.

10 But the form of undertaking, if you wish to, between you, amend the form that your
11 own experts have signed, but it seemed to us that that seemed the obvious one to
12 apply. (Pause)

13 I think that was communicated on Monday to the parties' solicitors that we were
14 proposing that it should be the same undertaking as the experts have given.

15 MR MCGURK: If that has come through, I have missed it.

16 THE CHAIR: Yes, well, it wasn't sent to you personally.

17 MR MCGURK: I think it's really helpful that we'd have the opportunity to see it if we
18 wanted to tweak the standard undertaking. There are just a couple of follow on
19 points on that. One of the things that concerns my clients is that Professor Ounis,
20 will obviously have access to the crown jewels, the algos and the signals and so on.
21 We wanted to explore, perhaps, what systems he had in place to quarantine that
22 material, because the things that the professor is going to be most interested in is
23 going to be held at LEO. So we just wondered about whether it might be useful to
24 have some kind of reverse teaching to ensure Professor Ounis was comfortable with
25 the tiering and the release of information out of the tier.

26 One of the things we were thinking about proposing was, insofar as the professor is

1 proposing to ask a question about LEO material, or give some sort of statement or
2 advice that's envisaged in the protocol, there might be a very small window for those
3 to be put to the parties just to make sure the confidentiality designations are met,
4 and that nothing inadvertently goes out of LEO that is LEO, which also has the
5 benefit of avoiding any embarrassment for the professor, of course. We would
6 propose some sort of mechanism like that to ensure the protection of confidential
7 information.

8 THE CHAIR: I don't know -- is it any different from the mechanism for the existing
9 two experts?

10 MR MCGURK: Well, we just want to make sure the mechanisms are in place and
11 might be operated in a way that avoids inadvertently disclosing LEO material out of
12 the LEO ring.

13 THE CHAIR: Yes, I'm just asking. LEO material has been disclosed to the expert
14 instructed by the Claimants?

15 MR MCGURK: Yes, indeed.

16 THE CHAIR: Was there any special mechanism put in place?

17 MR MCGURK: The Claimant is, presumably, well familiar with the confidentiality
18 rings that we use in the Tribunal. The concern is this may not be so familiar to
19 Professor Ounis, and we just want to assist, really.

20 THE CHAIR: Yes. Well, I think, first of all, if you'd like to look over -- we've had its
21 point since Monday -- but if you'd like to look over and let us know tomorrow and
22 communicate with each other if necessary if there's any change you wish to make to
23 the undertaking used for the two experts already so we can get an undertaking clear
24 by the end of tomorrow, it will clearly be after -- so and so's one month before, after
25 completion of after signing the undertaking you'll be supplied, and certainly the staff
26 here can explain to him the different levels of confidentiality and the need to preserve

1 it and any communications he makes.

2 I don't think he's being assisted by a team of people at all. I think he's just on his
3 own. Provide a secure form of email link as is used for members of the Tribunal, so
4 they don't come on Gmail or whatever. Google may have a certain interest in Gmail,
5 but still. So not on a public email server. So we will discuss that with him. If there
6 are any other points you wish to make about what you think is necessary, if you put
7 those in a letter then we can consider.

8 MR MCGURK: More generally on the protocol?

9 THE CHAIR: No, on this, you say, mechanism in place. Yes. On that.

10 MR MCGURK: We can communicate about that.

11 THE CHAIR: Yes. If there's any particular thing you want to write.

12 MR MCGURK: Yes.

13 Another point arises on paragraphs 4 to 6. We understand that the aim is to have
14 a discussion with counsel at the close of oral evidence, but before the start of oral
15 closings, so that will have to be provided for. But in terms of paragraphs 5 and 6 and
16 the steps therein, we had understood that to mean this would take place after oral
17 closings, but before judgment. We just wanted to be clear that, presumably, per
18 Global Mariner, there would be an opportunity for the parties to comment on that
19 prior to the judgment?

20 THE CHAIR: Yes, that's exactly right. That's what paragraph 6 deals with. And
21 then, in the light of those submissions, as we say, Professor Ounis can consider
22 them, whether he wishes to revise his advice, and then whether we go back to the
23 parties again will depend on what he says, because one wants to avoid continual
24 ping pong of points. So that will be a matter for us.

25 But we understand, and of course it's exactly the same concerns arise in admiralty
26 cases in which this is based and it seems to work satisfactorily.

1 MR MCGURK: Yes. Last one from me and then I'll stop. It was just on questioning.
2 We noted from the two authorities you referred to the parties in those assessor
3 cases had an opportunity to comment on questions to be put to the assessor or the
4 expert before they were put. I think the protocol provides for us to have an
5 opportunity to comment on the product, but not the question that is put.

6 We just wondered whether we might build in an arrangement to comment on the
7 questions as per the assessor cases?

8 THE CHAIR: You mean that paragraph 4 says "the topics" and paragraph 5 says
9 "put questions accordingly" and you want to -- I don't think we need to go through
10 sort of drafting the questions with the parties. I think one can over-engineer this
11 process. And if we agree that this is an area, this is something which we wish to ask
12 him about, we're not going to put leading questions to him, otherwise we end up with
13 a sort of drafting session on how we frame the questions.

14 MR MCGURK: We were just picking up from what was said in the two cases
15 referred to in the protocol. It appeared that the parties in those cases did have such
16 an opportunity, which is the only reason I pick it up.

17 THE CHAIR: Yes.

18 MR MCGURK: I don't want an over-engineered process and a delayed process, but
19 we just thought we would ask a question based on what's done on the naval case.

20 THE CHAIR: Yes, well, this is new territory for us. Let's see how we get on in the
21 course of that discussion. There may be very few topics. We don't know at this
22 point. They don't seem to arise from the expert evidence from what we see. They
23 arise really from the factual evidence, because some of the factual evidence, of
24 course -- we've been over that ground -- is in the nature of expertise from Google
25 and from Mr and Mrs Raff data-science issues. But I mean, we will, in operating
26 paragraph 4, we will certainly engage with the parties of exactly what

1 Professor Ounis is going to be asked, but not precise drafting of the questions. So
2 I think that should meet your concern.

3 MR MCGURK: That's understood. As I say, these were just points of clarification.
4 We very much welcome the protocol. We think it's a good innovation in this case.

5 THE CHAIR: Yes.

6 MR MCGURK: I'm very grateful, Sir.

7 THE CHAIR: Thank you.

8 I think we should probably now take a ten-minute break and we'll return at 12.00.

9 (11.49 am)

10 (A short break)

11 (12.01 pm)

12 SP08: To.

13 THE CHAIR: Just going back to the subject we were addressing before that short
14 break. On the undertaking, given that your solicitors were told about this on Monday,
15 if we could have -- if there are any comments on the form of undertaking, could we
16 have them by 4.00 pm tomorrow, please, the aim being we can get the undertaking
17 to Professor Ounis for the weekend and speed things up. And pointed out that one
18 method should be that he should be given an Opus account because all the
19 documents are on Opus, and Opus does indicate what's confidential, what's LEO
20 confidential, and that's the way for him to have the documents in a secure way.

21 Then, it may be witness statements and expert reports will be sent in hard copy, and
22 he'll be told to keep them securely.

23 Right. Then moving on, while on the subject, in fact, of confidentiality that a trial for
24 the documents in so far as we get -- I don't know how it's being done on
25 Opus -- insofar as we get hard copies presumably it will have highlighting to indicate
26 what is confidential and what is LEO confidential. That is extremely helpful. So in

1 witness statements, highlighted with two different colours, the passages that are
2 confidential, LEO confidential.

3 Next on skeletons and page limits. This being openings, long openings are really not
4 helpful to the Tribunal. The purpose of the opening is to address your case so that
5 we understand it and see what the key points being made are, reference to any key
6 authorities and so on. We do find, therefore, the idea of 135 pages between the
7 Claimants, 100 pages for Google, rather excessive.

8 We assume that there'll be some co-ordination between Kelkoo Ciao and Foundem
9 on addressing what are the issues or which you share between you and take the
10 same position, so that there's no need for the Foundem skeleton to repeat what's in
11 the Kelkoo Ciao skeleton? And we would have thought that 60 pages for Kelkoo
12 Ciao and 40 pages for Foundem should be sufficient.

13 Do you want to say anything about that? (Pause)

14 And if there are key documents that you want us to consider, rather than sort of
15 reproducing them in the skeleton, it is actually helpful then to be taken to them in
16 opening.

17 MR JOWELL: Can we make a slight advance on 60? That is a little -- it's going to
18 be just a little bit tight, especially at this stage where we already have a fairly
19 advanced draft.

20 THE CHAIR: Yes.

21 MR JOWELL: Could, could we perhaps say, 70 or 65 or -- some advance? I'm
22 bidding against myself.

23 MS ROSE: Never mind the quality, feel the width!

24 MR JOWELL: We thought we were doing quite well to get it down to 75, but, I mean,
25 there's a bit to say, and it's quite nice in a way, for the Tribunal to have it all set out
26 there. There is a reading week.

1 THE CHAIR: Yes.

2 MR JOWELL: And, of course, I absolutely take your point about the documents, and
3 that is what I was planning to do, in as significant part of my opening. But I only
4 have three quarters of a day, I think for opening, rather less than that perhaps, and
5 there are only so many documents one can go to at that time.

6 THE CHAIR: Yes. Thank you.

7 Mr West.

8 MR WEST: Could I possibly make this point, which is I'm conscious of the amount
9 we would have had if we'd never asked for more, because that is the default to begin
10 with. And that can be on the express understanding that we do not duplicate with
11 Kelkoo and Ciao, save where we have something slightly different to say in relation
12 to any matters which they address.

13 Just in relation to the Foundem-only matters, there are several claims now to
14 address, including as a result of today, things like quality as well as.

15 THE CHAIR: Yes. Although AdWords has gone, of course.

16 MR WEST: AdWords has gone.

17 THE CHAIR: They were a big part of it.

18 MR WEST: But, for example, we now have the additional penalties point (inaudible).

19 THE CHAIR: Yes. Well, just a moment. (Pause)

20 Very well. 65 and 50. And then we estimate for Google, we had in mind 80 pages.
21 We've gone down to 115 from 135.

22 MR MCGURK: On my very basic maths, can I make a pitch for a commensurate
23 reduction to 90 and ending up where my learned friends have on their page counts
24 between them? I think we would be content with that. Thank you.

25 THE CHAIR: Yes. Very well. 90.

26 The trial bundles, I know that's not, I think, on your agenda, but just to indicate we

1 would like hard copies of the openings of pleadings bundle; factual witness
2 statements excluding any exhibits; expert reports excluding any annexes; and the
3 joint statement. And a bundle with the Decision, the Commission Decision, and the
4 judgments of the two courts on the appeal. And the Decision, could it be highlighted
5 for bindingness, as well as for confidentiality, obviously different colours for the two?
6 There will be some overlap producing some colour combinations, no doubt, but in
7 a way that's clear what has been held to be binding. I think that's (inaudible). And
8 that in hard copy.

9 As regards authorities, we don't want all the authorities in hard copy. But if there are
10 some, as it were, core authorities, which you can agree between you, I think we
11 would like those in hard copy, but we don't want, as so often happens, you get, if
12 they are all in hard copy, you get six bundles of authorities. In fact, the argument
13 turns on about five of them, and the other 78 are scarcely mentioned, if at all. So
14 that would be helpful.

15 We certainly don't want the contemporary documents or reports or whatever, or
16 solicitors' correspondence in hard copy. That can all be simply on Opus.

17 MS ROSE: There's one suggestion. In relation to highlighting the Decision you
18 could consider highlighting for confidentiality and having a coloured underlining for
19 bindingness, because then you won't get into issues with colour combinations. So if
20 you had highlighted in yellow and then a red underlining where it was binding.

21 THE CHAIR: Well, we'll leave it to you. There are various ways of doing it, as long
22 as it's clear.

23 MR MCGURK: I do know that I've already asked for the bindings to be highlighted.

24 MR SMITH: Since I'm slightly colour blind, this proposal appeals to me.

25 THE CHAIR: Thank you very much. That's important.

26 We have sent the parties the contents of the judgments of the Dutch court and the

1 Berlin court in the Google comparison shopping claims there. They are of course in
2 Dutch and German. We assume that Google will have made proper translations of
3 those judgments. We would ask if Google can provide the translations to the parties
4 and to the Tribunal.

5 MR MCGURK: That will be done. Just to draw the Tribunal's attention, there's
6 a French judgment that was missed, which we will provide in native language and
7 translation copy as well.

8 THE CHAIR: Right, thank you very much.

9 MR JOWELL: And also another further German judgment.

10 THE CHAIR: Right, well, if you could send that to Google.

11 MR MCGURK: I misspoke. There's two French judgments.

12 THE CHAIR: I mean, some may be less relevant, but we'll see.

13 Right. I may have missed something, but I think that leaves the application
14 regarding Mr Stables's witness statement and the application by Foundem regarding
15 privilege. As I indicated, I think the Foundem application we'll deal with last, because
16 it doesn't concern Kelkoo. As regards Kelkoo's application concerning Mr Stables's
17 witness statement, we think probably that ought to be heard in camera. It's a little
18 difficult to address it in open court in any meaningful way.

19 MS LOVE: So I was going to be addressing that. I had prepared on the basis that it
20 might be necessary to do so in open court, and I was therefore just going to seek
21 rule 1025. But I'm very grateful for that indication. We do agree that would be
22 sensible, particularly in case the Tribunal has questions.

23 One wrinkle that I would ask for, in relation to the question of who stays in and who
24 stays out, is that you'll have seen we had actually proposed that the green
25 highlighting and attachments went only to an ELEO tier comprising external lawyers,
26 solicitors and counsel.

1 THE CHAIR: Basically not the experts, and not Mr and Mrs Raff; is that right?

2 MS LOVE: And not in-house lawyers.

3 THE CHAIR: Not in-house lawyers, yes.

4 MS LOVE: It may be prudent, in case questions arise, if the court be cleared on that

5 basis pro tem.

6 THE CHAIR: Well, I think for the purpose of hearing the application, that seems

7 sensible. Then we'll decide what happens.

8 Would it help if we were to rise for a few minutes or can that be -- no, we'll sit here

9 and if those people could please leave, and the livestream will then be turned off.

10 (Pause)

11 (12.13 pm)

12 (Discussion off the record)

13 (12.58 pm)

14 THE CHAIR: Well, thank you for those submissions.

15 We've reached this position: we are principle against you, Ms Love. We don't think

16 this is confidential.

17 However, equally much of that information we don't think is necessary, at all. And in

18 particular, if we look at paragraph 13. We think that the percentage in line 1 should

19 be disclosed, but the "for completeness", is not necessary. And footnote 9, he says

20 in paragraph 15, "my remuneration package comprises an annual salary". Well, of

21 course it does. And the details of the salary are not relevant.

22 So we would suggest that Kelkoo files an amended statement which can omit the bit

23 in green altogether, except for the percentage in paragraph 13, and we don't think it

24 need attach any of the documents. We think that complies with your duty of

25 candour, but that statement is not confidential and it's not subject to any

26 confidentiality ring.

1 MS LOVE: Sir, you have in fact reached what I was going to reach, which is that if
2 the Tribunal is not with me, in a matter as a matter of fairness to Mr Stables, he
3 should be given the opportunity to withdraw this and have all hard and soft copies
4 destroyed, and put in a revised and probably less detailed statement.

5 I'm going to turn behind me and just check if there are any other amendments other
6 than those you've just canvassed with me, and also the timing of that revised
7 statement.

8 THE CHAIR: Yes. (Pause)

9 MS LOVE: So we would like the opportunity to confer with Mr Stables in particular
10 as to what exactly the just-under number is replaced with, whether, for
11 example -- and I just float this now without having taken instructions -- a range
12 maybe more apposite, especially in the light of the sentence that follows. We were
13 going to suggest that we file an amended statement after having taken instructions
14 and conferred with Mr Stables by close of play on Wednesday, bearing in mind that
15 Monday is a bank holiday, and I ask the Tribunal if that would be satisfactory?

16 THE CHAIR: Yes, but I don't think it affects trial preparation.

17 MS LOVE: No, Sir.

18 THE CHAIR: Yes, by the close of business on Wednesday. Yes. That's seems to
19 us satisfactory.

20 So, we don't admit, therefore you withdraw and you're not -- the application to admit
21 the statement, but you will be filing an amended statement on the lines we've
22 discussed.

23 MS LOVE: Thank you, Sir.

24 THE CHAIR: By the close of business on Wednesday.

25 Yes. I think that concludes matters concerning Kelkoo, does it not, and Ciao, as
26 I understand it.

1 Is there anything else?

2 MR MCGURK: There it was one matter which --

3 THE CHAIR: Yes.

4 MR MCGURK: We have to just draw the Tribunal's attention to while Mr Jowell and
5 Ms Love are still here.

6 We had written to the parties seeking a standard order on admissibility.

7 THE CHAIR: Are these the documents in the bundle?

8 MR MCGURK: Yes, documents not exhibited to witness statements. Documents not
9 put in cross being nevertheless treated as admissible. We were proposing, Sir,
10 a very similar order to the one that you made in the Phones 4U litigation. We
11 considered that such an order might be needed because of, course, the practice
12 direction now prevents witnesses from trailing through documents and getting them
13 into evidence in that way, and we've adhered to that. And we didn't want the point
14 being taken in closing, "We haven't gone to that specific document, even though it's
15 on a theme that's in evidence or been subject to cross-examination".

16 It transpired in correspondence that it is broadly common ground that documents in
17 the bundle are admissible, and I just want to put on record the Claimants' response
18 of 19 May. They said:

19 "The Claimants have not suggested, and it's not their position, that documents in the
20 trial bundle are not admissible simply because they're not exhibited through
21 a witness statement or referred to in cross-examination or re-examination. If
22 a witness did not refer to and was not referred to a document in the preparation of
23 their evidence and the document was not put to them in cross-examination and
24 re-examination, there may be a separate issue of what weight should be given to the
25 document." [as read]

26 So we broadly agree with that, and in those circumstances we think this can be

1 managed in the course of trial and we don't pursue the order.

2 THE CHAIR: Yes. Thank you for raising that.

3 MR JOWELL: I should just mention that our position is of course as stated. But
4 what we were concerned with was that the order made specific provision that we
5 should, by particular dates, state if there was some reason why the document was
6 not admissible. Of course, that would have required us to trawl through, over
7 thousands of documents, to determine whether there was some other specific
8 reason why the document might be not admissible. That seemed to us to be
9 a complete waste of time and unnecessary.

10 At the same time, we didn't want to waive all objections to admit a potential objection
11 to admissibility on other grounds, because of course, there are many, many different
12 specific grounds on which you might say that a document is inadmissible. It's simply
13 that we are, but we're content to concede, of course, that (inaudible) that it is not
14 a ground for inadmissibility, that it is not referred to specifically in a witness
15 statement or put in cross-examination. So on that basis, we're all agreed.

16 THE CHAIR: I should have said that when we came back after rising briefly, what
17 has followed since is no longer in camera, and so on the transcript that will appear.
18 We haven't switched on the live stream, but I think our ruling, as it were, should be
19 an open ruling.

20 MR MCGURK: Yes.

21 THE CHAIR: We haven't disclosed any confidential facts in what's been said since
22 we came back.

23 MR MCGURK: Yes. Although of course the references to the witness statement --

24 THE CHAIR: Reference to, yes. But I think there's a general order made. If there
25 hasn't been, we should make the usual order, because there's a lot of confidential
26 material here that -- confidential material that the Tribunal may have read is not

1 | accessible to the public under -- it's one of our rules.
2 | If someone draws up that order.
3 | MR MCGURK: Yes, of course.
4 | THE CHAIR: Then that completes the PTR as regards Kelkoo and Ciao.
5 | We then have the disclosure privilege application, and we'll hear that at 2.05.
6 | You're excused, and those behind you, from attending.
7 | (1.06 pm)
8 | (The short adjournment)
9 | (2.17 pm)
10 | THE CHAIR: Yes, Mr West.
11 | MR WEST: Proceeding with privilege. I'm happy to be able to tell the Tribunal that
12 | over the short adjournment, a friend and I have agreed the wording of item 4.1.4 on
13 | the list of issues. That is now agreed.
14 | THE CHAIR: Thank you. If you could, when convenient, file an amended list.
15 |
16 | Disclosure privilege application by MR WEST
17 | MR WEST: Turning into the application, I think probably we need to have a look at
18 | the contents of the emails themselves, which may be the one element the Tribunal
19 | hasn't had an opportunity to do so far. There were originally 17 emails subject to the
20 | application. Two have fallen away because they have now been supplied in wholly
21 | unredacted form, and Foundem doesn't press the application in relation to a further
22 | four, which leaves 11, of which eight are slightly different versions of the same email
23 | string.
24 | That may be a slightly confusing introduction. When I was preparing my
25 | submissions on this yesterday, I put it into the form of a table. If the Tribunal would
26 | be assisted by that, I'll hand that up. (Handed)

1 THE CHAIR: Yes, thank you.

2 MR WEST: This lists all 17. The ones highlighted in the bluish grey are no longer in
3 issue. The ones highlighted in red are the different versions of the same email
4 string, and that leaves the ones in white which are the only other documents.

5 THE CHAIR: So just to understand, number 1, 2, and 6 to 11, they're all versions of
6 the same thing?

7 MR WEST: Yes. How it works is that usually those documents all contain the same
8 emails up to a certain point in time. Then after that point in time, there are one or
9 more additional emails, which are not necessarily on the other versions of the string.

10 THE CHAIR: And the additional emails also have redactions, is that it?

11 MR WEST: Yes.

12 THE CHAIR: Yes. But it means, does it, that there are four main areas, because --

13 MR WEST: Yes.

14 THE CHAIR: -- one of them is a composite; is that right?

15 MR WEST: The composite probably takes up a little bit more time, because of the
16 different versions of it, than a single document would. Probably, the best place to
17 start is document 1, which is Tab 18 of the Core Bundle. (Pause)

18 As with most email strings --

19 THE CHAIR: Just one second.

20 MR WEST: Yes. (Pause)

21 As with most email strings, this starts at the back, page 89. The first substantive
22 email is on page 87, which is an email between Google and Foundem that
23 introduces Mrs Raff to Mr Cutts, Head of Search Quality.

24 THE CHAIR: Sorry, what ...

25 MR WEST: Page 87 of Core Bundle 1.

26 THE CHAIR: Yes, my apologies. Got it.

1 MR WEST: Clearly, that's unredacted. Then there's an email from Mrs Raff to
2 Mr Cutts setting up a discussion. Then those discussions between Foundem and
3 Google carry on until the top of page 84, where Mr Cutts writes:
4 "Sorry for the delay in writing." [as read]
5 Apologising for delay. Then what we have is the first redacted email, which goes
6 over the page from 84 to 83. We see that that is an email from Mr Cutts, that's at the
7 top of page 84, "Matt" to around about the bottom half on page 83, to Daphne Keller,
8 she is an in-house lawyer at Google, and Mr --
9 THE CHAIR: Sorry, it's totally my fault. We're at the bottom half of page 83, are we?
10 MR WEST: Yes.
11 THE CHAIR: The email from Matt Cutts to Daphne Keller?
12 MR WEST: Yes.
13 THE CHAIR: Cc to Peter Barron?
14 MR WEST: Mr Barron is a comms, or public relations employee at Google?
15 Mr Cutts, as we saw earlier, is in the search quality unit. So he's not a lawyer, but
16 this email is redacted in its entirety.
17 MS ROSE: Daphne Keller?
18 MR WEST: She is an in-house counsel at Google. Then we have a short email from
19 Mr Barron replying to this redacted email:
20 "If it's the right thing to do, I don't see a problem in overriding the algorithm." [as
21 read]
22 THE CHAIR: Sorry ...
23 MS ROSE: In the middle of page 83.
24 MR WEST: Between the two --
25 THE CHAIR: I see, yes.
26 MR WEST: "[...] I don't see a problem in overriding the algorithm [that's

1 Algorithm A], it will demonstrate [...] we are prepared to listen and change our mind
2 rather than dig our heels [in]. [...] It's a celebrated case involving ICOMP, we'll need
3 to think carefully about how we would announce it." [as read]
4 As I said, Mr Barron is the public relations person, so he's interested in how it would
5 be announced.
6 We then have another redacted email. This one is from Julia Holtz, another in-house
7 lawyer at Google.
8 THE CHAIR: The one from Mr Barron is written to whom? Is that part of the larger
9 email?
10 MR WEST: It's not clear who the addressees are. I assume they would include
11 Mr Cutts, since I assume this is a reply. But the addresses don't appear for some
12 reason.
13 THE CHAIR: Yes.
14 MR WEST: As I say, there's a redacted email from Ms Holtz, who's an in-house
15 counsel. Then D-J is the author of the next email, that's David-John Collins, who's
16 another comms person at Google. He says:
17 "I think Julia makes some good points [that's Ms Holtz]. [...] We judge it on its merits
18 to users, the comments about the site after The Guardian article were damning. I'm
19 not so worried we create a precedent - after all, if we make a mistake [...] we should
20 be open about it. [...] In this case users, at least on The Guardian site, slammed the
21 site as spam." [as read]
22 That's Mr Collins. Moving on to page 82, the next email is again redacted for
23 privilege. That's from Louisa Edwards, who is another in-house counsel at Google.
24 That's just after the bottom hole punch on page 82, just above the box saying,
25 "Redacted - Privilege", one can see the name of the author of the email,
26 Luisa Edwards.

1 MR SMITH: Yes, and that's responding to an email that David Collins has now sent
2 to quite long list of people.

3 MR WEST: Indeed.

4 THE CHAIR: And "she" is ...

5 MR WEST: Luisa Edwards is another in-house lawyer at Google.

6 The next email we have -- sorry, this is rather laborious -- is Mr Barron again, Peter,
7 27 October:

8 "If it's the right thing to do we should do it, not because of pressure from Foundem or
9 ICOMP. The worst thing would be to become entrenched in [a] position we think is
10 wrong, and having to defend that against future attacks, of which it seems there will
11 be many. Backing down gracefully would be the best policy if we're absolutely sure
12 of the merits of Foundem's case - disregarding all the noise. I do not think readers'
13 opinions are relevant here - it should be our judgment." [as read]

14 That reference to readers opinions is presumably in response to Mr Collins's
15 reference to The Guardian.

16 THE CHAIR: Yes.

17 MR WEST: Then we have another redacted email from Mr Callaghan, who is
18 another in-house lawyer at Google. I think those are the four in-house lawyers who
19 appear in these documents: Mr Keller; Ms Holtz; Ms Edwards; and Mr Callaghan.

20 Over the page on page 81, there's another redacted email, this time from Ms Keller,
21 then Mr Cutts -- Matt -- just at the second hole punch:

22 "Hey all, I've been thinking about this a lot, and I'm leaning toward overriding our
23 algorithm." [as read]

24 That's what Foundem would call "whitelisting out of Algorithm A".

25 [– REDACTED FOR CONFIDENTIALITY –] Based on the additional information
26 and the fact I've seen improvements in Foundem's site [...] I've done spot checks of

1 | their quality in the past, I'm comfortable taking this action. Any site can make similar
2 | arguments via reconsideration requests, forums, blogs, Twitter, conferences,
3 | et cetera. If this causes major, major issues for anyone, please speak up now." [as
4 | read]

5 | That, if you like, is at least the provisional outcome of this discussion. We then have
6 | a short, further redacted email from Ms Holtz, Julia, and then --

7 | THE CHAIR: Are they in different time zones, or ... The one you've just read is
8 | 5.51 am on 28 October, and then Julia Holtz's email is 3.56 am.

9 | MR WEST: Yes, this is a time zone point.

10 | THE CHAIR: It may be because she's in Europe and he's in California, maybe,
11 | I don't know.

12 | MR WEST: And then the last email on the page is a non-substantive email asking
13 | Kate to organise a call for those on the thread.

14 | THE CHAIR: Yes.

15 | MR WEST: What I would say about this document is that the focus of these
16 | discussions, at least from what I can see, the unredacted content, is on matters of
17 | corporate strategy and PR. What we can also see is that every email -- the entirety
18 | of every email -- from in-house lawyers, (inaudible) by email, has been redacted.

19 | The basis of our application is whether it's reasonable to think that the dominant
20 | purpose of the whole of each of those emails is concerned with giving legal advice,
21 | rather than involvement by the in-house lawyers in the strategic and PR aspects,
22 | which the other participants seem to be discussing.

23 | For example, if we go back to page 83, Ms Holtz's redacted email at the first hole
24 | punch, to which Mr Collins replies, as we saw earlier:

25 | "I think Julia makes some good points." [as read]

26 | I think it must follow from the claim for privilege that Mr Collins is talking about legal

1 | points; is that very realistic?

2 | As we also saw going through the document, Mr Collins here talks about judging the
3 | case on its merits. That's the same language as Mr Barron uses, in his later email,
4 | at page 82, where he talks about "backing down gracefully [...] if we're [...] sure of
5 | the merits" [as read]. Again, suggests that this is really about the merits of
6 | Foundem's request, which would be a (inaudible) strategic point.

7 | Also notable in this email, that's Mr Cutts's email, bottom of page 83, which serves
8 | the purpose, so it appears, of forwarding his exchange with Mrs Raff onto Ms Keller
9 | and Mr Barron. That is also redacted in its entirety. Again, is it reasonable to think
10 | all of that email would be concerned with seeking legal advice?

11 | It's also notable that Mr Barron, to whom it's copied, replies, as we have seen,
12 | talking about how to announce any such change. He, in any event, appears to be
13 | discussing the public relations elements of Mr Cutts's communication.

14 | If we then go through the other versions of this document.

15 | THE CHAIR: Just help me. The one we've been looking at, on your schedule is this
16 | number?

17 | MR WEST: Number 1.

18 | THE CHAIR: This is number 1. Right, thank you.

19 | MR WEST: The next one, number 2. These document numbers are the same
20 | numbers of the documents in Google's schedule, which means that the document is
21 | the next Tab at 19. It is exactly the same as you'll see on the first page, page 90.

22 | Mr Cutts's email, which we looked at before, he says he's "leaning toward overriding
23 | [the] algorithm. [Let me know] if this causes major, major issues". We've seen that
24 | before. So the only difference in this version is there's then a further redacted email
25 | from this, Julia Holtz's very short one, just above the bottom hole punch. A further
26 | redacted email from Ms Edwards just above that. Otherwise the two documents are

1 the same.

2 THE CHAIR: Sorry, can you say again where the new emails are, on which page?

3 MR WEST: Yes. Page 90. The second hole punch, we see Mr Cutts's email that
4 we've seen before. So that and everything following on, if one turns the pages on,
5 the rest of the email, is the same. But there are then two further redactions.

6 THE CHAIR: One of those, is the one at the top, from Luisa Edwards, to Julia. So
7 that's between the two in-house lawyers?

8 MR WEST: Yes. Sorry, I've slightly misspoken earlier. The second redacted email
9 from Julia is actually also in document 1. The only difference is the one from
10 Ms Edwards.

11 THE CHAIR: Yes, I see. Yes, you're right.

12 MR WEST: If one turns back to document 1 in the previous tab, there is an email at
13 the top of that, which is not in document 2, which is Mr Barron's email, asking Kate to
14 set up a call. The only point to make about that is that Mr Barron's email was
15 recently unredacted. Until recently, that was redacted. We do say, it's difficult to see
16 how anyone could have (inaudible) that was an appropriate email to redact. But it
17 was.

18 The next --

19 THE CHAIR: (Inaudible). (Pause)

20 Yes, the second one on page 90 has got a different time from the second one on
21 page 81. But that may just be, again, whose copy it is.

22 MR WEST: I suspect (inaudible).

23 THE CHAIR: Yes, it's just where it's -- Yes, I see.

24 MR WEST: Just running through the other versions of the string very quickly. The
25 next one is document 6, which is at Tab 23. If one looks over the page, at page 119,
26 one sees just above the lower hole punch Mr Barron's email.

1 "If it's the right thing to do, I don't see a problem [...] overriding the algorithm [and so
2 on]."

3 Which we saw before in document 1. So this is the same up to that point. There are
4 then three further emails, but as the Tribunal will see, none of those are now
5 redacted.

6 THE CHAIR: So this is document 6.

7 MR WEST: Yes.

8 THE CHAIR: So is there anything in fact in document 6 that's not in documents 1
9 and 2 that you're complaining about?

10 MR WEST: (Inaudible).

11 THE CHAIR: I see, yes.

12 MR WEST: But again, the emails above Mr Barron's email from someone called
13 William or Bill Echikson and from Peter Barron, those are also recently unredacted
14 emails. So those were formerly redacted. (Pause)

15 So, again, we say it's a little difficult to understand how those can have been thought
16 to be emails to redact in the first place.

17 THE CHAIR: So when you say email from Mr Echikson, that's the middle, page 119.

18 MR WEST: Yes.

19 THE CHAIR: So it was formerly redacted and not now. The other one is the whole
20 of page 118 and top of 119. No?

21 MR WEST: I think there's a short email from Mr Barron, Peter, just above
22 Mr Echikson's email.

23 THE CHAIR: Ah, okay. Okay.

24 MR WEST: Next version is document 7, which is at Tab 24. If one turns on to
25 page 128, bottom box saying "Redacted - Privileged" from Ms Keller. (Inaudible)
26 was also in document 1, and everything below that is the same. But there are then

1 | some further emails after that point. We see that on page 128, the next two emails
2 | are redacted. We then have an unredacted email from Mr Anthony House, just
3 | above the second hole punch on page 127. (Pause)
4 | Just above the first hole punch on Wednesday, 28 October 2009 at 8.50 am,
5 | Anthony House wrote -- so this is new; this is not something we've seen before.
6 | Mr House is another PR or comms employee.
7 | THE CHAIR: He's saying:
8 | "This is obviously a decision that should be led by product with legal input." [as read]
9 | MR WEST: That's what he says, yes.
10 | "[So] two points I'd make from a comms's perspective. Foundem has been very
11 | vocal in making their case to the media [and second] to use any change in their
12 | ranking for another media cycle of the 'we beat Google' variety, (inaudible).
13 | "If we believe that improving their rank will benefit users, we should still do it, but we
14 | should do so with our eyes open to the knock-on effects. 1) Perception that the
15 | squeaky wheel gets the grease could encourage frustrated webmasters to air their
16 | grievances through the press, possibly with the help of ICOMP.
17 | "2) Increased scrutiny of our official reconsideration procedure, which many feel is
18 | not very responsive or transparent. As I said before, though, we should find a way to
19 | do what's best for our users." [as read]
20 | The next email, which is again new, is immediately above that, from Matt -- that's
21 | Mr Cutts -- to a large number of recipients, who writes that:
22 | "[...] I'm slammed with other commitments/meetings all day today. [...] I don't think
23 | I can make this 10.30 meeting." [as read]
24 | Mr Barron replies, just above the first hole punch:
25 | "Ok - we'll debate and come to a united position." [as read]
26 | Then the next privileged or redacted email is from Peter, we see -- that's

1 Mr Barron -- comes (inaudible) below the redacted box at the top of page 127. And
2 we see that email at the bottom of page 126 is sent to "Hi Matt/Daphne". Mr Cutts,
3 and Ms Keller.

4 So Mr Barron says:
5 "[...] We'll debate and come to a united position." [as read]
6 There's then a redacted email, which it's reasonable to expect, might set out what
7 that united position turned out to be.

8 THE CHAIR: Well, we don't know that.

9 MR WEST: But we don't know.

10 THE CHAIR: Because it's headed "client attorney privilege work product".

11 MR WEST: That's true. But that's the case with many of the documents that are
12 unredacted in these emails.

13 Moving on to the next email, still on page 126. This is again from Peter Barron. He
14 says he had:
15 "... two conversations with [...] Shivaun Raff [...] - both good natured and
16 constructive.

17 "I explained that having spent time reviewing Foundem's case Matt Cutts has
18 concluded it's not an open and shut case. [...] It deserves further investigation.
19 I suggested a period of a month in which we would decide whether or not we are
20 willing to override the algorithm, setting the deadline of the end of November.

21 "Shivaun was grateful for this and agreed on the period of a month, but did say there
22 are "balls in the air" which might hit before then. I asked if it would be possible to
23 stop those as they're likely to make the process more difficult. She called me back to
24 say that the "balls in the air" are already in motion [...], to warn me "in the spirit of
25 openness" that they may hit next week. It sounds like there will be a newspaper
26 piece talking about the threat of legal action and then the launch of [...] legal action

1 | itself.

2 | "I said this could infect our decision-making process and make it more difficult. She

3 | agreed with that, but said those decisions were out of her hands and had already

4 | been taken before we made contact. She suggested that if we could say we were on

5 | our way to saying yes within a week it would be possible to stop the action, but that it

6 | would be impossible to wait a month.

7 | "From a comms point of view life will clearly get much more difficult if news of a legal

8 | action is reported. I think if we were in a position to give her an indication within

9 | a week - or even earlier given the likely news piece - that we are going to say yes,

10 | and then take three weeks to get our plans in place before doing anything publicly,

11 | we can head this off. But none of that should colour the decision-making." [as read]

12 | Now, that email has some significance because Google say in their schedule that

13 | this is the beginning of potential legal, litigation privilege, because this refers to the

14 | threat of legal action. So from this point onwards, they invoke legal advice and also

15 | the litigation privilege.

16 | We see then there are further redacted emails, this page and the next page. There's

17 | also an unredacted email at the bottom from Daphne Keller, but that just explains her

18 | availability. That's document 7.

19 | Document 8, at Tab 25, is a subset of document 7. No separate issues arise on that.

20 | Document 9, which is the next tab, Tab 26, is also a subset of document 7.

21 | Document 10, at Tab 27. The Tribunal will recognise the email at the bottom of

22 | page 159 from Mr Cutts, 28 October. Then a further email from Mr Barron to

23 | Mr House, but that is unredacted. Again, no further, no separate issues arise.

24 | Document 11, which is the last of the 8, at Tab 28, same position. All of this is the

25 | same as document 7, with the exception of the email at the top of page 168, which is

26 | now unredacted. So separate issues are (inaudible).

1 Just to summarise Foundem's position in relation to that email string. We say that
2 there are certainly reasons to doubt whether it can be correct to say that all, each of
3 the unredacted emails benefits from privilege. That is, they are all concerned in their
4 entirety with giving or taking legal advice, or after the 30 October with litigation
5 matters.

6 If we were concerned here with dealings with external lawyers, I accept the position
7 would likely be very different. But these are internal lawyers whose emails appear in
8 email strings, which mainly seem, from what we can see from the unredacted
9 content, to be about strategic or PR issues.

10 We say that whoever carried out the review, the privilege review of these email
11 strings, should have asked themselves the question whether the primary purpose of
12 the email was giving or seeking legal advice, and whether that could be said to apply
13 in each case to all of the emails we have which are redacted in their entirety.

14 We do have examples, emails from Google's lawyers that are unredacted on the
15 basis that they do not involve seeking legal advice. One turns to Tab 22. This is
16 document 5. You can see from the table this is no longer an issue because there
17 are no longer any redactions on it. Page 114, the first page of the document, beside
18 the first hole punch, one sees an email from Julia Holtz. She is one of the in-house
19 lawyers:

20 "I think we are under the impression thus far that Foundem is an "innocent" company
21 which was picked up by ICOMP MSFT [I believe that's Microsoft] funded
22 anti-Google lobbying organisation and that they were grateful for ICOMP's help, but
23 this op ed makes me think twice, at least about their motives going forward. If you
24 look at, for example, this white paper available at ICOMP's website, at its "healthy
25 market places" section, the notion of transparency and search neutrality is all over
26 the place." [as read]

1 The white paper she seems to be referring to is an article which begins at the bottom
2 of that page and then runs over the next page about search neutrality, which was
3 written by Mr Raff, and published in the New York Times.

4 So, clearly, we have evidence that Google's in-house lawyers do sometimes write
5 about strategic matters, not about legal advice matters. This email was formally
6 redacted and is now unredacted. It's no longer an issue on the application, as

7 I mentioned, but it does show that it is an example of Google's in-house lawyers non
8 (inaudible).

9 THE CHAIR: And this was which one on the table?

10 MR WEST: This is document 5.

11 THE CHAIR: Thank you.

12 MR WEST: Can I just very briefly take you through the other three documents. This
13 document 3, Tab 20. This one is also in the usual order at the beginning of the pack.
14 This one is concerned with the actual implementation of Google's decision to
15 whitelist Foundem. If we can start at the top of page 102, this is an email from,
16 again, Mr Collins:

17 "[...] Agree with Pete, they'll certainly try to make news out of this. I think that while
18 we don't go into the ins and outs that we... On the record, say something like, 'while
19 it's not fair on individual websites for us to go into all their details publicly, some sites
20 do change their practices and as a result rise in our rankings. Our goal is to give
21 users the best results and if a site improves and is relevant then it's right that its
22 ranking in our search results rises'. [And then,] off the record, [...] we simply say
23 they asked us for guidance, we gave it to them and they made some important
24 changes." [as read]

25 Now, you may recall from Foundem's skeleton argument reference to the creation by
26 Google of a pretext whitelisting, or rather a pretext for why it was that Foundem had

1 risen in the rankings at the end of 2009. And here we see -- this is what Foundem is
2 referring to the idea that it rose because it made changes to its site, as opposed to
3 because it was whitelisted.

4 Bundle page 101. Emails from Mr Collins and Mr Callaghan. Just above the top
5 hole punch, Mr Cutts writes:

6 "The change did happen and foundem.co.uk has seen an increasing traffic. 2 to 3k,
7 up to 30 to 40k visitors from Google." [as read]

8 So we see that the whitelisting has now been implemented. Just to carry on
9 explaining what this is about, on page 100, just below the bottom hole punch, an
10 email from Mr Barron, Tuesday, 8 December:

11 "Thanks. She called me this morning [that's Mrs Raff]. Overall, she's very happy,
12 but asked me to circle back to you with one final enquiry - can we confirm they're
13 now on a completely level playing field with Kelkoo and others? They've seen big
14 improvements, but believe their score has risen to 7/10, rather than 10/10." [as read]

15 And the Tribunal will remember from this morning the issue of a further penalty. So
16 one sees immediately upon whitelisting Mrs Raff, saying, "Well, we still think that
17 we're subject to a 3 out of 10 penalty."

18 The email goes on in terms of making a noise about this. She says they intend to
19 leave it there. They won't issue a crowing press release, but it is, of course, likely
20 that ICOMP will point journalists to it.

21 Then a series of redacted emails. Mr Callaghan, in-house lawyer; Ms Holtz, another
22 of the in-house lawyers; Mr Barron, who's the comms person; and Mr Callaghan
23 again.

24 Then at the top, Mr Cutts:

25 "Just for internal info, I don't believe foundem.co.uk should have any remaining
26 issues [it's presumably a reference to the question of a further penalty], although

1 I haven't done an exhaustive check. It's possible that as we crawl and index the site
2 again, they may do slightly better. [...] I would expect that they're roughly where
3 they're going to rank going forward." [as read]

4 Over the page again, page 99. Further redacted emails, one from Mr Barron, one
5 from Mr (inaudible). In response to the last one, Mr Barron says:
6 "Great - I'll convey this to her, and consider the matter closed."

7 It's like what has been agreed upon is what message should go back to (inaudible).

8 MR SMITH: Can I be clear I've got the timing right on this. If we go back to tab 24,
9 which you were drawing our attention to earlier, on pages 126, 127, the emails in
10 October 2009 where the decisions should be led with legal input, news of the legal
11 action being reported. Foundem are believed to be contemplated legal action in
12 December. Mrs Raff is now very happy and we then got some legal email, some
13 emails from lawyers redacted. So this is two months after October? This is
14 October 2009 and December 2009? I just want to be clear about the timing.

15 MR WEST: Yes. So tab 24 is the end of October. And if you look at the email on
16 page 126, which is the one about the threat of legal action, Google explains that it's
17 likely to take a period of a month to make the decision.

18 MR SMITH: So it's not two months, it's five, six weeks.

19 MR WEST: Yes, (inaudible).

20 Going back, just to --

21 THE CHAIR: Trevor Callaghan, what's his position?

22 MR WEST: He's also an in-house lawyer.

23 THE CHAIR: He's also an in-house lawyer.

24 MR WEST: Again, looking at what, as far as we can tell from this email seems to be
25 about, again corporate strategic (inaudible) implications of the whitelisting.

26 MR SMITH: Or could it be about the fact that legal action was no longer being

1 contemplated?

2 MR WEST: (Inaudible)

3 Just quickly, the last two documents. Document 13 at Tab 30. This is actually a --

4 THE CHAIR: Have we done document number 4?

5 MR WEST: (Several inaudible words).

6 This is a reconsideration request by Bizrate, not by Foundem, which had suffered

7 a sudden drop in traffic, it appears to be in 2012. So we're now in the Panda era.

8 THE CHAIR: Is Bizrate another comparison site?

9 MR WEST: Yes, I believe it was part of Connexity. It used to be a Claimant.

10 THE CHAIR: Yes.

11 MR WEST: So they make a complaint about a drop in traffic. Mr Cody Kwok, at the

12 top of page 108, explains what's happening. The top line:

13 [– REDACTED FOR CONFIDENTIALITY –] And the explanation for why that has

14 happened is on page 106, just below the second hole punch. It's Mr Kwok. Mr Kwok

15 is the person who came up with Algorithm A. He says:

16 [– REDACTED FOR CONFIDENTIALITY –] [as read]

17 Mr Cutts replies:

18 [– REDACTED FOR CONFIDENTIALITY –] [as read]

19 So here we're discussing, so it seems, [– REDACTED FOR CONFIDENTIALITY –],

20 and we then see a redacted email. I don't think it's possible in this case to see who

21 it's from or who it was sent to.

22 We then have Mr Hubert, the public affairs gentleman, suggesting some public

23 comments. So again, that appears to be PR related.

24 Another redacted email where again, you cannot see who it's from or to.

25 Then more discussions of PR matters and another (inaudible).

26 Foundem is interested in this for obvious reasons, given the similarity between [–

1 | *REDACTED FOR CONFIDENTIALITY* –] and what may have happened with further
2 | penalties in connection with them to whitelisting.
3 | And then just very quickly, 30.
4 | This is an earlier request.
5 | THE CHAIR: Sorry, which tab?
6 | MR WEST: 30. This is an earlier request for whitelisting Foundem in 2008, a year
7 | before it actually happened. That's what all the emails discuss. But one has at the
8 | beginning and at the end redactions for privilege.
9 | MR MCGURK: I'm just informed that Mr West has taken the Tribunal through
10 | a confidential document, and I'm conscious that we're still live streaming.
11 | MR WEST: Sorry, that's not marked (several inaudible words). It's not highlighted in
12 | the document.
13 | THE CHAIR: No, nor in ours. That's the one we're just coming to, is it, or?
14 | MR WEST: Yes, I expected anything would be highlighted that I couldn't read out.
15 | THE CHAIR: It's a LEO document, is it?
16 | MR SMITH: So this is just a document at Tab 30.
17 | UNKNOWN SPEAKER: 21.
18 | MR WEST: I'm so sorry, I do apologise.
19 | THE CHAIR: Tab 21, yes. We don't have any indication of that either.
20 | Has anything been read out that's confidential?
21 | UNKNOWN SPEAKER: Yes.
22 | THE CHAIR: Is the whole of that document, every email in it confidential? We've
23 | got no marking at all. We'll pause the live stream.
24 | (3.02 pm)
25 | (Discussion off the record)
26 | (3.08 pm)

1 THE CHAIR: Mr West has just said that turning to the law.

2 MR WEST: It's actually Tab 1 of the Authorities Bundle.

3 THE CHAIR: And I think you said, Mr West, that you don't think there's anything
4 between the parties, and you're directing us to the West London Pipeline case?

5 MR WEST: Authorities, Tab 1, page 30, Summary of Law, paragraph 86, may be
6 familiar to the Tribunal. (inaudible) summary points.

7 "Firstly, the burden of proof is on the party claiming privilege.

8 "Secondly, an assertion of privilege [and] a statement of the purpose of the
9 communication over which privilege is claimed in an affidavit are not determinative
10 and are evidence of a fact which may require to be [...] proved. [...] It is, however,
11 difficult to go behind an affidavit of documents at interlocutory stage of proceedings.
12 [It's] conclusive unless it's reasonably certain from the statements of the party
13 making it that he has erroneously represented or [...] misconceived the character of
14 the documents [...], the evidence of the person who or entity which directed the
15 creation of the communications or documents over which privilege is claimed that the
16 affidavit is incorrect [...], [or] the other evidence before the court that the affidavit is
17 incorrect or incomplete on material points." [as read]

18 So if the court is not satisfied on the basis of the affidavit and other evidence.

19 The four options: inspection under A, we don't request that here; we can order
20 a further affidavit under B; it may inspect the documents under C, which is our
21 primary position in this case; or D, it can order cross-examination.

22 Now, that summary has to be read subject to the WH Holding authority at Tab 4,
23 page 408, paragraphs 39 to 40. They are here discussing the West London Pipeline
24 case. This is the Court of Appeal.

25 "It seems to us that, contrary to Mr Justice Baetson's narrow formulation contained in
26 86(3) and 4(c) of the West London Pipeline case." [as read]

1 That's where he referred to "reasonable certainty".
2 "[...] as the Court of Appeal identified in both Birmingham and Midland Omnibus and
3 Westminster Airways cases the power to inspect a document is a matter of general
4 discretion. That was also the approach of Lord Denning in Alfred Crompton. It is not
5 limited to cases in which, without sight of the documents in question, the court is
6 "reasonably certain" [...] the test has been misapplied. [The test for "reasonable
7 certainty" sprang] from the earlier case of Attorney-General and Emerson, which was
8 concerned with the position prior to the introduction of the express power of
9 inspection in November 1893.
10 "40. The court may inspect the documents in relation to which privilege is claimed in
11 order to see whether the test has been correctly applied, although it should be
12 cautious about doing so and it would be alive to the dangers of looking at documents
13 out of context. The discretion must be exercised in accordance with the overriding
14 objective, which requires balancing dealing with cases justly, proportionately and
15 a proportionate cost, and allocating an appropriate share of the court's resources.
16 Among the factors which will be relevant are the nature of the privilege [...], the
17 number of documents [...] and their potential relevance [...]." [as read]
18 The starting point is that the burden of proof is on Google to prove the privilege, and
19 Google's evidence is Mr Wisking's Ninth Witness Statement, Core Bundle volume 2,
20 Tab 43, paragraph 63 on page 599.
21 To summarise what Mr Wisking says here about privilege; found and requested that
22 Google carry out a review of these documents; Google did so --
23 THE CHAIR: Just one moment, please. I'm turning it up. Tab 43, page 599,
24 paragraph 63; is that right?
25 MR WEST: They carried out a review --
26 THE CHAIR: Just one minute, just one minute. (Pause)

1 MR WEST: Google did carry out a review and a number of redactions were lifted.
2 Mr Wisking then says:
3 "Google acknowledges the importance of ensuring that privileged redactions [of]
4 disclosed documents are properly made and confirms that it's taking [those]
5 concerns seriously. The Challenged Documents have been re-reviewed by
6 English-qualified solicitors of my firm. Google has set out in correspondence today
7 to Foundem the results of that review, including providing more information about the
8 scope of the material that's been redacted and in limited cases the removal of
9 privileged redactions where appropriate. Foundem is invited to withdraw its
10 application." [as read]
11 That is the extent of the evidence.
12 THE CHAIR: Well, that's a reference, isn't it? Google has set out in correspondence
13 today to the letter --
14 MR WEST: The letter --
15 THE CHAIR: Is it the letter of 7 May? We should probably look at that, shouldn't we,
16 because that's part of the evidence? I think it is in the Correspondence Bundle?
17 MR WEST: It is Correspondence Bundle, Tab 64.
18 THE CHAIR: Yes.
19 MR SMITH: Page number?
20 MR WEST: The letter begins on page 405, and the justifications for claiming
21 privilege are set in the schedule at 409. I said before the document numbers in the
22 schedule are the same as those in the little table that I handed up.
23 We see how this is addressed. For example, document 1:
24 "[The document] comprises [under HSF Kramer comments] a chain of email
25 correspondence between Google's in-house legal advisers [...] and the commercial
26 team reflecting legal advice in relation to Foundem's request for reconsideration.

1 Following our review, we've removed the redaction applied to the email from
2 Peter Barron ..." [as read]
3 That was the unredacted one in document 1 we saw earlier.
4 "[...] The content that remains redacted is content that discloses or reflects legal
5 advice." [as read]
6 That is effectively what is said in relation to each of these redactions. But as I say,
7 from 30 October onwards, reference is also made to litigation privilege. It's
8 essentially the same formulation.
9 What we say is that this doesn't descend to the necessary level of detail, explaining,
10 for example, why it is said that all of the contents of these emails from in-house
11 counsel reflected legal advice, rather than commercial matters.
12 MS ROSE: Do you think that that's the right test, whether the content discloses or
13 reflects legal advice?
14 MR WEST: It has to be the primary purpose of the communication, to either seek or
15 provide legal advice.
16 MS ROSE: But that's the communication as a whole. If the specific content
17 discloses or reflects legal advice, is that sufficient for a claim for privilege?
18 MR WEST: (Inaudible) if the content contains or reflects legal advice in that specific
19 context -- not necessarily (inaudible).
20 MS ROSE: So that's an assertion from the solicitor, supported by a signed witness
21 statement, that that content meets what I think you accept as the correct test of
22 privilege.
23 MR WEST: Mr Wisking doesn't say that he carried out this review himself. What he
24 says is a lot of people carried out this review, and then this (inaudible) one letter,
25 which we say doesn't descend to the necessary level of detail. It doesn't, for
26 example, indicate that consideration has been given to the different capacities which

1 in-house lawyers may act. Whether it is the case that --

2 MS ROSE: Why does that matter? Why does it matter in what capacity in-house
3 lawyers may act, if Herbert Smith have looked at this and said, "This material is or
4 reflects the content of legal advice"?

5 MR WEST: Again, (several inaudible words) explain that the whole context of each
6 of the emails (inaudible) is being privileged.

7 MS ROSE: But they haven't redacted the whole -- I mean, in some places they've
8 partially unredacted some of the emails.

9 THE CHAIR: I mean, they say the content that remains redacted is content that
10 discloses or reflects legal advice.

11 MR WEST: In each case it is the whole of an email that has been redacted; there
12 aren't any examples of partial redactions. I would say that the evidence is not from
13 someone who wrote or seemed to perform this review themselves, and it's not from
14 someone who says, "I personally confirm that the redactions are all related to
15 matters of privilege". He says, "Someone else carried out the review", and the
16 results are set out in the letter. (Pause)

17 To be fair to Mr Wisking, at the time he gave his evidence, it wasn't clear whether
18 Foundem would be proceeding with the application, but that was then confirmed on
19 (inaudible) day. They haven't had any further evidence from anyone personally
20 attesting to the correctness of the redactions.

21 Based on the contents, it does appear that these are primarily commercial
22 discussions or discussions about performance matters.

23 THE CHAIR: Well, there are commercial discussions, but equally, they seek legal
24 input. (Pause)

25 MR WEST: If one compares, for example, the evidence in the UTB case, which is in
26 the Authorities Bundle, page 426, the evidence in that case in support of privilege

1 was given by Mr Travers, para 51, who was a solicitor in the firm of solicitors which
2 had conducted the matter.

3 THE CHAIR: Paragraph 51?

4 MR WEST: 51, identifying Mr Travers. If one then looks at his evidence on
5 page 428. This is all setting out the contents of his affidavit, so this is just the
6 affidavit of documents. He says, at 29:

7 "I'm satisfied that all of the documents are privileged."

8 This is before see, for example, him going into the fact that one of the lawyers acted
9 in different capacities, and confirming that that had been borne in mind by the
10 lawyers carrying out the review. And if one looks then at the outcome of what
11 actually happened in this case, Chancellor Sir Geoffrey Vos, paragraph 73, in the
12 end decided nevertheless to inspect the documents.

13 THE CHAIR: Pointing to the outcomes in different cases doesn't necessarily take
14 one very much further.

15 MR WEST: We say that it isn't the case that, here, there is any evidence from
16 a specific individual asserting -- in his personal view, having looked at the
17 document -- that all of the actions are correctly made. We therefore say that --

18 THE CHAIR: What was the outcome of the inspection?

19 MR WEST: It looks like in the event he upheld the claim of privilege, having
20 inspected the documents.

21 THE CHAIR: Yes.

22 MR WEST: Of course, if the documents are genuinely privileged, that will not be in
23 any way upset by the inspection we're asking for; confirming that privilege has been
24 properly claimed.

25 THE CHAIR: Yes.

26 MR WEST: We're not asking for inspection, simply that there'd be a proper

1 verification process.

2 MS ROSE: Well, is there any evidence that they have wrongly claimed privilege?

3 MR WEST: We obviously are not the position to refer you to the material, which is
4 redacted. What we have seen is that certainly some of the previously applied
5 redactions have been removed.

6 MS ROSE: But doesn't that actually suggest that they've been through it very
7 carefully and looked at it on a granular basis? We've got an enormously
8 experienced firm of solicitors; they've told you that the review has been done by
9 English-qualified solicitors; you've got a schedule here that tells you that the things
10 that remain redacted are legal advice or reflect legal advice. That's the right legal
11 test. What's the basis for doubting what they say?

12 MR WEST: Well, two things: one is looking at the documents of the board; it does
13 seem to contain discussions of non-legal matters, and there's been some suggestion
14 that they apply to --

15 MS ROSE: But I mean, obviously, if there's an email chain, part of which is not
16 privileged, the bits that are not privileged and disclosed will not be legal advice. You
17 can't infer from the fact that some bits have been disclosed that don't contain legal
18 advice, that the bits that haven't been disclosed also don't.

19 MR WEST: When we see that Mr Collins says that Ms Holtz made some good
20 points, it seems unlikely that's a legal point.

21 MS ROSE: Why?

22 MR WEST: Because he isn't a lawyer.

23 MS ROSE: But people who are not lawyers are capable of acknowledging that
24 lawyers make good legal points surely.

25 MR WEST: The other point is we say that the level of detail that has been provided
26 in the explanations is quite high level.

1 MS ROSE: Well, I mean --

2 THE CHAIR: It's a bit difficult to go down to more detailed levels, isn't it, without
3 actually telling you what was said?

4 MR WEST: Could, for example, be confirmed that whoever was carrying out the
5 review had in mind that these counsel often act in multiple capacities and often
6 (inaudible) sent communications which are not entirely legally related. They have
7 satisfied themselves that the whole contents of each email is privileged, rather than
8 simply saying, "Contains or reflects legal advice".

9 MS ROSE: So I mean, if you look at document 2, for example, in the schedule, it
10 says:
11 "The unique section [...] is an email from Google's in-house legal team, specifically
12 Luisa Edwards, setting out legal advice in relation to Foundem's request for
13 reconsideration." [as read]

14 I mean, do you challenge that?

15 MR WEST: I do challenge the level of detail.

16 MS ROSE: But do you challenge the statement in that schedule saying that this
17 email sets out legal advice?

18 MR WEST: We say there's a good chance the level of detail doesn't refer to the
19 entirety of the email (inaudible) other aspects within the emails --

20 MS ROSE: But I mean, that's a suggestion that that statement is misleading, isn't it?
21 Because the statement says, "This email sets out legal advice".

22 MR WEST: (Several inaudible words)

23 (Pause)

24 There are also emails that we've looked at which are from non-lawyers to lawyers.
25 And so at least, for example, in the case of Matt Cutts's first e-mail requesting
26 advice, quite a lengthy email, there was at least one response from a PR person,

1 | which again suggests that it cannot all have been exclusively concerned with
2 | seeking (several inaudible words). Part of it must have been (inaudible).

3 | THE CHAIR: I'm conscious of the time. You've taken us to the law. Do you want to
4 | wrap up? Then we should have our short break before we hear from --

5 | MR WEST: (Inaudible) my submissions. Looking at the criteria in the West London
6 | Pipeline case for when inspection should be ordered, the number of documents we
7 | say is limited. Effectively, it's a single (inaudible) or very small number. The
8 | privilege claimed is mainly a legal advice privilege, certainly prior to
9 | 30 October 2009. And the documents, we say, are of central importance to
10 | Foundem's case, for example, in relation to why it was that the site was penalised,
11 | the circumstances surrounding whitelisting, and the question of a further penalty.
12 | In those circumstances, we say the Tribunal has an unfettered discretion to look at
13 | the documents which would not be an onerous, certainly not disproportionate,
14 | exercise, and if the privilege is correctly asserted, will simply lead to (inaudible) held
15 | that if it isn't correctly asserted in relation to the whole of the email question that, we
16 | say, would be highly relevant evidence, potentially.

17 | THE CHAIR: Yes.

18 | MR WEST: In a nutshell, that's what we say. I do apologise for the time it's taken
19 | me to go through that.

20 | THE CHAIR: Well, we had to see the emails. It's not always easy to follow. Yes.
21 | Well, we'll come back at 3.40 pm.

22 | (3.29 pm)

23 | (A short break)

24 | (3.49 pm)

25 | THE CHAIR: You won't be surprised to know we've been giving this a little thought.
26 | We haven't reached a firm view about inspection at all, and obviously we haven't

1 | heard from Mr McGurk.

2 | We do think that it would be desirable if, Mr Wisking as the partner in charge of the
3 | litigation, were himself to consider the documents. There are now very few
4 | documents where any challenge is raised. We say that partly because we know
5 | clearly there's a large team working at HSF Kramer on this case, and there does
6 | seem to be some small inconsistencies in the way that privilege has been dealt with.
7 | We note, for example, that while in many of the documents that are redacted, one
8 | can see the name of the sender and the recipient. That is not the case for the
9 | redacted documents number 21 and number 30 on the list where one doesn't even
10 | know from whom or to whom the email was sent. We think that information is
11 | generally helpful, and we struggle to see why that in itself could be confidential. But
12 | that just suggests to us that there's -- the review was done in different cases by
13 | different hands.

14 | If Mr Wisking were himself to conduct a further review of the few documents left and
15 | make a statement either involving any further redaction or confirming, as was the
16 | case in the Sheffield United case, which Mr West referred us to, that he's satisfied
17 | that all redactions, all remaining redactions, are justified on the basis of legal
18 | professional privilege, and while we would give Foundem liberty to renew its
19 | application, we can say it would take a lot of persuasion, in those circumstances, to
20 | order inspection.

21 | The other point we noted, which slightly concerned us that in the
22 | justifications -- again, this is relating to document 13 where it said -- and that those
23 | are the documents where we don't know the sender or recipients of the
24 | email -- refers to Julia Holtz, a member of Google's in-house legal team involved in
25 | the EC investigation. So far as we're aware, in 2008, there was no EC investigation.
26 | It started, we think, a couple of years later, and therefore that description doesn't

1 seem 100 per cent accurate.

2 So there is just enough for us to say that we think a further review, taking into
3 account the fact that there are so few documents, and if it is done by Mr Wisking as
4 the partner responsible, that will give us that additional comfort, but, as I say, there
5 will be liberty for Foundem to reapply, if so minded. And it will no doubt bear in mind
6 the preliminary view we've expressed, that we would be very cautious indeed about
7 then ordering inspection.

8 Now, Mr McGurk, that's our proposal. You can seek to contest that if you wish, or if
9 you want to take instructions, obviously, we'll let you do that.

10 MR MCGURK: Well, I need to draw something to your attention. I may then need to
11 take an instruction because I can see a route through in light of what you have said.
12 So yes, it's very helpful.

13 Mr Wisking was the partner not only in charge of this, but he reviewed the
14 documents.

15 THE CHAIR: It was his review?

16 MR MCGURK: He was -- he led the team of lawyers who did the review. So he has
17 done the re-review that has produced the schedule.

18 Now, I accept the point --

19 THE CHAIR: It's not what he says in his witness statement.

20 MR MCGURK: But we -- so to your suggestion of what we do next, it may be that he
21 produces a witness statement confirming that fact he did the review, and that the
22 points that you have raised, including on document 13 and the to-and-from
23 omissions be addressed.

24 THE CHAIR: I'm a little puzzled because in his witness statement, he says "The
25 Challenged Documents have been reviewed by English qualified solicitors [plural] of
26 my firm."

1 That's a slightly odd statement if what he's saying is "The Challenged Documents
2 have been re-reviewed by me".

3 MR MCGURK: Well, it's to convey the fact that a number of lawyers were involved in
4 this, because, bear in mind, the request for the re-review was made on 16 April. On
5 21 April, we said we would do the re-review. That was two days in advance of the
6 deadline for the PTR applications. On 23 April, the application was made on
7 a protected basis.

8 Now, while the team was doing the re-review, hanging over their head was the threat
9 of maintaining the application on the out-turn of the re-review. So, I take the point on
10 the language, but it was only to convey the fact that there were a number of people
11 in the team who did this. Now, if that needs to be set out more clearly, we can do so.
12 I say that, Sir, subject to taking instructions on, Sir, your proposal.

13 THE CHAIR: What I think we're saying is, we quite understand why there were
14 a number of people who did it under Mr Wisking's sort of instructions and overall
15 supervision. What we're suggesting and asking for is that the re-review now is done
16 by Mr Wisking himself, not by people under his supervision that he personally reads.
17 And it won't take more, from what we've seen, than a couple of hours at most.

18 MR MCGURK: No, but he has read them all already.

19 THE CHAIR: He has? Right. Why doesn't he say that?

20 MR MCGURK: In order to reflect the fact that this was taken seriously, and
21 a number of eyeballs went over these documents to make sure we got it right, given
22 that there was an application hanging over us.

23 Now, it could have been phrased differently to make that clear, and if that needs to
24 be made clear, we will make that clear, but Mr Wisking has read every one of these
25 documents. For the avoidance of doubt, it's been suggested by Mr West, we have
26 done a document-by-document or email-by-email review. He says that because

1 | there are no partial redactions in relation to the emails in relation to which privilege
2 | has been claimed. But there's a non-sequitur in that submission because
3 | a line-by-line review was done, and just because no de-redactions were made of
4 | a single line in an email, it does not follow that a line-by-line review was not done.
5 | THE CHAIR: We take that point. No, we're not impressed by that point. We do
6 | wonder why the addressee and a person sending it have been redacted in some, but
7 | not in others, which was consistent with it being done by a number of different
8 | solicitors, so we would still ask that Mr Wisking looks at them again.
9 | MR MCGURK: Can I turn my back?
10 | THE CHAIR: Yes, of course.
11 | MR MCGURK: Have you a timeline in mind for this? As soon as possible?
12 | THE CHAIR: Well, obviously, as soon as possible, but given the small number,
13 | I imagine it can be done fairly quickly. But if you, after taking instruction, tell us what
14 | you think is reasonable. (Pause)
15 | MR MCGURK: Sir, might we provide the statement to you by tomorrow in a week?
16 | Next Friday? (Pause)
17 | THE CHAIR: Today is Thursday. By the end of next Friday?
18 | MR MCGURK: It's partly the bank holiday, but can we offer you Wednesday?
19 | THE CHAIR: Yes, I think that that's more reasonable, given Monday's bank holiday.
20 | End of Wednesday?
21 | MR MCGURK: Yes.
22 | THE CHAIR: Yes. Well, Mr West, I haven't given you a chance to comment on that,
23 | but I think you can see where the Tribunal is coming from.
24 | MR WEST: (Inaudible).
25 | THE CHAIR: Yes.
26 | MR WEST: In the circumstances, I don't press for inspection (inaudible).

1 THE CHAIR: Yes, and we made clear you will have liberty to apply, if so advised, to
2 renew your application. If necessary, that can be done by an online hearing; we
3 don't need a full in-court hearing to deal with something like this.

4 Very well. Is there anything else? We would normally say of PTR, costs in the case;
5 is that acceptable?

6 MR WEST: Yes, Sir. Thank you.

7 THE CHAIR: Well, thank you all very much.

8 (4.00 pm)

9 (The court adjourned)

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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?