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IN THE COMPETITION

Case No: 1572/7/7/22 & 1582/7/7/23

APPEAL

TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 May 2026

Before:

The Honourable Mr Justice Leech
John Alty
Dr Maria Maher

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Ad Tech Collective Action LLP

Class Representative

V

Alphabet Inc. and others

Defendants

A P P E A R A N C E S

Gerry Facenna KC, Niamh Cleary and Greg Adey (Instructed by Humphries Kerstetter LLP, Geradin Partners Limited & Hausfeld & Co. LLP) On behalf of Ad Tech Collective Action LLP

Conall Patton KC and Natasha Simonsen (Instructed by Freshfields LLP) On behalf of Alphabet Inc. and Others.

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Thursday, 21 May 2026

(10.29 am)

Housekeeping

JUDGE LEECH: Good morning.

MR FACENNA: Good morning, Sir. Shall I dive in with introductions? I don't know if you wanted to make the customary remarks and so on about the live streaming.

JUDGE LEECH: Yes. I'll make it clear to all of those that these are public proceedings, that there are a number of confidential matters that will be referred to, and that there should be no reproduction of what takes place in this Tribunal, at least without the consent of the Tribunal members.

MR FACENNA: Good morning. I appear again, in this case, with Ms Cleary and Mr Adey on behalf of the Class Representative. My learned friend Mr Patton appears today with Ms Simonsen on behalf of Google. And we also have in attendance Mr Brealey KC, who appears on behalf of the advertiser claim, which has been issued separately. There's no objection to them being present. There's no directive that they should attend -- really for observation purposes only. There's no -- I mean, I saw the correspondence, there's no objection.

JUDGE LEECH: Yes, quite no objection.

MR FACENNA: So the Tribunal will have received the agreed agenda from the parties. You should also have a draft composite order which has been through several iterations.

JUDGE LEECH: Yes, yes we do.

MR FACENNA: And that is also in relation to the disclosure issues, which are the substance of what we're dealing with today. For the most part, there is a Redfern

1 schedule -- which presumably both parties will be referring to -- and which hopefully
2 will be a useful guide.

3 4 Submissions by MR FACENNA

5 In terms of the agenda, there are a number of disclosure and expert management
6 issues before the Tribunal today. At a high level, the Class Representative's position
7 is really that we should make decisions today to continue to ensure that the case
8 proceeds in a staged, proportionate and workable way, and we are -- the parties are
9 now already dealing with very substantial existing disclosure, which, pursuant to the
10 Tribunal's previous orders, has been obtained from the overlapping regulatory and
11 litigation processes and the Class Representative's approach is to say that it's
12 important for us to understand and work through that material efficiently, and then to
13 identify any genuine gaps, before we decide about imposing burdens on class
14 members or any other third parties.

15 Google has an application before you today which would set in train a substantial
16 disclosure exercise involving class members. The Class Representative's position, as
17 you'll have seen, is that, well, it's not that class member evidence can never be
18 appropriate, it is that the Tribunal can and should at the moment defer that issue until
19 it is clearer what, if anything, is genuinely missing from the existing material. And that
20 same approach informs the applications that we make today, for -- to have a copy of
21 the unredacted version of the European Commission's confidential decision and some
22 further disclosure from the US materials.

23 And then there are also one or two directions I'll need to deal with briefly at some point
24 today on the process to deal now with the DR and EDQ, which we received pursuant
25 to the last order and some decisions.

26 JUDGE LEECH: When did you actually receive it?

1 MR FACENNA: That's a good question. I need someone to remind me. It was at the
2 end of April, was my recollection. April 30, it is fairly recent and I don't want to get
3 ahead of myself, but I mean, effectively, we are proposing a process by which we
4 would ask some questions about it. There would be some further exchanges in
5 relation to that and before we come back and make any specific requests.

6 So, that's the outline on the agenda. The first matter is Google's application in respect
7 of disclosure from class members. So unless there is something else at the outset
8 I can deal with, I'll hand over.

9
10 Submissions by MR PATTON

11 MR PATTON: Yes, good morning. Good morning, Sir. So I was proposing to
12 structure my submissions on the application as follows.

13 First of all, I was going to show you -- simply by way of introduction -- the relief that we
14 seek in the draft composite order.

15 Second of all, I was going to take you to the relevant rules and such guidance as is
16 available to you.

17 Thirdly, I was going to address you on the critical question of timing, ie why is now the
18 right time to grasp the nettle on this question?

19 And fourthly, I was going to address the Class Representative's other objections to the
20 application.

21 If I can begin just by asking you to turn to the latest version of the composite order,
22 which has been added to the bundles. That's bundle E1, tab 5, page 35. You may
23 have it loose. We've got you. Have you got a colour copy? Yes, because we've got
24 some for you if that would be helpful.

25 So the relief we seek begins at paragraph 42A, and it may be that the version you've
26 got is not paginated; I'm sorry about that, but it's page 44 of the bundle,

1 paragraph 42A, and it's the text in green.

2 And so just walking through the steps, the first step -- which is something that we've
3 added in response to submissions made by the Class Representative -- is for there to
4 be an expert meeting to discuss the requests and see whether they can be agreed or
5 refined in any way and we propose that that should happen in short order. As you can
6 see, in the week of 1 June, paragraph 43, the next step is essentially for the Class
7 Representative to identify who are the class members who account for the large
8 majority of the value of the claim, and to explain how they have arrived at that
9 identification, and I'll come to explain why that's such an important step in this process.

10 In due course and in addition, that they -- that the Class Representative -- should also
11 identify anyone else from whom they say it's appropriate to seek data or disclosure
12 and that might be either because they wish to get a more representative
13 sample -- which is one of the points they have raised -- or for example, because they
14 intend to adduce fact witness evidence from them and we have said -- and I hope this
15 can't be too controversial -- that if someone is going to give evidence at the trial, it's
16 appropriate that they should have given data and disclosure.

17 And then the next step of paragraph 44 would be for the Class Representative to
18 identify any further requests beyond those that we have identified, that it considers
19 should be made, so that there's an opportunity for both parties to ensure that their
20 requests are met.

21 The next stage is for us to respond in relation to the identification of the large
22 publishers and to see whether there's any issue about who those are and following
23 that, we can seek to agree the list of the publishers from whom data and documents
24 should be requested.

25 Then at paragraph 47, the Class Representative would write to the Disclosing
26 Publishers and request they conduct a reasonable and proportionate search for the

1 data and documents that it's been agreed that they should produce. So there's been
2 either our request or the Class Representative's request and we should make sure
3 that that becomes known to the relevant class members. And then we suggest that
4 once that material is received from the class members, the Class Representative
5 should produce it to us in these proceedings.

6 And then finally, at paragraph 49, in the event that any of the disclosing publishers
7 haven't produced anything in response to the requests, that that be made clear and
8 those class members are identified together with any explanation that's been given as
9 to why they have declined to do that.

10 So that is the nature of the relief that we seek, and we don't understand there to be
11 any fundamental objection to that type of process on the part of the Class
12 Representative. In other words, that it should be a cooperative process of the kind
13 that we've identified with both parties having input. We understand the principal
14 objection to be one of timing, and whether that's something that should be dealt with
15 now or delayed until later and as I've said, I will deal with that.

16 Now, in terms of the requests that Google itself seeks to be made of the Disclosing
17 Publishers, those are set out in appendices 2 and 3, to the latest version of the
18 composite order, just so that you have it all in one place. (Pause)

19 Appendix 2 towards the back of the composite order, this is essentially a template for
20 the critical data to be provided. And you can see it's in quite small print, but I hope
21 you can make out that essentially in sheet 1, we're looking for particular pieces of data
22 in relation to the impressions that have been served via the programmatic channel.

23 And then on sheet 2, one has the equivalent data set for direct impressions.

24 And then sheet 3 relates to unsold inventory. So that's essentially providing data that
25 one would expect the class members -- or certainly the larger class members -- to
26 have available to them and this is simply a template to ensure that the data is provided

1 in a common format, which can then be used by the experts on both sides.

2 Then Appendix 3 is a list of document requests -- so moving on from data to

3 documents -- and they've been identified as categories of material that will be relevant

4 to the issues in the case and, to date at least, there has been no objection to any of

5 this material as not being relevant to the case. There's a question as to whether it's

6 necessary for the class members to produce it, and I'll come to that, but in terms of

7 relevance, it's not been suggested that these materials would not be relevant to the

8 issues in the case and if you cast your eyes down the list, you'll see that these

9 documents are very carefully targeted to information that is going to be peculiarly in

10 the publishers control, and it's directed at information about their choices in the way in

11 which they have configured the software and in relation to the rationale that they have

12 for the way in which they carry on their business relevant to Ad Tech.

13 So you can see, for example, item 1, documents relating to their choice of publisher

14 ad servers and the factors informing that choice; item 2, documents relating to their

15 choice as to whether to use one or more publisher ad servers and the factors informing

16 that choice and if you go down through the list, that is the theme. This is really seeking

17 to understand things from the publisher's perspective. That's the point I'll develop

18 a little bit more in due course.

19 That essentially is why this is material that needs to come from the class members

20 rather than from Google, because it's looking at it from their perspective and not from

21 Google's perspective.

22 So if I could now take you to the relevant rules and guidance -- having just shown you

23 an outline -- the relief that we're seeking -- and I'll come to explain in a bit more

24 detail -- why we say that's an appropriate form of relief. If I can start with the rules,

25 and I don't know if you have the Authorities Bundle electronically or in hard

26 copy -- okay, you have both. Okay, I see, so this is in the second tab of the Authorities

1 Bundle, which is the rules. The relevant rule is at page 68.

2 JUDGE LEECH: 68.

3 MR PATTON: And its rule 89 towards the bottom of the page:

4 "In addition to the Tribunal's general powers under these Rules to order disclosure,
5 the Tribunal may order, on any terms it thinks fit, disclosure to be given by [and the
6 relevant one, for our purposes is] (c) by any represented person ..."

7 So that's -- I'll show you the definition in a moment -- the class members too, and in
8 particular, the Class Representative or the defendant.

9 So and that's the nature of relief.

10 (10.42 am)

11 (Audio lost)

12 (10.43 am)

13 MR PATTON: Under rule 73, you can see represented person means a class member
14 in accordance with rule 82, and the relevant one here is (b), was domiciled in the
15 United Kingdom on the domiciled date and has not opted out of opt-out collective
16 proceedings. So those are the represented persons that we're concerned with here.

17 As I said, the power under the rule itself is, on its face, extremely wide. There is no
18 particular threshold specified in the rule itself. Importantly, it's a power that exists
19 separately from the Tribunal's power to order third-party disclosure. Just to make that
20 good, if you could go to page 57. You can see rule 63 orders for disclosure against
21 a person not a party. That rule very much resembles the equivalent rule under the
22 civil procedure rules. So one sees in sub (3):

23 "The Tribunal may make an order under this rule only where -

24 "(a) the documents of which disclosure is sought are likely to support the case of the
25 applicant or adversely affect the case of one of the other parties ... and

26 "(b) disclosure is necessary in order to dispose fairly of the claim or to save costs."

1 And it has to specify the documents or the classes of documents -- the respondent to
2 specify whether they're no longer in its control, and so on.

3 So in rule 63, as in the CPR, there are these jurisdictional thresholds before the
4 Tribunal can make an order for non-party disclosure. But those jurisdictional
5 thresholds do not form any part of rule 89, which is the rule under which we are
6 applying.

7 Now, the only judgment of the Tribunal to date that either of the parties has found,
8 which contains any detailed consideration of rule 89, is the McLaren case: a decision
9 of Ms Bridget Lucas KC sitting by herself. That's in the bundle at page 304, which is
10 tab 11.

11 Just before I take you through the key points in the judgment, it's important to
12 appreciate -- and both parties have mentioned this in the skeletons, so you probably
13 have it already -- that there was a background to this decision which was that the
14 Tribunal had earlier ruled that it was impermissible for the defendants to communicate
15 directly with class members without getting the Tribunal's permission first. That was
16 clarified by a subsequent ruling which held that the defendants had to get the court's
17 permission if they were going to send any letter about documents or evidence which
18 foreshadowed the possibility of making an application. So that was a specific ruling,
19 so it was in that context that the defendants sought permission from the Tribunal to
20 write to the class members seeking disclosure from certain large fleet owners who
21 were class members. I'll come to show you, in a few moments, that the Court of
22 Appeal ultimately decided that that had been a misapprehension, this restriction on
23 direct communication, and it is part of the context which is important to have in mind.

24 If we could go to page 316 of the bundle. At paragraph 27, Ms Lucas draws together
25 the threads in relation to disclosure from class members in collective proceedings.

26 You may want to read subparagraphs 1 and 2. (Pause)

1 Then at subparagraph 3, she makes the point that:

2 "Class members are not parties and are not subject to the ordinary burdens that fall
3 on parties to litigation. Those burdens, including in relation to disclosure, primarily fall
4 on the Class Representative and their legal representatives."

5 Over the page at (4), she says:

6 "Class members are not parties, but nor are they 'non-parties' in the technical sense
7 that that term is used in relation to, for example, disclosure."

8 That's because, as I showed you, there's a separate rule for non-party disclosure:

9 "If the Class Representative is successful in the pursuit of the class members' claim,
10 the class members stand to benefit, ordinarily financially. The class members
11 therefore occupy an area of middle ground where they ordinarily ought not to be
12 subject to the burdens of litigation but where, given that they are the ones intended
13 ultimately to benefit from the collective proceedings, it may be necessary for them to
14 participate, whether that be to produce documents or information, for example.
15 However, that is intended to be the exception rather than the norm and will be subject
16 to careful scrutiny by the Tribunal, which will be astute to ensure that the burdens on
17 class members do not become such that the entire purpose behind the collective
18 proceedings regime is undermined. That is a point of difference as between class
19 members and non-parties."

20 And she says that, for non-parties:

21 "... the making of the request does not run the risk of undermining the policy reasons
22 behind collective proceedings. A request made of class members runs the risk of
23 doing so, in particular in 'opt-out proceedings', if the alternative course is for the class
24 member simply to opt out so as to avoid the hassle."

25 Then in (5):

26 "For that reason, whilst the parties to litigation are generally to be permitted to prepare

1 and frame their cases as they see fit, the Tribunal will exercise its supervisory
2 jurisdiction to ensure that the interests of class members are adequately protected."

3 Then just over the page on page 318 at paragraph 29, she begins by saying:

4 "It seems to me that, generally, if it is likely that there may be a need to contact class
5 members to seek data [et cetera] ... that could also be raised at the certification stage,
6 or at a CMC ... and directions sought. The directions that may be appropriate are likely
7 to depend on the particular facts in dispute, but in general.

8 "(1) one of the issues that the Tribunal is likely to wish to consider is who it is who
9 should have conduct of such communications as may be necessary: the Class
10 Representative ... or the defendant."

11 In this case, as you know, we are suggesting that the Class Representative should
12 have the conduct of those communications. If a defendant wishes to correspond with
13 class members, the first step is to raise the issue with the Class Representative to
14 reach agreement. Either way, the Tribunal must be kept informed as to what's
15 proposed. And she suggests, at the end of that subparagraph, that it may be best to
16 adopt a tailored disclosure report approach.

17 Then at sub (3), she says that:

18 "The Tribunal has recently made it clear that it is the expert economist who is likely to
19 be best placed to explain how it is envisaged the evidence will be developed to trial,
20 and that the Tribunal is likely to particularly regard to what the expert says they need,
21 and what is the most efficient and proportionate way to proceed to trial ..."

22 If we could then go on to page 319 at paragraph 32 at the foot of the page. She says:

23 "In this particular case, the LFOs are limited in number and likely to be large
24 businesses. The Defendants have identified less than twenty they wish to contact. I
25 am told by the Defendants that if a fleet size of over 20,000 vehicles is taken then
26 those twenty LFOs are likely to account for approximately 40 per cent of the estimated

1 claim value. Further, it is clear in this case that there is an evidential lacunae which
2 needs to be addressed, and the Defendants consider it necessary to consider whether
3 or not the LFOs have data and documentation that will enable them to address it."

4 Just in terms of the relief she actually ordered on the facts, just so that you've seen
5 that -- I mean, obviously specific to the case that was before her -- you can see that at
6 page 326. What she decided in that case was, at paragraph 46, that the first step was
7 to seek a disclosure report from the class members. So not to proceed directly to
8 disclosure but to provide a disclosure report.

9 So that's the guidance that really focuses on the operation of rule 89. But can I just
10 show you, because it is important to have it in mind, what the Court of Appeal then
11 decided in the McLaren case, on the question of communications with the class
12 members. That's in the bundle at page 331, which is tab 12. (Pause)

13 As it happens, it's a decision of 8 December, so it comes, I think, just three weeks after
14 Ms Lucas's decision.

15 If you could go to page 341. At paragraph 21, the Court of Appeal actually refers to
16 the hearing that came before Ms Lucas. It's just above the letter F in paragraph 21.
17 They say:

18 "The application for permission, disclosing the terms of the proposed communication,
19 resulted in MMCR objecting to other parts of the proposed communication and led to
20 further argument before Miss Lucas sitting as the CAT. In her ruling handed down on
21 14 November 2023 (the day before the commencement of the hearing [in the
22 Court of Appeal]), Miss Lucas gave detailed consideration to how evidence-gathering
23 from class members should be approached. She refused to allow the approach to be
24 made in the form sought by the Shipping Companies, which sought disclosure,
25 determining that a first step should only involve identifying what disclosure the class
26 members might be in a position to give."

1 Then Lord Justice Popplewell says this:

2 "Without quoting from it at length, I would characterise the approach of the Tribunal as
3 being that because the Rules impose a ban on communications without permission
4 (as found in the Ruling the subject matter of the present challenge), any departure
5 from that presumed norm requires justification by the least invasive approach, and
6 subject to careful scrutiny of the approach by the Tribunal."

7 So Lord Justice Popplewell is tying the observations that Ms Lucas made about the
8 need for very careful scrutiny by the Tribunal. He is tying that to the previous decision
9 of the Tribunal, that communications between the defendants and the class members
10 were prima facie prohibited, unless permitted by the Tribunal. So that's why it's
11 relevant for the Tribunal to see paragraph 21.

12 That's picked up again in, if we could go to page 362 of the bundle, paragraph 101.

13 Lord Justice Popplewell says:

14 "... the decision of the CAT on the disclosure application illustrates that the Ruling has
15 been interpreted as requiring intensive scrutiny of any permission to make a direct
16 communication because it involves an exception to a general rule, and this is
17 encouraged by what was said by the Tribunal at para 28(2) of the [original] Ruling that
18 it is a 'process which should be conducted under the overall supervision of the
19 Tribunal'."

20 Then having made those observations, the Court of Appeal's actual conclusion is at
21 page 370. That's paragraph 124. One can take it really from the introductory words:

22 "For all these reasons, I have concluded that the Rules do not contain the Restriction
23 determined by the Ruling. In summary those reasons are the following."

24 There isn't one in the rules; there isn't one in other civil litigation. There's nothing in
25 the context and purpose of the proceedings regime which makes it necessary to imply
26 one in the express words of the rules. At (5), in particular, he refers to the practical

1 consequences pointing against that implication. One has seen what Lord Justice
2 Popplewell has already said about the practical consequences in the context of this
3 disclosure application.

4 So we do submit that although Ms Lucas's judgment contains helpful guidance on
5 rule 89 and, in particular, the distinction between that and third-party disclosure, it does
6 need to be read now against the background of the restriction that was understood at
7 the time to exist, and to call for particularly careful scrutiny by the Tribunal, but which
8 the Court of Appeal very shortly afterwards said wasn't required. It didn't exist.

9 Although the question before you of class member disclosure wasn't before the Court
10 of Appeal, one can see the references to that reasoning in the decision in the Court of
11 Appeal's judgment. We submit that the implication from the way in which they
12 characterised her decision on disclosure is that they considered that an approach of
13 intensive scrutiny was itself the result of a misapprehension of the law. So one
14 shouldn't, in our submission, place too much weight on that part of the reasoning.

15 There's one further development in the authorities which we submit is also helpful to
16 the Tribunal to have regard to. That's a decision of the Supreme Court in the Evans
17 case, which I suspect you've looked at before. That's in the Authorities Bundle at
18 tab 20, beginning at page 716.

19 This is obviously a case that was primarily concerned with the question of certification,
20 which is not a point that's before you on this occasion. But we do submit that the
21 observations of the Supreme Court about the nature of collective proceedings is
22 something important for you to take into account in this context.

23 There are just two passages I wanted to go to. The first is at page 745. And it's
24 paragraphs 116 to 117. So this is the judgment of the court.

25 "The regime is designed to accommodate a wide spectrum of cases, with different
26 features, to allow classes of claimants a reasonable opportunity to litigate, but not an

1 absolute or specially privileged right to do so. At one end of the spectrum, there may
2 be a large class of ordinary consumers affected by a breach of competition law
3 resulting in their having to pay more for goods or services, but involving small sums
4 for each individual which would make each individual case economically unviable
5 given the costs involved. This was the type of situation addressed in Merricks and is
6 the paradigm type of case in which opt-out proceedings are likely to be justified. The
7 large numbers of claimants and the small sums involved are likely to make an opt-out
8 procedure the only basis on which it is practicable to bring proceedings.

9 [117] At the other end of the spectrum, the claimants who allegedly suffered loss as a
10 result of breaches of competition law may be large commercial organisations, well
11 capable of looking after their own interests, and the sums involved may be large
12 enough to make it financially viable to contemplate bringing proceedings to seek
13 recovery. That may be done by clubbing together with other similar organisations with
14 similar claims to bring a single set of proceedings with multiple claimants, or a number
15 of separate proceedings that are case managed together, rather than trying to bring a
16 collective action with a Class Representative. In such circumstances it may not be
17 appropriate for collective proceedings to be brought at all; and if collective proceedings
18 are considered appropriate, it is likely to be only on an opt-in basis."

19 Then if we could go on to page 747, paragraph 124:

20 "It's difficult to see why the financial institutions and large entities with substantial
21 claims should be allowed to proceed by way of opt-out collective proceedings. The
22 additional leverage that this would give them cannot be justified having regard to their
23 particular circumstances. The Tribunal was entitled to conclude that they should not
24 be permitted to bolster their position by pointing to and bundling themselves together
25 with another group of potential claimants with a different profile who, for quite separate
26 reasons, are not able to bring their claims. It would certainly not be appropriate for the

1 Tribunal to order opt-out proceedings simply to give the large commercial operators
2 the advantage arising from the expectation that the smaller entities for whose benefit
3 the opt-out proceedings are supposedly being brought will increase the overall award
4 of damages but will not ultimately come forward at the end of the day to claim their
5 share of the award."

6 Now that guidance is plainly directed to the question of certification, but we submit that
7 the logic of the observations goes further, and has relevance in a case such as this
8 one, where certification has already happened before these observations were made.
9 Because what it reminds us is that if class members are large commercial
10 organisations who are well capable of looking after their own interests, the Tribunal is
11 not required to consider their interests as tenderly as it would in the case of what the
12 court called the paradigm example of a collective proceedings, namely, a claim
13 brought on behalf of a large number of ordinary consumers claiming small sums.

14 The reason for that is that large commercial organisations capable of looking after their
15 own interests, the sums involved may make it financially viable for them to pursue
16 recovery by ordinary litigation, and such organisations have no entitlement to expect
17 that they will be insulated against the ordinary incidents of that kind of litigation,
18 including the need to give disclosure, if that is considered necessary by the Tribunal.

19 Now, how do these observations relate to the characteristics of the members of the
20 class in the present case? This is obviously not a consumer claim. It's a publisher
21 claim. In Dr Latham's report for certification purposes, he assumed -- it's bundle B2,
22 tab 1 at page 186. It may be appropriate to turn it up.

23 He assumed that 80 per cent of the damages had been incurred by 20 per cent of
24 publishers, and he took that to imply that there were 20,000 publishers which had
25 suffered 80 per cent of the aggregate damages. You get the 20,000 publisher point.
26 It's the key bit in his report, the footnote right at the foot of page 186.

1 So his assumption at the stage of certification is that there's a huge number of
2 publishers who account for 80 per cent of the damages, ie for the lion's share of the
3 damages.

4 JUDGE LEECH: Just at 619, the size of the class implies there's a long tail of small
5 publishers.

6 MR PATTON: He does say that as well, but in the footnote he says that 80 per cent.

7 JUDGE LEECH: 80 per cent.

8 MR PATTON: Yes, exactly. So the lion's share of the damages are incurred by
9 20 per cent of the publishers. But because he thinks that the class size is 100,000
10 publishers, he implies from that that there are 20,000 publishers who account for
11 80 per cent of the damages. So a very large number of publishers, accounting for the
12 lion's share of the damages.

13 Now, pursuant to the Tribunal's orders, disclosure has been given by Google of data
14 concerning the customers who account for the lion's share of AdX revenue, Google's
15 revenue from AdX. One can treat that for present purposes as a rough proxy for the
16 proportion of damages. What has been done, and this is set out in a letter from
17 Freshfields, which you should have if you've got the latest version of the E1 bundle,
18 it's at tab 3. It's page 21. So beginning at paragraph 12 on page 21. What they
19 explain is that based on the data that has been disclosed in the proceedings --

20 JUDGE LEECH: This is the 21 April letter?

21 MR PATTON: Yes, that's right. The reason it's now in this bundle is that there is some
22 confidential information in it, and so it's been moved. I'm sorry about that, but it's been
23 moved.

24 JUDGE LEECH: it's old. I think this is an important letter and I think I took it out, so
25 just give me one~...

26 MR PATTON: Yes, I did the same. It was originally, if it helps, in D1, tab 42.

1 JUDGE LEECH: Thank you.

2 MR PATTON: So if you've got the original pagination, it's on page 235.

3 JUDGE LEECH: Paragraph 12.

4 MR PATTON: Paragraph 12, exactly. That's explaining the point that based on the
5 disclosure of the AdX revenues, what has been done is to take the largest entities by
6 percentage of AdX revenue accounted for by publishers with a UK billing address
7 between 2015 and 2022. I'll come back to the significance of the UK billing address,
8 but for present purposes, that's the approach that's been taken to identify UK entities
9 within the AdX revenue.

10 The precise figure has been highlighted as confidential but what you can see is that
11 the 80 per cent of the revenue is now accounted for, on the basis of this data, by a very
12 small number of publishers. If you then turn to Annex C to the letter, which, Sir, if you
13 have the original pagination it is at page 243. In the new pagination, bundle E1, it is
14 at page 29.

15 JUDGE LEECH: Where are we going next?

16 MR PATTON: Its annex C to this letter, which was page 243 and is now page 29 in
17 the confidential bundle.

18 JUDGE LEECH: Yes.

19 MR PATTON: So this provides a breakdown. Again, the names and the figures have
20 been marked as confidential. But you can see, ranked in order of percentage of
21 revenues, the names of the publishers and the percentage of the AdX revenues that
22 corresponds to that, adding up to 80 per cent.

23 If you would cast your eye down through the names, without giving away anything
24 confidential, you can see that these are indeed large commercial organisations who
25 are well placed to look out for themselves in commercial litigation.

26 JUDGE LEECH: I'm just trying to match that up with paragraph 12. So that's the

1 percentage of the AdX revenues. Is that right?

2 MR PATTON: Exactly. So this is treating AdX revenue as a reasonable proxy for the
3 proportion of damages.

4 JUDGE LEECH: That's the percentage of total AdX revenues, rather than the
5 (overspeaking).

6 MR PATTON: It is the percentage of AdX revenue accounted for by publishers with
7 a UK billing address. So attempting to confine that to the UK rather than other
8 countries.

9 JUDGE LEECH: So that's 80 per cent. Sorry, that's the percentage of AdX revenues
10 of publishers with a UK billing address.

11 MR PATTON: Exactly.

12 JUDGE LEECH: So the 80 per cent figure is slightly a red herring. That's Dr Latham's
13 figure. Is that total revenues or is it of the associated -- it's the heading to annex C,
14 I'm slightly puzzled by.

15 MR PATTON: Yes. I think it's right that Dr Latham was also seeking to come up with
16 a UK figure. So it is comparing apples with apples.

17 DR MAHER: I'm actually a little bit confused here because if you look at the
18 percentage of AdX revenues in that column, that doesn't add up to 80 per cent.

19 JUDGE LEECH: That's what was confusing me.

20 DR MAHER: Yes, that was confusing me also. That adds up to substantially less than
21 80 per cent. I can quickly do ...

22 JUDGE LEECH: It's the 80 per cent figure which is puzzling me.

23 MR PATTON: On my very quick arithmetic, it comes to 80 per cent.

24 JUDGE LEECH: Okay.

25 MR PATTON: I know the numbers look quite small, but when you add them all up.

26 JUDGE LEECH: When you add them all up. We're not going to fall out.

1 MR PATTON: That is not a point that's been taken against us at the moment, that it
2 doesn't add up.

3 JUDGE LEECH: Just trying to make sure we understand the actual data that you're
4 relying on.

5 MR PATTON: Exactly. Well, I hope I've made that clear.

6 JUDGE LEECH: Yes.

7 DR MAHER: Just a quick question in the sense that you can see that, leaving aside
8 maybe the top two or three -- maybe generously five -- publishers, there's a long tail
9 at the bottom. That remaining 20 per cent could also be -- so if you look at only the
10 top five, that's only really going to account for considerably less.

11 MR PATTON: That's true, I accept that.

12 JUDGE LEECH: But presumably 1 per cent or 2 per cent of the loss is still a lot.

13 MR PATTON: Well, this is a claim for many billions of pounds. So that's really the
14 context. I agree with you, 1 per cent --

15 DR MAHER: So you could end up then with, you know, 0.5 per cent of being quite
16 a large number of publishers or ...

17 MR PATTON: That may be.

18 DR MAHER: Yes.

19 MR PATTON: That's why we've really confined ourselves. I mean, at least all of these
20 people have at least a very significant percentage.

21 JUDGE LEECH: So you've tried to identify the people who've got real skin in the
22 game.

23 MR PATTON: Exactly. It may be that once one goes beyond that, one has a longer
24 tail. But the key point that we obviously were seeking to address was the suggestion
25 that even for the 80 per cent of the damages, you were talking about a huge number
26 of publishers -- 20,000 publishers -- and this is a world away from that. It's really

1 a relatively small number of entities.

2 Now, as I say, we've made clear that the basis on which we've selected these entities
3 is simply the UK billing address point, and that is not the test for whether they are
4 within the class; that is not itself a test. The test within the class is whether they are
5 UK domiciled, and you may remember that from the claim form. But if I can just take
6 you back to the claim form, just so you see how it's put. That's in bundle B1, tab 1,
7 page 15. (Pause)

8 JUDGE LEECH: Paragraph 29(1): "'Publisher' means a UK-domiciled natural or legal
9 person ..."

10 MR PATTON: Exactly.

11 JUDGE LEECH: "... that publishes content on a website or mobile app containing ad
12 units."

13 So that could be -- (Pause)

14 MR PATTON: So the question really is: are these entities the UK domiciled ones?
15 They've got a UK billing address, but are they UK domiciled? And just so you can see
16 what the Class Representative said about this -- or says about this -- in its claim form,
17 if you also then go on to page 17 of paragraph 32. (Pause)

18 Yes, exactly, the claim form. (Pause)

19 Paragraph 32, they explain:

20 "The opt-out sub-class is comprised of all UK-domiciled publishers ..."

21 And then in the second sentence:

22 "The sub-class is confined to UK-domiciled Publishers to ensure that the Proposed
23 Class is focused on harm suffered in the UK and to minimise overlap with claims
24 brought elsewhere. It's not envisioned that the criteria will cause complexities, as
25 Publishers should know their domicile and be able to evidence it easily."

26 And so that explains why -- although we've been able to do this exercise simply by

1 selecting the billing address -- as the very first step in the draft order, paragraph 43,
2 we suggest that it's necessary for the Class Representative to itself identify who it
3 considers to account for the majority of the claim value, the large publishers, because
4 one needs to actually be confident that these people are UK domiciled, because if
5 they're not UK domiciled, then they're not within the class. So that really explains why
6 that part of the relief is necessary. But as the Class Representative --

7 JUDGE LEECH: I'm sorry is that. 43?

8 MR PATTON: 43.

9 JUDGE LEECH: 43.

10 MR PATTON: As the Class Representative itself says, they don't envisage that that
11 will cause any complexities, because the publisher should know their domicile, and
12 that's presumably something that they've been seeking to verify anyway.

13 Now that part of the relief -- this requirement to identify who are the UK domiciled
14 publishers -- as far as we can see, that hasn't been addressed at any point in the run
15 up to the CMC by the Class Representative, but no doubt Mr Facenna will explain his
16 position on that.

17 JUDGE LEECH: Can I just raise this one question? We'll obviously hear from
18 Mr Facenna; it does raise quite an important point, though, because Ms Lucas sort of
19 sat firmly on the fence, didn't she, about whether they were parties to the class action?
20 If you like. I mean, you're asking us to make an order under Rule 89, which assumes
21 that they are, in fact, parties. You're asking us to -- and that must be right, mustn't it?

22 MR PATTON: It assumes that there are class members, that are represented persons.
23 So Rule 89 requires that they be represented persons, and so the people from whom
24 disclosure should be sought should be represented persons; that's true, that they
25 shouldn't be people who may or may not be --

26 JUDGE LEECH: So your point is that Rule 89 goes wider than simply requiring

1 disclosure from a party. It is a specific bespoke rule for -- so you say you don't need
2 to establish that, you know, these people -- it could be that the list of large
3 publishers -- I think we'll begin to call them -- in the list of large publishers, they may
4 know nothing about these proceedings as yet. They may not have been contacted,
5 had any engagement with the action. But nevertheless, you're entitled -- you can be
6 entitled to an order against them because of their potential recovery and that doesn't
7 require them to be treated by the Tribunal as effectively -- perhaps "parties to the
8 parties to the class action".

9 MR PATTON: It doesn't, because, as you said, there's a bespoke rule dealing with
10 this, that if they are members of the class, they are represented persons. It doesn't
11 matter whether they've been keen or interested up to now. It would be quite
12 surprising -- in my submission -- if very large commercial entities -- who stand to make
13 on the Class Representative's case millions or hundreds of millions of pounds in
14 damages -- it would be very surprising if they were unaware, unengaged in the
15 proceedings, and we know that certainly some of them are aware of the proceedings
16 and they are involved in other litigation.

17 JUDGE LEECH: We've got no formal evidence before us about the level of
18 engagement between -- or indeed about the identity of the large publishers.

19 MR PATTON: No, because --

20 JUDGE LEECH: You've got to approach it on a principled basis. Yes, a principled
21 basis. But you say also that your directions are largely directed at the CR rather
22 than -- and it's only once you get to the end of that process that you actually have
23 to -- the individual -- the large publishers themselves are to have the burden of actually
24 giving actual disclosure.

25 MR PATTON: That's right. At this stage, it's an order in fact, as you say, directed at
26 the Class Representative. It's true that we don't have evidence about what the

1 | dealings have been between the Class Representative and the class members,
2 | because although we made this application for the CMC, the Class Representative
3 | has chosen not to put any evidence about that before you one way or the other, so we
4 | simply don't know.

5 | JUDGE LEECH: But it is -- we are being asked to decide it as a point of principle, and
6 | on the basis that the first involvement in this action that -- albeit large publishers who
7 | may have a large amount of skin in the game may have is when they get a disclosure
8 | request either from you or from across the -- well, let's say across the desk of their
9 | general counsel.

10 | MR PATTON: Yes, that's true, and my submission on that is that if one goes back to
11 | Rule 89 in the Authorities Bundle, at page 68, tab 2.

12 | JUDGE LEECH: So you don't disagree with Ms Lucas's analysis? You say that it's
13 | a practical issue about the -- Evans just demonstrates that she was perhaps more
14 | cautious than she needed to be, but you don't disagree with the way she approached
15 | the issue in terms of principle.

16 | MR PATTON: In general, we don't disagree, but there's language that she uses about
17 | being the exception, rather than the law, and one doesn't want to overstate that. It
18 | doesn't happen in every case -- it's very unlikely to happen in cases where the class
19 | members are consumers, because the Tribunal will probably be reluctant to make
20 | orders for disclosure against consumers and you wouldn't have this situation that we
21 | have where there may be a very small number.

22 | JUDGE LEECH: You're talking about, I don't know --

23 | MR PATTON: £100.

24 | JUDGE LEECH: £100. But also if you're talking about the use of a credit card or
25 | something.

26 | MR PATTON: Exactly.

1 JUDGE LEECH: How much evidence do you actually --

2 MR PATTON: Do you really need? Exactly. But so --

3 JUDGE LEECH: In a highly technical case like this, you say, well, we actually need
4 to understand not only Google's side, but the publisher's side.

5 MR PATTON: Exactly, exactly.

6 MR ALTY: Can I ask, I mean -- presumably, though, given that Dr Latham thought
7 there were 20,000 in this category, even though you don't think that's right, it does sort
8 of illustrate that we don't actually have any idea what the numbers of these are. And
9 so if the order is granted, the Class Representative is going to have to do some work
10 to find out who these people are, because they don't necessarily know. Nobody
11 knows.

12 JUDGE LEECH: Well, yes, that's the corollary aspect.

13 MR PATTON: That does follow, but that's not a surprising thing to require the Class
14 Representative to do, to identify if it hasn't happened before and we simply don't know
15 that it hasn't happened -- it would be slightly surprising in my submission if it hadn't
16 happened, because Class Representative is representing these people, and the
17 people with -- to use the term, have skin in the game.

18 JUDGE LEECH: Let's say that they go away, do the exercise that you envisage, which
19 is really the first part of the -- we get to 46, don't we, before they write to the disclosing
20 publishers, and what if they come back to you and say, "Well, actually one of two
21 things: one, you're actually completely wrong about the list of large publishers; the
22 largest publisher we can find has got 0.2 per cent and Dr Latham is right, or secondly,
23 well, we just can't find out the answers to that".

24 We can't actually identify, because people are being very cagey about this. One of
25 the reasons Mr Facenna says is that this may encourage people to opt out. I mean,
26 you say, "So what?" Because that's putting them on the spot. Got to engage with this

1 | sooner or later, if they want to collect a large sum of money as a result of this, and
2 | I understand that point, but they may have difficulty in complying with the terms of the
3 | order, and given that they're not actually parties to the litigation in any formal sense
4 | and Rule 89 is -- you saying that it's an exorbitant jurisdiction is putting it too high, but
5 | it's something unusual in terms of sort of normal High Court litigation in this country.

6 | I mean, is there a case for saying that there ought to be a second stage in this, which
7 | is when we -- if we order 43 to 46, you come back, and then we decide precisely what
8 | to order, or at least giving them permission to apply, if, the assumptions that you're
9 | asking us to make about the large publishers, "disclosing publishers" as you call them,
10 | turn out to be correct.

11 | I mean, the problem is one of lack of evidence. Nobody knows what they may not
12 | even know. You say they've made a litigation decision not to present that information
13 | to you, we can only take that so far.

14 | MR PATTON: I understand the points you're putting to me. Can I just say there is
15 | some evidence that they've been engaging with the class members, because it's in
16 | that context that they say that in their dealings with the class members, the class
17 | members say they would want to know why they're being asked for disclosure. So
18 | clearly there has been some engagement, but there's no specificity as to who they've
19 | been dealing with and how far it goes.

20 | Well, I don't suppose if there's a question of liberty to apply, if there's
21 | a problem -- I mean there is always liberty to apply if there's a problem, but --

22 | JUDGE LEECH: I mean it is quite important, because -- I mean you say Mr Facenna
23 | hasn't taken a stand on this and said, "No, this is not an order which the court can or
24 | should make, he's just -- his objections are practical". So if that's right -- and we'll hear
25 | from him to confirm that -- because if it isn't right, and he says, "Well, actually we don't
26 | consent, and this is an important point of principle", then we are going to have to think

1 about it quite hard, it seems to me. Because it could have quite big consequences,
2 I suppose, if you could -- as a defendant -- even if you pass the CPO hurdle
3 post-evidence, you can actually get individual orders against the -- on the basis of
4 a decision that we make, possibly subject to appeal.

5 MR PATTON: Well, as I say, I was just about to take you back to Rule 89. I mean, it
6 is quite clear that the Tribunal has that power, I mean -- and it's been specifically
7 thought about and it's been put in there, and it's also been put in, in a completely
8 untrammelled way. They didn't say, "Well, third-party disclosure is enough of
9 a solution to this". The drafters of the rules applied their mind to this issue of the
10 represented persons and decided there should be a specific power in the Tribunal to
11 require them. So this shouldn't come as a surprise to class members. This is part of
12 the regime that's been there from the outset.

13 JUDGE LEECH: But, in a sense, that doesn't help us because you could say, "Well,
14 what kind of power is this". If it is an exorbitant power to, in effect, make a different
15 kind of third-party disclosure order, shouldn't we be -- you say, "Oh no, that's dealt with
16 by a different rule", so that it should be treated as a general disclosure power. You
17 say, also, we shouldn't take very much notice of what Ms Lucas did because she was
18 operating under the wrong assumption, which is that --

19 MR PATTON: Insofar as she said there had to be particularly intensive scrutiny or, as
20 she said, it's exceptional. That was driven, in part at least, by the misapprehension.
21 Can I just be very clear though that in relation to the relief that we are seeking, if you
22 go back to paragraphs 43 and following, the relief we're seeking at the moment is not,
23 in fact, for an order that the represented persons be ordered to give disclosure, which
24 is a relief that would directly engage rule 89. It's that at this stage, if you look at 47 as
25 the clearest example, it's a request from the Class Representative to the disclosing
26 publishers for them to do a search and to produce the documents.

1 JUDGE LEECH: No, no. I mean, I fully accept it. It's an order against the Class
2 Representative --

3 MR PATTON: It is, it is.

4 JUDGE LEECH: -- and it's an order requiring them to do two things. One, write to the
5 large publishers. It's identify, write to, and then disclose what you get. Those are all
6 orders against the CR and you say that there's a power to order that because it's an
7 indirect way of giving effect to rule 89. That's what I understand.

8 MR PATTON: Exactly, exactly.

9 JUDGE LEECH: And it's been designed quite carefully, I understand that.

10 MR PATTON: I'm grateful. Obviously, if there was a complete refusal on the part of
11 the representative persons, then the terms of rule 89 itself would be more directly
12 engaged. It would be for the parties --

13 JUDGE LEECH: You might say, if they said, "Just continue to say shan't", well, then
14 now is the time to make an order directly against the --

15 MR PATTON: Exactly, exactly.

16 JUDGE LEECH: That's ultimately the in terrorem application you will make. I mean,
17 if they don't engage.

18 MR PATTON: Not with any negative connotation with in terrorem, but that is the
19 potential consequence --

20 JUDGE LEECH: That's the potential consequence.

21 MR PATTON: Yes, (overspeaking).

22 JUDGE LEECH: So you say that this is not a full-throated rule 89 application.

23 MR PATTON: Yes, exactly.

24 I was going to deal with the important question of timing, which does also arise from
25 the points that you've been putting to me, and why we say now is the time to deal with
26 it and it's not something to be kicked down the road. We submit that actually ought to

1 be an uncontroversial proposition, because that was the Class Representative's own
2 position shortly before the last CMC. You probably picked this up from the skeletons,
3 but if I can just show you the letter. It was in response to a letter from Herbert Smith
4 asking about its proposals to pursue class member disclosure. It's at bundle D1,
5 tab 18, page 113.

6 JUDGE LEECH: 2 December 2025.

7 MR PATTON: Exactly. It's just paragraph 3 of the letter. This was before CMC 2.
8 They say:

9 "It is therefore premature for the CR to take decisions about potential witness evidence
10 or disclosure from class members; the appropriate time to consider those matters is in
11 the lead up to CMC 3, once the scope of disclosure from Google is clearer."

12 So that was their position and, as a result of that, the point wasn't ventilated before
13 you at CMC 2.

14 Now, if I can just complete the run of the correspondence, what happened there is
15 absolutely nothing. The Class Representative did nothing, as far as we know, to
16 progress the issue of class member disclosure at all in advance of this CMC, despite
17 having adopted the position very clearly in this letter.

18 JUDGE LEECH: Well, it isn't "we will". It's "we'll think about it", really; isn't it?

19 MR PATTON: "The appropriate time to consider those matters". But as far as we
20 know --

21 JUDGE LEECH: They say that now they've considered it and it's not the right time to
22 give disclosure.

23 MR PATTON: Well, they certainly didn't volunteer any sort of proposal. Even
24 a proposal to do nothing they didn't volunteer. That resulted, just so that you've seen
25 it, in Freshfields' writing on 17 March. That's page 215 of this bundle.

26 JUDGE LEECH: I take your point. They didn't throw up their hands and say, "God,

1 | this is going to be really, really difficult. We can't do this until way down the track".

2 | MR PATTON: No. They just went completely silent and seem to ignore the issue
3 | altogether. That's why the form of the application before you is an application from
4 | Google in the form that it is.

5 | So 17 March, Saint Patrick's Day, Freshfields write to the claimants again. If you just
6 | look at the bottom of 217, paragraph 7. (Pause)

7 | I won't go through the detail of it, but the punchline at paragraph 7:

8 | "Google invites the Class Representative to set out, by return and in any event by 24
9 | March 2026:

10 | "(a) an explanation of your engagement with the class members to date regarding the
11 | provision of relevant materials they hold."

12 | That was asked for back then and you have, essentially, nothing at all before you in
13 | relation to that request which would have been extremely helpful for your deliberation.

14 | Then (b):

15 | "a detailed outline of your proposals for disclosure from the class members, taking into
16 | account the issues raised above."

17 | If we could go on to page 225. This is the response on 30 March, a couple of weeks
18 | later. Paragraph 4, they say:

19 | "The Class Representative has no further update to provide at this time and does not
20 | currently anticipate seeking directions from the Tribunal for disclosure from the class
21 | at CMC3. There is no obligation ... to do [so]: There was no such order at CMC2 and
22 | the Rules ... do not give rise to a requirement to comply with the requests in your
23 | letter."

24 | So it's essentially quite a legalistic position, "We haven't been ordered to do it".

25 | Obviously, they weren't ordered to do it because they said they were going to do it
26 | anyway, "And there's no rule that requires us to do it".

1 JUDGE LEECH: It's what I would call the forensic dead bat.

2 MR PATTON: Yes.

3 So that's when we first learned they're proposing to do literally nothing on this
4 important issue in the case. So that's why it's fallen to Google to make the proposals
5 it did, and I know you've been looking closely at the 21 April letter which is where those
6 proposals are made.

7 So really, to say now that it's premature for you to consider this question, flies in the
8 face of their own position in December and it flies in the face of the fact that they've
9 had many opportunities to address this in the 5 or 6 months running up to this CMC
10 and they've simply chosen not to. It's important, you'll remember, that the witness
11 evidence is due under your order on 17 February next year. So disclosure obviously
12 needs to be completed some time in advance of that. If there's going to be factual
13 evidence from class members, as I've said already, it's important that disclosure be
14 given by those class members beforehand. That really requires the process of
15 disclosure to be finished well before the end of this year.

16 Now, we received a letter late last night -- I think sometime before
17 midnight -- suggesting for the first time that there is a timetable which would allow all
18 of this to be dealt with in good time for that deadline. But it simply doesn't work
19 because what they're proposing is that this all be left until November or December.
20 So we try and agree something say in October and then, if we can't agree, we come
21 before the Tribunal presumably in November or December. You can immediately see
22 that doesn't leave time for the witness statement deadline to comply.

23 JUDGE LEECH: Has that letter made its way into the bundle?

24 MR PATTON: I don't think it has because it literally, I think, arrived about -- oh, maybe
25 you do have it.

26 JUDGE LEECH: Sorry. So this is the 20 May; is that right?

1 MR PATTON: That is right.

2 DR MAHER: Yes.

3 MR PATTON: (Inaudible) this letter, 20 May. At paragraph 7 we've got their various
4 suggested dates at (a), (b) and (c).

5 JUDGE LEECH: I'm not sure that we have that.

6 MR PATTON: Maybe you don't have it.

7 JUDGE LEECH: All we've got is a covering letter (inaudible).

8 MR PATTON: I see. I can either leave my learned friend to explain it, that might
9 be -- but essentially, it doesn't leave -- (Pause)

10 JUDGE LEECH: Thank you.

11 MR PATTON: The proposed timings are at paragraph 7 and it culminates at (c) in
12 suggesting that, by 30 October, the parties seek to agree what directions, if any, are
13 required and the meeting of the experts could happen sometime in October. Then
14 they say there could be a further hearing. So that necessarily means that that further
15 hearing would have to be either in November or December. Even suppose it's
16 November, that means we don't have a decision on anything to do with class member
17 disclosure until either that hearing or, if you reserve judgment, until later than that.
18 Then one doesn't have time for: first of all, the class members to receive the requests
19 and give disclosure; if the class members decline to give any disclosure, any further
20 applications arising from that; and of course, time for the parties to review the
21 disclosure and see how it affects the witness evidence from whom there is witness
22 evidence required, and so on. It's plain that none of that could be completed within
23 the window from November, December to 17 February. So this latest proposal which,
24 as I say, came at, I think, about 11.00 last night, simply doesn't work. It's the first
25 timetable I think we've ever received from them on this subject.

26 Now, the big point of principle that's put before you by the Class Representative is

1 essentially that one should wait until all of Google's disclosure has come in, and it's
2 been reviewed in detail, before one even looks at this point, this question of class
3 member disclosure.

4 We say that's wrong in principle. It's wrong because there's nothing in the rules that
5 suggests that that's the right way of looking at it. There's nothing in rule 89 itself, for
6 example, that subordinates it in that way. It's not actually supported by Ms Lucas's
7 judgment, which itself takes a fairly restrictive approach, given what the law was
8 understood to be at the time.

9 As I said before, although she talks about it being the exception rather than the
10 ordinary thing, I've explained why we say that doesn't really answer the current
11 position. But more than that, it's actually completely illogical to suggest that it's
12 essential for all of Google's disclosure to be completed and looked at before one
13 considers this disclosure, for the reason I gave at the outset.

14 The disclosure we are seeking is concerning matters that are within the peculiar
15 knowledge of the class members, of the publishers. All of the requests, as I showed
16 you in Appendix 3, are carefully targeted at looking at matters from their point of view.
17 What are the choices that they made, and what are the factors or rationales that inform
18 that choice? They are obviously going to be the source of the best evidence in relation
19 to how they do things and why.

20 Now, there's not actually any particular reason to think that Google's disclosure would
21 have a significant bearing on that. But one can imagine that Google, from its point of
22 view, will be thinking about what publishers want and what their objectives are, and so
23 on. So you may find documents in Google's disclosure which set out Google's view
24 or understanding as to how publishers might behave or why they would behave in
25 a particular way.

26 But that would just be second hand evidence. That would be evidence of Google's

1 perception of publisher conduct, or Google's perception of publisher rationales. It may
2 be accurate; it may not be accurate. It may reflect Google's view of things rather than
3 the publisher's view of things. But what it would certainly be is inherently inferior and
4 more oblique as a form of evidence, if the Tribunal is seeking to get at what were the
5 publishers doing, and why were they doing it.

6 To get at that question, the Tribunal would obviously wish to be informed by the
7 publisher's own materials. That is the rationale for these requests, that has been
8 explained in Dr Majumdar's statement.

9 JUDGE LEECH: They are quite extensive is my initial reaction to it. Part of the
10 difficulty for the Tribunal is, as with many of these applications, it's very hard to work
11 out precisely what burden the disclosure requests will impose, particularly on a highly
12 complex case like this one. I mean, you're not simply just asking for people to tick
13 boxes and provide individual documents. This is going to take quite a lot of work and
14 might involve taking legal advice in order to determine whether, in fact, you've
15 complied with it.

16 You can see running satellite litigation, which could be given, and which could be
17 generated by a spat over whether in fact there's been compliance. You say it's
18 targeted and I am prepared to accept that, but it is a very complex exercise.

19 I mean, you're entitled to say, well, you know, "They're expecting to recover large sums
20 of money, so they should be asked to do it", and that I follow. But it is still a complex
21 exercise that you're asking. I suppose you say, "Well, so what? The first part of this
22 exercise is to see whether they'll engage at all; if they answer half the questions, then
23 we're better off than if they answer none. If people just come back and say we won't,
24 then further down the track, the Tribunal's going to have to decide whether they want
25 to live with that or to insist on more."

26 But I am concerned about the complexity and length of the Appendix 2 and

1 Appendix 3.

2 DR MAHER: If I can just add a point on that. Some of the things that are in
3 Appendix 3, publishers may view as being commercially sensitive, from their point of
4 view, and be highly reluctant to provide that information to Google.

5 MR PATTON: I'll certainly come to that point. I completely see that. I mean, I agree
6 with the various answers that you thought I might give to that. I mean, certainly this is
7 a list we have sought to be as narrow and selective as we can. Obviously, what hasn't
8 happened here, which might have expected to happen, is that the Class
9 Representative comes back to us and says, "Well, that one's a bit wide", or "That one's
10 a bit complicated", and "That's a bit disproportionate", and "Can we narrow this in
11 some way?"

12 We made these requests on 21 April. We've literally had no comments on any of these
13 requests. Nothing. So that process hasn't happened. I don't know whether that would
14 have led to any refinement and narrowing. But that's really the Class Representative's
15 choice not to engage in any way with the details of the requests.

16 But also, as I explained at the outset in paragraph 42(a) of the order, we do now
17 propose that the experts meet directly - Dr Majumdar and Dr Latham - with a view to
18 seeing whether they can refine the list in any way. So that would, I think, go some
19 way to meeting your request. But you're right. This will require work on the part of the
20 publishers; that's undeniable. But, as you say, they are seeking many millions of
21 pounds in damages. It's really in that context that the question of proportionality has
22 to be weighed. I also do agree with the point that you put to me that at the moment
23 they're simply being asked, "Please give us this". They're not being ordered to do that
24 under pain of contempt or anything like that.

25 JUDGE LEECH: The commercial sensitivity point.

26 MR PATTON: Yes. So why don't I deal with that now. We have actually recognised

1 that point and we've said we're happy for there to be a confidentiality ring limited to
2 external advisers. That's a point that we made clear in correspondence. I'm just trying
3 to find the reference. So that's the answer to that. I mean that's something that
4 happens. It's often the case in competition cases. It's bundle E1, tab 1 page 4. It's
5 paragraph 16. This is Freshfields' letter of the 13 May. So it's about a week ago.
6 They say:

7 "For the avoidance of doubt, Google is content for such materials to be designated as
8 confidential, for example within an external-advisers only ring. We trust that any such
9 concerns are therefore resolved ..."

10 So that's how one normally deals with this sort of issue in competition cases.

11 You have Dr Majumdar's statement which explains why, from his point of view as an
12 expert economist, these requests are necessary.

13 JUDGE LEECH: Certain criticisms are made of Dr Majumdar. Do you want to deal
14 with those now or wait to hear from Mr Facenna?

15 MR PATTON: Well, the criticisms essentially boil down to saying he hasn't reviewed
16 all of Google's disclosure. So although they're enumerated at great length and it's built
17 up into a huge attack on him for having put in the statement that he did, it actually
18 comes back to that simple point, "Do you consider that it's necessary to review the
19 whole of Google's disclosure before looking at requests which are actually directed at
20 matters viewed from the publisher's perspective".

21 The point he makes is that it's obviously more informative and more relevant to have
22 what the publishers themselves say, rather than simply seeking secondary evidence
23 in scraps from Google's table. And that's really the answer to the attack that's made
24 on Dr Majumdar.

25 JUDGE LEECH: I suppose you might get some information from Google's disclosure.
26 I mean, obviously you're going to get some sort of dialogue at various stages between

1 large publishers and Google about the technical limitations of the process. There may
2 be complaints, you know. You say, "Well, that's of limited value".

3 MR PATTON: It's of limited value.

4 JUDGE LEECH: The Tribunal will be asking to draw inferences about publisher
5 conduct more generally.

6 MR PATTON: Exactly.

7 JUDGE LEECH: Maybe you may have people who just complain a lot and other
8 people who just suck it up, you know.

9 MR PATTON: Exactly. Also you have the publishers who are not actually contracting
10 with Google for particular software. And so you're less likely to be getting that sort of
11 material.

12 This is a problem that crops up in these types of case where the Tribunal, by the time
13 you get to trial, you're thinking, "Well, why is this the material we've been given on
14 these important subjects? Why are we being driven to use inference or common sense
15 based on a very limited material, when we could actually be presented with the proper
16 material?" It's just an illustration of it.

17 But in the updated Authorities Bundle, this is just a new authority that we added
18 yesterday, I think if you have that electronically, it's the Kent v Apple case, page 1275
19 of the updated Authorities Bundle.

20 JUDGE LEECH: Yes, just getting there.

21 MR PATTON: Yes, I'll just wait. (Pause)

22 Paragraph 26:

23 "Finally on the subject of evidence, we should say that, despite the extensive written
24 and oral material, there was considerable unevenness in the extent and quality of
25 evidence placed before us. As an example, despite the case being largely about
26 dealings between Apple and developers, direct evidence from developers was limited

1 to one expert, Mr Howell. We have therefore had to piece together the factual position
2 from multiple sources and, on occasion, to fill gaps as best we could with what we
3 hope is our own common sense and judgement."

4 This is a point they make a number of times later in the judgment, in particular at
5 paragraphs 945 and 951. Now, Kent was a case where the class were consumers.
6 So it might perhaps be understandable that there wasn't disclosure or witness
7 evidence from developers, beyond this single expert. But that's not obviously the
8 position here. Here the publishers are the class. They are the people who are seeking
9 to be awarded damages. They are the represented persons using the language of
10 rule 89.

11 So this Tribunal does have the ability to ensure that documents and data, and indeed
12 witness evidence from the members of the class, is available at the trial. Why should
13 you be left in the position of the Tribunal in Kent, trying to use what they hoped was
14 common sense to piece together very uneven and thin material when you could equip
15 yourself with the actual material that will give you the best insight into what the factual
16 position is?

17 JUDGE LEECH: What was the second paragraph reference you gave?

18 MR PATTON: It was 945 at page 1597.

19 JUDGE LEECH: I'd like to look at that, if I may.

20 MR PATTON: Yes, of course. Page 1597. This is a similar point. They said:

21 "... we were left with relatively little evidence on this point. It would have been helpful
22 for us if there had been more direct evidence from developers. We are however able
23 to form some views as a matter of commercial common sense."

24 At 951, I think I said at page 1598, they said that:

25 "... Mr Howell's evidence was reasonably clear, and although Mr Kennelly KC's
26 cross-examination created a degree of uncertainty about consistency across the entire

1 developer community, we accept the broad thrust of what Mr Howell said."

2 But why would it be fair to Google, in this case, for you to be filling in the gaps based
3 on essentially what amounts to either what one might say is speculation when you can
4 have access to the raw material that's necessary to make a proper set of factual
5 findings? Why would that be fair to you as the Tribunal, to have to approach matters
6 in that way?

7 Now, the next approach -- I'm hopefully coming to the end of my submissions. Did
8 you want to take a transcriber's break or?

9 JUDGE LEECH: How long are you likely to be?

10 MR PATTON: I'll probably be ten minutes.

11 JUDGE LEECH: Shall we finish off your submissions now, and then we'll take a break.

12 MR PATTON: Of course.

13 They make a proportionality point in the skeleton. This is paragraph 13, internal
14 page 5 of the Class Representative's skeleton.

15 JUDGE LEECH: Yes.

16 MR PATTON: So the point they make is they say:

17 "Disclosure of documents from individual class members is unlikely to be the most
18 appropriate and proportionate means of obtaining any necessary information. Some
19 or all of any information that is ultimately determined to be required may be more
20 appropriately captured by survey evidence, written responses to questions from class
21 members, pre-existing non-contemporaneous materials submitted to regulators, or by
22 evidence from an industry expert."

23 The oddity about that is that although they said now was the time to address this,
24 they're not actually making any proposals for any of them. They're not seeking
25 permission to conduct a survey. They're not seeking permission to issue
26 questionnaires to the class members. They're not actually putting forward any

1 concrete alternative to the application we've made.

2 This is just, "Oh, there are other ways of doing this", but they're not ways that they
3 themselves are proposing to pursue, or they've put any flesh on the bones of how that
4 might actually be done.

5 And you may know from other contexts that survey evidence is itself subject to
6 limitations. It may be influenced by hindsight, maybe based on mistaken recollections.

7 It may be that the responses are not particularly detailed because they're simply
8 answering a survey. It may really be opinion rather than fact. You may not capture
9 the nuance that you get from the real materials. So none of that is taken into account,
10 but as I say, there's no actual proposal before you for it to be pursued in that way.

11 Why is this a reason not to get the actual data and the documents?

12 And insofar as an industry expert is concerned, we'll come to that issue later. But
13 you're not going to be assisted by someone coming along and saying, "I'm an expert
14 on what publishers do. Just take it from me, this is what they do and this is why they
15 do it", because how is that evidence going to be supported and how is it going to be
16 tested? The way in which it would be tested would be by looking at direct materials
17 from the publishers themselves, which show what they really do and why they do it.

18 And really someone coming along saying, "Well, I was a publisher once and this is
19 how I see things". I mean, that's really just factual evidence. It's not really expert
20 evidence at all. But it's not an answer to suggest that someone can come in document
21 free and make assertions about this.

22 The next point that's made at 13(3) of the skeleton, is they say we haven't explained
23 why the request should only be made against large publishers rather than
24 a representative sample, and we say that's actually fairly obvious: it's the Evans point,
25 the fact that they have skin in the game, and they've got the resources to do it, and
26 they're also the people who are likely to have kept the records. That's a point that

1 Dr Majumdar made at paragraph 22 and they would be likely to be representative
2 because they will have lots of different ways of working. Sometimes they'll work with
3 Google, sometimes they'll work with other software providers.

4 So it's really rather obvious why the large publishers are the ones that we are
5 particularly concerned about.

6 JUDGE LEECH: Can you just show me where Dr Majumdar says that?

7 MR PATTON: Yes.

8 JUDGE LEECH: I'm happy to take it from you, but I'd just like to know --

9 MR PATTON: Yes, so I've got it in -- you may have it elsewhere -- it's in bundle C at
10 tab 3, page 330.

11 DR MAHER: 330 or 313?

12 MR PATTON: 330, and it's paragraphs 22 and 23. He says: "On this basis I consider
13 it sufficient to receive." So this is the fourth line of 22:

14 "On this basis, I consider it sufficient to receive disclosure from the publishers that the
15 Class Representative considers to account for the large majority of claim value. This
16 should include representative examples of publishers that do not use Google products
17 across the Ad Tech stack ... as well as those that do not solely use Google across the
18 Ad Tech stack."

19 And then he says it's understood that'll be confirmed.

20 And then in 23, he says:

21 "I consider as well that it is more likely these publishers would hold data and
22 information that are responsive ... because it is plausible that larger publishers would
23 have more resources to ensure that relevant data and information are recorded,
24 particularly if [they're] similar to [the ones] that are listed in Annex C ..."

25 MR ALTY: Sorry, can I just ask? Maybe I've misunderstood this, but if publishers
26 aren't using Google at all, will they be a member of the class?

1 MR PATTON: Yes, yes they will --

2 MR ALTY: Okay.

3 MR PATTON: -- and this is one of the counterintuitive features sometimes of these
4 cases in the same way that in Merricks, you didn't actually have to do any shopping
5 on a credit card to be a class member. And if you look at the class definition --

6 MR ALTY: No, I'll take your word for it. I'm sure we'll hear to the contrary if they
7 disagree.

8 MR PATTON: But of course we're not shutting the class -- if the Class Representative
9 wants to suggest other publishers should give this material, we're not in any way
10 seeking to shut them out from doing that. It's just that we have concentrated on these
11 large publishers, because it's very difficult to see how there could be a proportionality
12 objection to that.

13 A point is taken about the costs of the exercise, and in relation to that, we would be
14 content for the Tribunal to reserve the costs of compliance as something that it could
15 make a decision about in the light of its overall determination of costs and the
16 proceedings.

17 Confidential information I've dealt with.

18 And then there's the point about the chilling effect. Well, the Class Representative
19 hasn't adduced any actual evidence from these sorts of people, that they would be
20 chilled by this, and it's implausible that they would. They are substantial commercial
21 entities who are no strangers to adversarial litigation. Some of them are, in fact,
22 already -- as the claim form makes clear -- suing Google in other jurisdictions, so
23 they're obviously not afraid of that. It's very implausible that Google is going to put its
24 relationships with customers at risk because of this litigation.

25 JUDGE LEECH: That cuts both ways.

26 MR PATTON: Yes, that's true. So, subject to any further questions you've got.

1 JUDGE LEECH: I just had one question really, which is: certainly from my part, I find
2 this an interesting issue, and it may well be that we will want to take a little bit of time
3 to consider. I just wonder, at the moment you're seeking an order that 42A is that the
4 expert advisers should meet in the week commencing 1 June. So I'm just wondering
5 if there is any actual flex in your timetable. If we do reserve, it'll be for a relatively short
6 period of time. But it seems to me that we ought to give a reasoned decision on this
7 point, and even if we were all in agreement, I think at the very short, off the cuff
8 extempore judgment is probably not what's required.

9 MR PATTON: Well, the long stop on our timetable is really paragraph 47, because
10 that's when the request is made to the disclosing publishers. And so that's when the
11 categories will be identified to them. So if the experts --

12 JUDGE LEECH: If we pushed it back by two weeks or something, is that going to be --

13 MR PATTON: I don't think that would cause any issue.

14 JUDGE LEECH: Because, I mean, that's the kind of time frame I have in mind.

15 MR PATTON: Yes, thank you.

16 JUDGE LEECH: Should we take a short break? We'll meet again at say 12.05,
17 according to the clock in this room.

18 (11.56 am)

19 (A short break)

20 (12.07 pm)

21 MR FACENNA: Sir, I'm conscious of the indication that you may want to write
22 a judgment on this issue. I'm going to make sure I go through the points with care and
23 give you the references.

24 JUDGE LEECH: Yes.

25 MR FACENNA: And just in terms of timing, I wonder whether hearing me and then
26 having Mr Patton give a reply -- I'm not sure we'll be able to do that by 1.00, and we'll

1 see how we go. But if you're worried about that, I am very confident that some of the
2 other issues on the agenda are going to be much shorter than we might have allowed
3 time for.

4 JUDGE LEECH: I'll hold you to it.

5
6 Reply submissions by MR FACENNA

7 MR FACENNA: The Class Representative's position on this application is that it
8 should be refused. If you're not with us on that, then our alternative proposition is that
9 it should be deferred until sometime in the autumn. The reasons that we say the
10 directions should not be granted now are, first of all, the premise that this affects
11 a small number -- the number is confidential -- but a small number of larger publishers
12 is simply wrong, and I'll show you why that's wrong.

13 Secondly, the application in the terms in which it's made is deficient on its own terms,
14 because it rests on evidence from Dr Majumdar, which is not a proper analysis or
15 a reliable basis for assessing where the gaps might be in any Google disclosure and
16 that might justify seeking information from class members. Moreover, as the Tribunal
17 pointed out, the requests themselves are extremely broad. In practice, they would
18 impose party style disclosure obligations on absent class members who at the moment
19 have no involvement in these proceedings whatsoever. So there are those
20 deficiencies with the application.

21 Thirdly, we say it is premature, because neither side has yet -- Dr Majumdar himself
22 has only recently been instructed. He's not even in the confidentiality ring yet. Neither
23 side has yet completed the necessary analysis of what evidence exists in Google's
24 own disclosure.

25 And finally, the proposals themselves are on their terms disproportionate, because if
26 this does ultimately prove to be a case in which there should be information sought

1 from members of the class, there are a whole range of less onerous and more targeted
2 ways to do it than is currently proposed.

3 Can I deal first with the 80 per cent damages point and the small number of
4 publishers? Now that's Google's headline point and it's important to put it in its proper
5 context, because as it's currently put, it's apt to mislead.

6 Now, Google's skeleton argument says said that 80 per cent of damages were
7 suffered by around the confidential number of publishers. Now, Mr Patton fairly made
8 it clear that actually the analysis on which he relies concerns 80 per cent of AdX
9 revenue, not 80 per cent of the class damages and if you want the reference to that,
10 you were taken to it before. It's paragraph 12 of that Freshfields letter, which is now
11 in E1, tab 3, page 19. It was previously --

12 JUDGE LEECH: What he says is that's a good proxy.

13 MR FACENNA: Well, they say it's a good proxy, it's not. In fact the distinction really
14 matters. This claim is not confined to AdX revenue, it's not confined to AdX
15 transactions and it's not confined to publishers who use AdX exclusively. The
16 class -- and the claim covers losses suffered on a whole range of rival supply side
17 platforms. It includes publishers who used AdX for only part of their inventory. Most
18 importantly, it includes umbrella effects on other categories of ad sales. So things
19 which are not captured by use of AdX or other supply side platforms at all and it
20 includes direct sales and ad network effects.

21 So there are a whole range of damages and losses and class members who would fall
22 completely outside the analysis that Google relies on, which is who its largest
23 customers are for AdX.

24 Now of those points, the umbrella effect point is particularly central, as you'll
25 recall -- and I'll take you back to Dr Latham's report that you were taken to earlier -- his
26 estimate -- well, his methodology -- includes harm to a whole range of publishers

1 whose revenues were affected through wider channels, including ad networks and
2 direct sales and as he says in his report, smaller publishers are particularly likely to
3 fall within those categories. If I can just take you back to Dr Latham's 2. So that's
4 back in bundle B2, and it's tab 1, and I think we were looking at page 14, where he
5 describes the class size and there are some preliminary calculations, paragraphs 11
6 and 12.

7 So his estimate is that of about 100,000 publishers in the class, only about 20 per cent
8 would be making use of publisher ad servers and SSPs, and that would include AdX.
9 The remaining 80 per cent use ad networks subject to the potential umbrella effects
10 analysis and those are more likely to be the long tail of smaller publishers.

11 JUDGE LEECH: So we're back on -- just give me the page reference again.

12 MR FACENNA: It's page 14.

13 JUDGE LEECH: Of B2.

14 MR FACENNA: 14 of B2, paragraphs 11 and 12.

15 JUDGE LEECH: I thought I had them in front of me. So 100,000 publishers in this
16 class -- so that class is referring to is -- that's the umbrella effects immediately above.

17 MR FACENNA: Yes.

18 JUDGE LEECH: Yes.

19 MR FACENNA: And just to see, at page 17, paragraph 27, if you go ahead.

20 JUDGE LEECH: Do you mind if I just read 10, 11, and 12 to myself very quickly?

21 (Pause)

22 MR FACENNA: Important point at 12 about the difference between sales transacted
23 only if you include SSPs. So there the damages estimate is between 1.2 and 7. But
24 once you include -- take account of the umbrella effects, you see that the estimate
25 jumps up to 3.3 to 30. (Pause)

26 Mr Patton took you to page 185 and 186 of this bundle. This is --

1 JUDGE LEECH: Footnote 384?

2 MR FACENNA: I think he --

3 DR MAHER: Where are we?

4 MR FACENNA: We're now on page 186 in the same bundle, paragraph 622, 623, 624
5 and 625. So Mr Patton relied on paragraph 624, which includes the footnote that he
6 referred you to at 386. Of course, if you read that paragraph in the context of the
7 paragraph above it and below it, it's absolutely clear that paragraph 624 is only talking
8 about the situation where you completely exclude the umbrella effects which have that
9 enormous impact on the overall damages in the class. That's true of the footnote as
10 well as the table below, you see. So this idea that there are only a handful of
11 publishers who are really affected here; it's a completely unreliable figure. It certainly,
12 we say, cannot rationally define the target or the scope of any appropriate disclosure
13 from class members because, at best, that analysis is only a partial AdX revenue
14 analysis. It's not at all, actually, an analysis of class loss, not a reliable proxy for it.
15 So it's nothing at all about losses suffered by publishers who were using other SSPs,
16 or publishers who only use that extra part of their inventory, and it excludes
17 altogether -- or certainly very substantially underestimates -- the umbrella effects
18 which are central to the methodology that has been certified in this case and the losses
19 claimed by smaller publishers.

20 So insofar as that's the premise on which the application is put, it's not a sound basis,
21 we say, for setting in motion litigation-style disclosure obligations against a select
22 group of class members.

23 JUDGE LEECH: It says in 624:

24 "... the estimated preliminary damages per publisher in the top 20 per cent range from
25 £386 to £1,425k."

26 MR FACENNA: Yes, so that again is excluding the umbrella effects analysis.

1 JUDGE LEECH: But those are large organisations. We're not talking about, you
2 know, credit card users who have suffered £100; are we? We are talking about
3 substantial sums of money.

4 MR FACENNA: We are talking about substantial sums of money, and that will be true
5 once you include the wider class as well. I think the point I'm making is that the number
6 is not the number which we're not allowed to say, that small number. It's going to be
7 very substantially larger than that number. It's not a handful of recognised household
8 names. That's my point.

9 MR ALTY: Although -- sorry. So, roughly, the umbrella effects just under double
10 damages. So it may not be that number but it might still be a relatively small number
11 accounting for the large --

12 MR FACENNA: It's complex, is the reality of it. It's certainly not as simple as has been
13 suggested. That's not a reliable proxy. We accept that there will be a way in which
14 it's possible to try and identify that number and that's something which can be done in
15 due course, but it's a much more complicated exercise than simply identifying who the
16 biggest customers of AdX are.

17 The proper legal approach, we accept, is the one that's set out in McLaren. In the
18 interest of time, I won't take you back to those paragraphs you were taken to. For your
19 reference, again, it's authorities, tab 11, page 304. You'll recall there that Ms Lucas
20 KC sets out the governing principles, the wider case management powers of the
21 Tribunal, the starting assumption that class members are not generally expected to
22 participate in collective proceedings -- that they're not parties to the proceedings -- and
23 then you have the key principles distilled at paragraph 27.

24 We say that is the correct starting point. What the Court of Appeal says doesn't really
25 change anything because, as Mr Patton fairly recognised, the Court of Appeal was
26 considering a different issue which is whether defendants should be writing directly in

1 a sort of in terrorem way to class members, which doesn't say anything really at all
2 about the principles which are distilled in paragraph 27. So again, the starting point
3 for any consideration of class member disclosure: these people are not parties to the
4 litigation; they are not subject to the ordinary litigation burdens; they do occupy that
5 quasi middle ground, and that's something that you see recognised in the Canadian
6 jurisprudence. If you're interested, when you come back to look at the Court of Appeal
7 in McLaren, there's this reference to a Canadian case, Del Giudice I think it's called,
8 which sets out what the Canadian courts have done about this.

9 But we say Ms Lucas is quite right to have said that involvement of class members in
10 the litigation is exceptional and it shouldn't be routine, and the Tribunal should indeed
11 be astute to ensure that any burdens which are imposed on members of the
12 represented class do not undermine the purpose of the regime. That is especially,
13 obviously, important in opt-out proceedings, where onerous requests may encourage
14 class members to opt out or disengage or simply to avoid the burden. It's also
15 consistent, if I can just show you briefly because we say it's relevant. There's
16 a judgment of Hodge Malek KC in a case called Rodger v Alphabet, which is in
17 authorities, tab 17, the page number is 556. An observation in paragraph 33 there:

18 "In competition cases such as the present where a class of a significant size ... are
19 alleged to have suffered loss and damage ... it is often the case that there is more than
20 one way of establishing or rebutting infringement, and coming to an estimate of
21 overcharge and pass-on. That does not mean that each party should, or the Tribunal
22 will permit parties, to run every single route or permutation. Parties and their experts
23 need to use their common sense and sense of proportion in which ways they want to
24 prove their cases. Simply because a party or expert wants to run and get evidence on
25 an alternative method of estimating overcharge or pass-on does not mean that will be
26 encouraged or permitted by the Tribunal."

1 That's important, we say, because the current position is that you have evidence from
2 an expert who's recently been instructed who essentially says, "Well, this material
3 might be very useful when it comes to the experts preparing their evidence." You'll
4 recall in McLaren, at paragraph 29(3), there was an observation that it's the expert
5 economists who are likely to be best placed to explain how the evidence will be
6 developed to trial. But of course, that observation presupposes that you are in
7 a position where the experts are already familiar with the issues in the proceedings
8 and the disclosure and the material that's already available, and that is not the case
9 with Dr Majumdar because of the limitations of the nature of his instructions and the
10 evidence.

11 Until recently, what he actually said in his witness statement was that he was instructed
12 in relation to these proceedings. He didn't say that he'd been instructed to give expert
13 evidence at trial. In response to correspondence enquiries, it's now been clarified
14 Google does intend to instruct him as its trial expert but seemingly has not yet done
15 so. That's Freshfields' letter of 19 May at bundle E2, page 111.

16 JUDGE LEECH: Do you want us to go to that or do you ...

17 MR FACENNA: No, I'll just give you the reference. It's a short point. I mean,
18 essentially, Google relies -- I think, at least in its skeleton argument -- on the point in
19 McLaren; the expert economist should lead this. I think we say, "Well, that has to be
20 on the basis that you have an expert who's instructed to give evidence at trial and has
21 a proper understanding of the material that's already available".

22 JUDGE LEECH: So not yet instructed and no proper understanding, you say.

23 MR PATTON: If it's helpful for me just to explain that point; it's simply that, because
24 permission hasn't yet been given for expert evidence, he hasn't been formally
25 instructed as an expert. That's the only point that's being made in that letter.

26 MR FACENNA: Secondly, at the time of giving a statement, Dr Majumdar explains

1 that he had only reviewed a limited set of documents. This is paragraph 2 of his
2 witness statement, which is at B2, page 405. He explains that he had only reviewed
3 the statements of case, Dr Latham's second and third reports and Mr Kornacki's
4 certification-stage witness statement. So he hadn't been given, it appears, or looked
5 at the 248 page explanatory note, or the disclosure report and EDQ, or any of the
6 actual disclosure repositories.

7 Now that is a serious problem, we say, for an application of this kind relying on expert
8 evidence of the type that Dr Majumdar gives. Because at best, what he really can do
9 and all he does do is make general assertions about what he understands Google to
10 hold. There are examples that we give of that in our skeleton argument at
11 paragraph 11. But the basis for those understandings are not explained in a statement
12 and there's no evidence from anyone with actual knowledge of Google's systems and
13 repositories confirming that there are real gaps which exist.

14 I can illustrate the problem with a concrete example. So Dr Majumdar and Google
15 now say that they need publisher disclosure on header bidding. That's Majumdar 1,
16 paragraph 13, where Dr Majumdar says that Google has only limited information on
17 header bidding. That's B2, page 408. But we can already tell, based on materials
18 which we've been provided with, that Google [REDACTED – CONFIDENTIAL]. If I can
19 just show you this because it illustrates part of the problem and the prematurity of this
20 application. If you're able to open bundle C1 and it's tab 9 and page 1788. So this is
21 part of the documents which have already been disclosed. This is in the confidential
22 bundle so I ought to be slightly careful about what I say about it.

23 At 1788, you'll see what it is. [REDACTED – CONFIDENTIAL]. If you go to 1790, so
24 a few pages onwards.

25 DR MAHER: Which one?

26 MR FACENNA: It's C1, 1788. So that should be the [REDACTED – CONFIDENTIAL].

1 [REDACTED – CONFIDENTIAL] then contains [REDACTED – CONFIDENTIAL]
2 analysis on header bidding including: [REDACTED – CONFIDENTIAL] and so on.

3 Then, to give you another example. In the same bundle if you go to 1854, this is
4 [REDACTED – CONFIDENTIAL]. You can see the executive summary over the page.
5 But, I mean, the essential point is this is another document and this, I think, has
6 [REDACTED – CONFIDENTIAL] analysis.

7 So on the one hand you have, from Dr Majumdar, evidence asserting that we will need
8 to get, from the class members, evidence about adoption of header bidding and so on.
9 Actually, when you go to the proposed questions and the annex to the order, there's
10 some pretty wide questions about header bidding. I think it's under question 6 -- let
11 me just have a look at that.

12 I mean, if you have the Appendix 3 to the draft order, actually number 6 is a pretty
13 good example of the extreme broadness, if I can put it that way, of these requests. So
14 under question 6, what's being asked:

15 "Documents and data relating to how publishers chose to configure Google's ad tech
16 tools during the relevant period, including but not limited to ..."

17 And then there are various examples. You'll see that a number of these will concern
18 header bidding and the way in which it was configured and publisher choices about
19 them, and market share and so on. You see those references in (a) and in other
20 subparagraphs.

21 So the evidence that you've been provided with, to supposedly support you making
22 the order which you're asked to make, is based on Dr Majumdar's apparent
23 understanding that Google has limited visibility into the extent to which its own tools
24 were being used relative to rival tools. He says that in his evidence. But even these
25 two documents show that there will be extensive material within Google's own control
26 and disclosure monitoring the market shares of header bidding providers, relative to

1 AdX and relative to one another. When you come back to look at those documents,
2 you'll see the level of detail that there are [REDACTED – CONFIDENTIAL].

3 Now, again, I'm not asking the Tribunal to decide today that Google's header bidding
4 materials will answer every issue about that in the case. The point is that before class
5 members can be asked to go away and do an extensive search on these materials, in
6 circumstances where they're not currently parties to the proceedings, Google's own
7 [REDACTED – CONFIDENTIAL] should be understood. There is no point in having
8 class members searching for materials about header bidding and efficiencies or
9 advantages of open bidding, or related issues which you see there in the proposed
10 questions until we know what material there already is about that. The parties and
11 their experts can then consider, "Are there gaps here?"

12 To go back to the point that Mr Malek made in the Rodger v Alphabet judgment, it's
13 not enough for experts to say, "Well, it would be very helpful to have this". We are
14 actually very cautious about making this an expert-led process because, with all due
15 respect to the economists in the room, there's always additional data and information
16 that might be useful, and you might be able to run a different analysis on it, come up
17 with different modelling. But we do have to have a sense of proportionality and
18 practicality here, and have regard to costs as well.

19 The essential point is this. There needs to be proper consideration of what material
20 already exists. The parties and their experts then need to be given an opportunity to
21 identify whether additional evidence should be obtained from the class, and what that
22 should look like. We want to undertake that exercise. Our experts are already thinking
23 about it.

24 I think I can say it's quite likely that we think there will be material that we will want to
25 obtain from the class. We won't necessarily do it in this way. I think you'll see in
26 Mr Starr's evidence, he suggests that you could have questionnaires and surveys that

1 might be far more proportionate ways of doing it.

2 Now, we received a letter yesterday where Google tried to secure some of the defects
3 with Dr Majumdar's evidence confirming that he's now reviewed the explanatory report
4 and the DR and EDQ, and that doesn't change his mind on anything. Freshfields'
5 letter is at E1, page 30, and it's paragraph 11 of that letter.

6 I've been asked, the topic of those materials I take you to is strictly speaking within the
7 confidentiality ring, although I don't think it's confidential in the draft composite order,
8 is it. Anyway.

9 JUDGE LEECH: We'll take a little care.

10 MR FACENNA: We'll take a little care. I don't intend to go back to any of the detailed
11 materials.

12 On the point that's now made about Dr Majumdar's position, as I'll come on to when
13 we look at the disclosure report and EDQ, those are not a substitute for reviewing the
14 actual materials themselves, because they're frankly pretty high level.

15 The justification for this application now appears to have shifted somewhat because it
16 originally proceeded on the basis of assertions that there were no or limited
17 information. The way in which my learned friend put it this morning was that this is
18 information which, by definition, can only be obtained from the class, or it's focused on
19 facts which will be within the control of the class.

20 What's now said in that Freshfields letter I've just referred to you, is that publishers will
21 hold the best evidence of the issues identified by Dr Majumdar. We don't necessarily
22 accept that. It can't be taken for granted that disclosure from a small number of
23 individual publishers will be better evidence than the kind of detailed global evidence
24 you see that Google holds. But more fundamentally, again, neither we nor Google
25 can reliably reach that conclusion until the Google disclosure has been reviewed.

26 So the question for today is not whether publishers might have some relevant

1 information and whether, in due course, the parties in the Tribunal may want to obtain
2 some of that information. They may have relevant information. The question is
3 whether, and in what form, it is necessary and proportionate to seek it from class
4 members. Google has not established that it's proportionate and necessary to do that
5 now.

6 I've made the point already about the breadth of the requests. I think I've shown you.
7 Question 6 is a good example of it. They're not narrow requests for readily identifiable
8 data. I think the way in which the Tribunal was imagining the general counsel, even
9 of a large company, who receives this letter, I mean, they are party-style disclosure
10 requests. They're framed by reference to factual, contested factual, and economic
11 issues. Even with the examples given under question 6, they are non-exhaustive
12 subcategories.

13 It doesn't take much to imagine what the reaction might be of a publisher who may or
14 may not know that they're even within the class receiving this, even from us rather
15 than from Google, inevitably backed up with the implied proposition that if you don't
16 comply with this, that you might find yourself dragged into a contested disclosure
17 application.

18 That would be a pretty terrifying set of requests, I would submit to the Tribunal, for any
19 class member to receive. It would raise exactly the kind of concerns that are identified
20 in McLaren about a class member simply saying, "Well, I don't want the hassle of this",
21 particularly when it involves what is inevitably going to be for almost all of them, an
22 extremely important and powerful commercial partner in the shape of Google.

23 The order is also, we say, operationally problematic. There is the point about
24 confidentiality, which may or may not be solved with a confidentiality ring. The search
25 obligations are unclear. There aren't really any workable limits on the terms in which
26 they are put. There's currently no provision for the costs of this exercise. Who's going

1 to bear the cost of it? If they are to be borne by the class members, there's no
2 provision within the Class Representative's budget for the costs of effectively being
3 deputised to run a third-party disclosure exercise.

4 So there, it seeks to impose rolling obligations on the Class Representative for material
5 that is not in its possession, and leaving completely unclear what the treatment would
6 be of those publishers who do not respond.

7 Now, the reason we say it's premature, you've heard what I said about that. I think
8 there's a slightly unfair point which has been made, which is that we haven't engaged
9 with it. When the Class Representative indicated last year that class member
10 disclosure would be considered at CMC 3, that was on the footing that at that time we
11 expected that Google's disclosure would be available materially earlier, and we were
12 hoping that would be last year. In fact, the bulk of the relevant disclosure was only
13 provided at the end of February this year. So we've only really had the bulk of that
14 disclosure for about ten weeks before Google issued this application.

15 The review of that material is ongoing. We are reviewing that material. We say the
16 proper sequence is that we should be given an opportunity to understand that
17 disclosure, identify genuine gaps, and then consider with Google and its experts how
18 those gaps might be filled, and proportionately.

19 The final point on proportionality is, of course, the less burdensome alternatives point.
20 This application in this form, at this stage, we say is premature and disproportionate.
21 The alternatives that might be considered, some of them are set out in Mr Starr's
22 evidence in Starr 6, which is at B2, page 732.

23 You'll see at paragraph 13(e) of his evidence that there are a range of other options
24 which the parties will want to consider. So questionnaires, there might be surveys,
25 targeted sampling, some factual expert evidence, targeted requests to
26 a representative sample of identified publishers. Of course that's also an important

1 point. I say "a representative sample". Google's proposal targets the largest
2 publishers but would potentially exclude all publishers who didn't use AdX, and the
3 large proportion of the class that relied on other ad networks.

4 There's no reason at all why the large publishers should be treated as a representative
5 of the class as a whole. By definition, they are likely to be those with more market
6 power and a greater ability to switch than a number of other members of the class. So
7 if there was going to be some attempt to obtain representative evidence from the class
8 as a whole, some proper thought would need to be given as to the relevant sampling
9 of publishers.

10 JUDGE LEECH: Which was the paragraph in Starr 6?

11 MR FACENNA: It's 13(e), which is on page 732.

12 There is a real chilling effect concern. Google's acceptance that any contact with class
13 members should be co-ordinated through the Class Representative is a welcome one,
14 but the risk remains. As you'll see from Mr Starr's evidence, the sole opt-in class
15 member in this claim did withdraw after Google indicated that it intended to seek
16 disclosure from it.

17 I do not need to put the point any higher than that. We say it does illustrate the concern
18 recognised in McLaren that imposing burdensome requests on representative class
19 members may simply deter them from participating in or remaining within the collective
20 regime. Can I just deal briefly with what is said about Kent, the Kent judgment? That's
21 in Authorities Bundle tab 40, page 1275 is where it starts.

22 JUDGE LEECH: 1295, yes.

23 MR FACENNA: I think the first paragraph you were referred to was 26. The point
24 that's made there is that there was considerable unevenness in the extent and quality
25 of the evidence. Despite the case being about dealings between Apple and
26 developers, direct evidence from developers was limited to one expert.

1 Then the other paragraphs, I think, that you were referred to were 945 at 1596. We
2 understand that Google also relies on paragraph 990 at 1611. The point really to be
3 made about those paragraphs and the observations in them is that they relate to really
4 very narrow points which would have required commensurately narrow additional
5 evidence or disclosure from developers, to deal with. The fact that you might have
6 identified a targeted point on which you wanted evidence from developers, if anything,
7 supports our approach, rather than a broad litigation-style disclosure exercise from
8 class members at this stage.

9 You were taken to the proposals which were sent, I'm told, at 9:00 pm last night rather
10 than midnight, not that it makes any difference.

11 But essentially, just to wind up on it. Our primary position at this point is that this
12 application should be refused for the reasons I've given: disproportionate; premature;
13 there's no proper evidentiary basis for it. That's obviously without prejudice to their
14 ability to make an application in due course.

15 Our alternative position, if you're against us on that, is that it should be deferred until
16 the Class Representative has reviewed the pre-existing disclosure material that they
17 have.

18 JUDGE LEECH: Is it set out in that letter, your alternative, your fallback position?

19 MR FACENNA: Yes. So the fallback position --

20 JUDGE LEECH: Just give us the reference again.

21 MR FACENNA: Well, I'm not sure this letter (overspeaking)~--

22 JUDGE LEECH: Is this the one. This is last night's letter?

23 MR FACENNA: It's last night's letter.

24 JUDGE LEECH: Thank you. Yes.

25 MR FACENNA: So because what's proposed was that the experts should meet next
26 week, and we've said that's completely impractical, it won't achieve anything. You

1 heard what I said about just a slight caution on our part about this becoming an
2 expert-led process. So what we've suggested at paragraph 7 is that by 18 September,
3 which is the time by which we anticipate we will have materially advanced our review
4 of the pre-existing disclosure, and there'll be further questions having been asked on
5 the DR and EDQ, that we would then write to Google with our proposals. Google
6 would have an opportunity to reply, and then we'll seek to agree directions. If we can't
7 agree those, then we would come back. You'll see that we've somewhat reluctantly
8 accepted the possibility that there might be a further hearing in November.

9 The only point that's taken against these proposals is that there's a deadline for factual
10 evidence in, I think, February the following year. But it's important to recall that that's
11 only each party's own witnesses of fact. Google's witnesses of fact ought to be
12 speaking to within their own facts and knowledge, not matters which come from
13 disclosure from class members.

14 The expert evidence, which is where this really bites, is not due until the end of 2027,
15 I think. Ours is due in September. So the point doesn't really hold any water.

16 We could have this by towards the end of this year, particularly if we come back to the
17 Tribunal in November. Both parties will have had an opportunity to undertake a proper
18 analysis of what material there is, what might usefully and proportionately be obtained
19 from the class members, and how we might go about doing that. We will try to agree
20 that, and if we don't, we'll come back and ask you to give directions. That will still
21 leave 12 months, frankly, until the experts have to produce their reports. Plenty of
22 time to do the questionnaire or survey or whatever we decide to do.

23 At that time, we would say, the parties will be in a position to do what hasn't been done
24 to date, which is to identify exactly which pleaded issues cannot be addressed from
25 the Google disclosure universe; why that information is unavailable from Google or in
26 some less burdensome way; what exact categories are sought; why it's necessary;

1 and what the mechanism should be for doing it.

2 So again, to be clear, we're not resisting the idea that there should be evidence
3 obtained from class members. It's merely a question of timing and proportionality and
4 how and when it's done.

5 So those are my submissions on Google's application.

6
7 Reply submissions by MR PATTON

8 MR PATTON: Just a few points in reply, if I may.

9 So my learned friend's first point was that he said that the AdX revenue isn't a good
10 proxy for the largest class members because of the umbrella effects point that
11 Dr Latham makes.

12 Now, it is the best proxy that we have -- that's information that is in disclosure and it's
13 therefore the proxy that we'd have used and it's not suggested that any better proxy
14 can be identified to identify who the largest class members are.

15 Suppose -- he makes the point that there is a claim for umbrella damages, and that
16 may be claimed by publishers who are not AdX customers, that that's part of their
17 case. But suppose -- and I think this is the point that the chairman made -- the
18 percentages that we've identified to date are only of the main damages, even ignoring
19 the umbrella damages, you're still talking about main damages said to run into the
20 billions of pounds.

21 So the percentages of even that sub-set of damages is still very large sums of money,
22 which certainly put these people into the category of large commercial organisations
23 with large claims to their own name, which would be sufficient to justify their
24 involvement in disclosure.

25 So suppose it's not necessarily a percentage of the damages as a whole -- it actually
26 doesn't detract from the key point, which is that these are parties -- or these are

1 entities -- represented persons with very large claims being pursued in this litigation
2 and therefore no reason why they shouldn't be expected to give disclosure.

3 But he went on to say -- to assert to the Tribunal today -- that if one takes into account
4 umbrella damages, the number of publishers is going to be much larger than the
5 number that we have identified and that's not a point that is addressed in any of the
6 evidence that the Class Representative has served for this hearing, and it's not
7 supported -- as far as we can tell -- by any evidence. Dr Latham's analysis, we can
8 see, was based on estimates from publicly available data that he had used. But we
9 can see that so far as the main damages claims are concerned, that is falsified by the
10 data that's actually now being given in disclosure.

11 So far as the main damages are concerned, that is inconsistent with what the
12 disclosure shows.

13 JUDGE LEECH: Where do you get that from?

14 MR PATTON: We're using the AdX revenues as a proxy. If you use the
15 AdX revenue --

16 JUDGE LEECH: We can't decide how good a proxy it is.

17 MR PATTON: No, I'm not suggesting you have to decide.

18 JUDGE LEECH: I mean, let's say the entities or individuals identified in Annex C,
19 Freshfields letter, identifies a number of large -- the figures don't actually matter that
20 much, I think. I mean, what's more concerning, I think, is whether they're truly
21 representative. That's the second point he makes.

22 MR PATTON: The second point.

23 JUDGE LEECH: But let's say that they -- your percentages of the overall damages
24 take are wrong, nevertheless, the entities you've identified -- if they are members of
25 the class -- are likely to recover quite a lot. But that's all we can really -- that's we have
26 to approach this -- that's the best we can really make of the evidence before us, isn't

1 it? Would you accept that?

2 MR PATTON: I think I would accept that, and that's because that's the only evidence
3 you've got on this subject. The class -- my learned friend makes assertions now, but
4 the Class Representative hasn't sought to put any other or different evidence before
5 you. But that's all the evidence you need to grant the relief that we're seeking. You
6 don't need to go beyond that; you don't need to decide what is the actual percentage
7 of the overall damages that they would be likely to recover.

8 It's sufficient that these are large commercial organisations who, using the best proxy
9 that we have, look set to, if the claim succeeds, recover a very, very substantial sums
10 of money.

11 JUDGE LEECH: Again, I'm not necessarily -- I just want to tease out a bit more, which
12 is that you don't necessarily accept that they're all, in fact, members of the class,
13 I think, because --

14 MR PATTON: We don't know.

15 JUDGE LEECH: We don't know, so it may be the best proxy we've got, but how
16 reliable is it, is the question I'm really asking you. Because we can't say for certain
17 whether your numbers are correct and we can't say for certain whether all the
18 individuals or entities in the list are -- it seems likely that they are, because you'd
19 expect them to be trading its jurisdiction. So you -- I mean, they might just simply have
20 a branch office, which isn't the same test, was it? As being UK domiciled --

21 MR PATTON: The fact that they've been billed from the UK, they've used the UK
22 billing address.

23 JUDGE LEECH: But I'm saying you could have a branch office.

24 MR PATTON: That's possible.

25 JUDGE LEECH: Yes, so I mean it doesn't automatically follow the fact that you give
26 a billing address in the UK that -- I mean, I'm not saying you're necessarily wrong, but

1 I'm just trying to work out how -- quite a lot follows really; if we're with you on this point,
2 quite a lot follows from that, which is the point. I mean, it seems to me that the question
3 of the having a number of large publishers or -- if you do have them and they're likely
4 to recover large sums of money, then it seems to me the proportionality question really
5 goes away, but it's that really -- and if they haven't engaged, perhaps they ought to,
6 you know.

7 So it's really the reliability of that information. And it has been challenged and they
8 say, well, you know, this is the wrong time for us to carry out this exercise. We will be
9 coming to it. So they say, "Why should we have to carry out a similar analysis to put
10 it before the Tribunal now?"

11 So let's say that their position is defensible. How reliable is it for us to rely on their
12 information? I mean, in principle, if you're right, it seems to me it's a strong reason for
13 making the order you see. But can we be confident that the information you've set
14 before us is sufficiently accurate to justify making the order? That's really the question
15 I find difficult about this application.

16 MR PATTON: Well, you've got to bear in mind that the data that we're talking about
17 is data that's been disclosed in the proceedings in February. So it's data that's been
18 available to the Class Representative, they've been able to interrogate it, they've been
19 able to get Dr Latham to look at it, and presumably he will have --

20 JUDGE LEECH: There is a surprising -- I mean, on its face, there's a real difference
21 between what Dr Latham says and -- who knows, if this information had been
22 available, the CPO might have taken a different course, particularly in the light of
23 evidence. But this isn't information that we collected at the time or put before the
24 Tribunal when the proceedings were certified, and the proceedings were certified on
25 the basis of Dr Latham's numbers. You know, I mean, that's the position -- that's quite
26 a strong point in Mr Facenna's favour.

1 MR PATTON: But the point is that that's what he was able to do with what he had
2 two years ago. He's now had this data from February of this year and there is
3 absolutely nothing before the Tribunal from him to explain whether he has now
4 reconsidered what he said two years ago without this data and how it impacts on that,
5 whether he thinks it actually doesn't affect his analysis for some reason.

6 My learned friend is simply taking you back to the expert report that predates the
7 disclosure of this data and invites you to say, "Well, that still stands", but Dr Latham
8 hasn't said that, and if Dr Latham was in a position to say that, that's the evidence you
9 would expect to be before you today. I mean, there's no suggestion that Dr Latham
10 has been unavailable, he's been unable to look at any of this. But there's a resounding
11 silence from Dr Latham about this.

12 So although the evidence is now criticised in submissions, that's not actually how you'd
13 expect this to be done. The Class Representative is very well resourced, it's got huge
14 legal teams, it's got a very experienced expert and you'd expect evidence to be put
15 before you to say, "Well, it's actually not a good proxy for the following reason", or, "It
16 doesn't correspond in the way that we suggest", or, "These are unlikely to be UK
17 domiciled entities", and none of that is here.

18 And then going beyond that, obviously our --

19 JUDGE LEECH: Just remind me the date.

20 MR PATTON: 21 April.

21 JUDGE LEECH: So they've had a month.

22 MR PATTON: A month, exactly. And there's no suggestion that they've been unable
23 to do that. Simply, there's just a silence in the evidence.

24 DR MAHER: So the point about the AdX revenues only represent 20 per cent of the
25 overall damages and the damages also include the umbrella effects and ad networks.
26 How does that fit in with the ability of what you're relying on it for?

1 MR PATTON: Well, obviously we don't -- whether these umbrella damages will ever
2 materialise is obviously a very heavily contested issue and in fact, the Freshfields letter
3 makes its own criticisms in relation to the umbrella damages calculation and
4 challenges Dr Latham's analysis on that and there's been, again, a resounding silence
5 in response.

6 We're leaving that point on one side. Even if all that we are able to tell you is that
7 these are percentages as a proxy for the main head of damages, for the principal -- the
8 primary head of damages, if I can call them that, before you get to the umbrella
9 damages, those are themselves in the billions and so these are percentages of huge
10 sums of money.

11 JUDGE LEECH: Would the findings of fact the Tribunal make in relation to what's
12 called the "direct" damages -- as opposed to the indirect -- have a bearing on the
13 umbrella damages, or are they completely discrete legal issues? (Pause)

14 MR PATTON: They're almost bound to be connected.

15 JUDGE LEECH: There's bound to be overlap somewhere.

16 MR PATTON: There's bound to be an overlap -- there's bound to be some sort of
17 overlap.

18 So what one is looking for is material from the publishers themselves that will inform
19 the Tribunal's analysis and here what the Tribunal can be confident of -- on the basis
20 of all the evidence you've got before you -- is that there are large commercial
21 organisations with very substantial claims, even if those claims don't yet take into
22 account the umbrella damages, and those are parties who should be expected to
23 engage in the litigation by providing data and disclosure.

24 DR MAHER: What, in respect of Mr Facenna's point, that they haven't finalised
25 disclosure, and that a lot of the information that Google is seeking from class members
26 is possibly within Google's remit. They might have that, for example, on the header

1 bidding. So also taking into account the concerns that a lot of this information by large
2 publishers may be -- they might be reluctant to provide that information, given how
3 commercially sensitive it is to them.

4 Wouldn't it make more sense to maybe review first the disclosure and what information
5 is available in disclosure before approaching class members or having the experts
6 then say, "Well, this information -- we still need it, and is not available".

7 MR PATTON: There are two issues with that, and I'll be repeating what I said earlier
8 this morning. But the first is that the material that we're seeking is peculiarly concerned
9 about the publisher's own actions and their rationale. Now, can you find that Google
10 has drawn inferences for its own purposes as to what it thinks publishers see as being
11 important? Of course, there will be material of that kind in there, and I accepted that
12 this morning.

13 But the issue isn't: should we make do with the scraps that fall from Google's table of
14 what Google thinks about publishers? Why should the Tribunal disable itself from
15 actually having the material directly from the publishers themselves, which gives you
16 the actual answer? And of course it's going to be possible -- they pointed to a couple
17 of documents which show that Google is thinking about things from a publisher's
18 perspective, or trying to make judgments about what the publishers are interested --

19 JUDGE LEECH: You'll have to guide me in relation to this. What kind of corpus of
20 knowledge would you require in relation to the way publishers behave? The subjective
21 views of one or two publishers? I take your point about Google but, say the subjective
22 views of one or two publishers might have some sway with the Tribunal. But what
23 you're trying to establish is the behaviour of, effectively, a class of actors in the market;
24 aren't you?

25 MR PATTON: That's right.

26 JUDGE LEECH: So the subjective evidence that you might obtain from, let's say, the

1 number that we're talking about, how much probative value does that have when we
2 are coming to make, you know, detailed findings of fact about all of the key issues.

3 MR ALTY: Can I just add to that, because you were going to come on to the
4 representativeness of those organisations. So they are large, let's assume. But
5 equally, we don't know how large the class is. So you may get a rather distorted view
6 of what's going on simply by asking those organisations.

7 MR PATTON: As I said before, the benefit of having materials from these publishers
8 is that, at least looking at the primary way in which damages are calculated, what they
9 do is there to represent a large proportion of those damages. So it will be very
10 important to the Tribunal because, by value, their conduct and their rationale, and so
11 on, goes to a great proportion of the claim.

12 I'm not excluding the possibility, as I hope I made clear, that the Class Representative
13 may say, "Well, actually, it's important to look at some other examples to make sure
14 that it's representative". Our draft order makes provision for the Class Representative
15 to raise that. It's simply that we have concentrated on these largest publishers in part
16 because they account for so much of the claim value as far as we've been able to
17 estimate it, but also because of the proportionality concern which is obviously
18 something that you have to consider. If the answer is: it is better to have material from
19 these publishers than to have no material from the publishers, it's clearly better for the
20 Tribunal to have access to information from these publishers. If someone wants to
21 make a contextual point at the trial about, it would be different for a smaller publisher,
22 then they can lead evidence to that.

23 JUDGE LEECH: My question is slightly different, which is what is the probative value
24 of factual evidence as opposed to, let's say, economic evidence about the market or
25 about the behaviour of the parties? If you've got anecdotal evidence, let's say, from
26 a group of individual publishers generated through the kind of disclosure exercise

1 we're talking about, will that largely be taken and processed by the experts or will we
2 be asked to make findings of fact on the basis of it?

3 MR PATTON: I understand. Is this going to the timing question?

4 JUDGE LEECH: It goes to the necessary -- I mean, if this is essential evidence then
5 your case, in a sense, improves. But if it is just more material for the -- I mean, I hear
6 what Mr Facenna says about he doesn't necessarily accept that it should be expert
7 led or expert driven. But I'm just trying to focus in my own mind. You have far more
8 experience than I of these issues, of the actual probative value of the evidence coming
9 from these. As a finder of fact, I'd much rather have evidence from the horse's mouth
10 but if it's not actually going to inform the evidence the experts give, I'm less concerned
11 about it.

12 DR MAHER: If I can maybe add something slightly different on that same point, it's
13 that Google is also a very sophisticated entity. While you refer to it as always being
14 second-hand knowledge, I'm quite sure that they're well aware of how their major
15 clients' incentives operate and how they work. So, again, my concern is that a lot of
16 this information is already available within Google's disclosure.

17 MR PATTON: Well, I don't think I can add to what I said previously in relation to that
18 question. But in relation to the chairman's question, in terms of the data -- so that's
19 Appendix 2 to the order -- that's transaction data. That, no doubt, will be needed by
20 the experts.

21 JUDGE LEECH: I was thinking more of Appendix 3.

22 DR MAHER: Exactly.

23 MR PATTON: There are really questions of primary fact here. They're not just, let the
24 expert tell you what they think, how it works. So, for example, how did publishers
25 configure the software and why did they do it? That's a question of fact for the
26 Tribunal. It's not for an expert to tell you how they configure a particular piece of

1 software, and it's not for an expert to speculate about what reasons -- I mean, an
2 expert could tell you, "Well, I think they would have this incentive to do it, or that
3 incentive". But what you actually want to know is why did they in fact do it? What was
4 their reason for doing it in that way? As you put it, you want the evidence from the
5 horse's mouth. You don't want some expert lecturing you about why they think that
6 might have been the case. You need the primary documents to reveal that.

7 JUDGE LEECH: How much more time do you want? If your reply is not going to be
8 very much longer it would be nice if you could finish off and then take a slightly later
9 lunch break. If you're ready, if you're happy to keep on going.

10 MR PATTON: Yes.

11 So my learned friend came close to saying that getting the best evidence -- ie,
12 evidence from the horse's mouth -- doesn't satisfy the necessity test. We
13 fundamentally disagree with that because we think you, as a Tribunal, are in the
14 business of deciding the case on the best evidence and therefore that does satisfy the
15 necessity test. So that is really the critique of Dr Mujumdar. On a point of detail, it
16 was said he isn't in the confidentiality ring yet. He is now in the ring. He didn't need
17 to be in the ring, just to be clear, to review Google's confidential information, and that's
18 the information in question. So the ring point is absolutely a red herring.

19 My learned friend said that our requests were broad but, as I pointed out this morning,
20 his side have never engaged with the formulation of these requests. If they --

21 JUDGE LEECH: (Overspeaking) paragraph 42(a) is designed to deal with that. If
22 they've got real issues about the requests, they've got to meet and agree.

23 MR PATTON: Exactly.

24 JUDGE LEECH: It seems to me that any order we make ought to be subject to you
25 coming back, if you can't actually agree about the questions.

26 MR PATTON: On the point of timing, he said that when they wrote the letter of

1 2 December, they thought Google's disclosure would be finished last year. I mean,
2 that can't possibly be correct. That hasn't been suggested in the evidence. The CMC,
3 if you recall, took place before you on 18 December so it was obviously not going to
4 result in all the disclosure being given by the year end. The idea that the disclosure
5 arriving in February was any later than expected really just doesn't fit on that
6 chronology.

7 JUDGE LEECH: The only real question on timing from our perspective is whether it
8 would be better to carry out the disclosure review first. Subject to that, if you're entitled
9 to the order it's better that you have it straight away. I think the real question is whether
10 it's better to insist that the review of disclosure comes first.

11 MR PATTON: Yes.

12 But, as I say, there's the further timing point of when the statements are due in
13 February. The only answer really put forward to that was, "Well, Google's witnesses
14 don't need to review this material to give their witness evidence". But that ignores the
15 prospect of fact witness evidence coming from the class members which, certainly, we
16 would expect the Class Representative would wish to adduce.

17 JUDGE LEECH: I think the key point that I'd like to address is Mr Facenna's point
18 about the mechanics of this. The CR, who is the party against whom the order is
19 made, all he has to do is ask questions. But ultimately, if push comes to shove and
20 a request is made for an order against the individual class members themselves, the
21 point he made which chimes with me: he said there was no search mechanism and
22 no provision for costs. I mean, in practical terms, he says you're getting a third-party
23 disclosure order without any of the checks and balances which it would normally
24 contain. I think that is a concern.

25 MR PATTON: As far as the search mechanism is concerned, all of paragraph 47 of
26 the draft order, it's just a request that they conduct a reasonable and proportionate

1 search. So it's not an absolute obligation to generate every possible document that
2 comes within these categories. It's a request at this stage, not a direction.

3 JUDGE LEECH: Yes.

4 MR PATTON: Because that's a reasonable proportionate search. The sort of entities
5 that we are dealing with here, I mean, they will be very familiar with that. That these
6 are entities that are very frequently in litigation.

7 Can I just -- on who the entities are -- ask you to have a quick look at E1, page 3. Just
8 because this is relevant to a number of submissions that were made. This is
9 a Freshfields letter which is confidential.

10 JUDGE LEECH: Is this 21 April?

11 MR PATTON: It's not, actually. It's 13 May. (Pause)

12 So you've got the list in annex (c) of the 21 April letter. I'll explain in a moment why
13 I'm taking you to this letter.

14 DR MAHER: Which paragraphs should we ...

15 MR PATTON: Paragraph 13.

16 JUDGE LEECH: 13, yes.

17 MR PATTON: It's just in the third line. The reason I draw attention to this is that you
18 may not have recognised, necessarily, the first name on the list from annex (c), but
19 that explains who they are. As I say, they are the sorts of people who would be very
20 familiar with having to conduct reasonable and proportionate searches for data and
21 documents, and who are not going to be chilled by a request that they know is in
22 litigation involving Google. If they're in that litigation, they're in that litigation anyway,
23 whether or not this request is made. The request doesn't really change that.

24 There was another point you'd asked me to come back.

25 JUDGE LEECH: Well, it's just that --

26 MR PATTON: Costs.

1 JUDGE LEECH: Costs, yes.

2 MR PATTON: In relation to costs, it's true it's not in this draft order but I think I made
3 clear this morning we would be entirely content for the Tribunal to reserve a question
4 of those costs to itself.

5 JUDGE LEECH: Including whether costs would be payable to the third parties
6 themselves.

7 MR PATTON: That would be a matter for your discretion. We would submit that that
8 would be something that you would exercise your discretion on in the light of your
9 judgment on costs in the proceedings as a whole.

10 JUDGE LEECH: But you'd accept that the Tribunal would have power to require you
11 to pay the costs of the members who answered any request. I mean, we'd have the
12 power to make such an order.

13 MR PATTON: You have the power. We submit that this is not third-party disclosure
14 and so their body of cases dealing with what you do about costs and third-party
15 disclosure is --

16 JUDGE LEECH: If we reserve the question of costs, that would include costs payable
17 to the individual members who actually provide the disclosure.

18 MR PATTON: It would; it would.

19 Just finally, if I may, on timing. Our concern is that if this is left until later, then the
20 whole of the directions that you set at the last CMC do become under great pressure,
21 including the trial date. That's why we have sought to act as quickly as we can to bring
22 this application before you, at the CMC. But, as I've explained, if there is going to be
23 a problem with fact evidence going in February, I mean, those deadlines have been
24 carefully calibrated to make sure that the existing trial, so far as possible, can happen
25 when it's been listed, in September 2028. We are concerned that that would then have
26 to be revisited if this question can't be dealt with now.

1 Thank you very much for bearing with me.

2 JUDGE LEECH: 2.10.

3 (1.13 pm)

4 (The short adjournment)

5 (2.13 pm)

6 JUDGE LEECH: Yes. Where are we going next?

7
8 Submissions by MR FACENNA

9 MR FACENNA: Sir, so on the agenda, we're moving next to items 2 and 3, which are
10 requests for production of the confidential version of the European Commission's
11 decision from 5 September last year, and requests for production from the pre-existing
12 disclosure. I think I've agreed with Mr Patton, in particular because he has some
13 points he wants to make which are overarching across both. I'll make my submissions
14 on both of those and then you can hear from him.

15 So this part of the case really is concerned with further disclosure from the pre-existing
16 universe of materials which have been collected and are held by Google following
17 overlapping procedures in other jurisdictions.

18 The first aspect relates to the confidential EC decision. The arguments are set out in
19 row one of the Redfern schedule and in the composite draft order. The directions
20 which we are speaking about start at paragraph 24.

21 The class rep is seeking the EC decision for effectively practical case management
22 and disclosure review purposes. The Class Representative is not seeking to rely on
23 the Commission's findings as proof of liability. Effectively, the purpose of seeking the
24 unredacted version is to identify what underlying evidence matters, and where it is
25 within the documents which, in relation to the EC, we mostly already have actually.

26 The request, as you are now asked to deal with it, is narrower than it was originally

1 framed. It's accepted that the unredacted version which is to be provided should still
2 have redacted from it any without prejudice material and any material which is referred
3 to as Pergan material. It's referred to as Pergan material, which is a reference to
4 a general court decision. That's essentially material that might be incriminating of
5 a third party, which didn't have appropriate defence rights. There's an established
6 understanding of what that would encompass.

7 We are now proposing a 21-day timetable for an interim confidential version to be
8 provided with the redactions relating to Google removed, save for the exceptions I've
9 just mentioned. So the first thing would be within three weeks Google removes the
10 redactions relating to its own material. We were originally asking for that within seven
11 days.

12 Then we've proposed a process for dealing with any concerns that might be raised by
13 the Commission or third parties through a series of directions which propose
14 a notification procedure. I'll come on to deal with those, but they reflect the approach
15 that's been taken in other cases. Of course, disclosure would only be into the
16 confidentiality ring in any event.

17 So the directions are at paragraphs 24 to 33. The reason why this document really
18 matters is to make the disclosure that we have usable. I can give you some concrete
19 examples of this.

20 You might recall that the pre-existing disclosure, which you have already ordered to
21 be provided, essentially includes the material that was provided to the European
22 Commission. So our understanding is that we already have most of the material that
23 the Commission would have relied on, or would have had access to. The basic point
24 is the public version of the decision is extremely heavily redacted. I'll give you, in
25 a minute, an example of that. The documents the Commission relies on; what it says
26 about those documents; what the documents establish; what the documents really are:

1 | those are redacted effectively in the public version.

2 | So one needs the confidential version to identify both what these highly relevant
3 | documents are within Google's production, to understand their significance, and then
4 | also to identify gaps in the material that we have already had disclosed to us. The
5 | other aspect of this is that this is currently the only -- well, certainly the most important
6 | resource which we'll be able to be used to train the AI models, which we are then
7 | relying on to be able efficiently to go through the currently three million, likely to be
8 | more, documents, which we need to get through in order to obtain a sensible subset
9 | of highly relevant documents.

10 | That's been explained. There's a witness statement from Mr Streatfeild, Streatfeild 4,
11 | which was served in accordance with the Tribunal's directions. What then happened
12 | was that Mr Frey, on behalf of Google, put in evidence which included a number of
13 | criticisms of the class rep's approach. You will have received, I think, a copy of
14 | Streatfeild 5 yesterday.

15 | Google objects to that witness statement going in. I don't think I need to get into the
16 | detail of it. All I'll say about it is this. It seems to be accepted that what's in Streatfeild 5
17 | could have gone in a letter. It's fine. If it needs to go in a letter, it can go in a letter.
18 | Mr Streatfeild was correcting what appeared to be misunderstandings and
19 | misapprehensions in Mr Frey's evidence about Streatfeild 4. Really in Streatfeild 5,
20 | it's actually quite detailed about the review process and the AI processes and how
21 | they work, and the degree to which there's human input. So it seemed to us it was
22 | appropriate to put it in evidence. I don't think I need to say more than that, subject to
23 | what Mr Patton wants to say about that process.

24 | The really important thing is that obtaining the EC decision -- the confidential parts of
25 | the EC decision -- will materially assist that process. To put it bluntly, currently, there's
26 | a limited way into the 2.8 million documents that we have. As I'll show you, the

1 European Commission's decision is likely to be the best way through those
2 documents. That's also Mr Streatfeild's evidence in both his fourth and fifth witness
3 statement.

4 Now, to be clear, it's not an attempt to shortcut the evidential burden. In this case, it's
5 essentially about obtaining a practical case tool to speed up the review.

6 If I can show you the decision, the public version of the decision, to show the practical
7 need for this. Before I do that, to make the point good, if I can show you, first of all,
8 the agreed list of issues. That's in bundle B1, tab 4. I was going to take you to
9 page 350.

10 So this is the agreed list of issues. In relation to the "Third Abuse", I just wanted to
11 show you, list of issues 18(1)(d). You'll see there that the issue there is that prior to
12 the introduction of the "Unified First- Price Auction in 2019", one of the ways -- sorry,
13 I should have started, in respect of Google Ads, one of the ways in which Google Ads
14 treated AdX more favourably was by submitting only the highest bids to third-party
15 SSPs, compared to its submission of two highest bids to AdX, so when the Google
16 Ads part of the infrastructure was submitting bids into the marketplace, when it was
17 doing it to Google's own SSP, AdX, it would submit two bids, whereas it would only
18 submit one to other SSPs, and there are various other elements of that. So I just
19 showed you that. If I then take you to the EC decision itself, the public version. That's
20 in B4. It has, I think, a bundle all to itself. If we look at the contents page first, which
21 is on page 4 of this bundle. So you'll see, where I'm going to take you in the EC's
22 decision is number 8. So at the very bottom of that page you'll see "The abuses". The
23 very last item is chapter 8, abuses.

24 Over the page, section 8.3 is that "The Buy-side Conduct departs from competition on
25 the merits". Then 8.3.2 is that "Google Ads ... have been favouring AdX". 8.3.3 is
26 that:

1 "When engaging in Buy-side Conduct, Google uses resources inherent to its dominant
2 position on certain markets, leveraging that dominance into the [SSP market]"

3 8.3.4, which is where I'm about to jump to, is a section under here which sets out the
4 Commission's case on why the circumstances of this case fall outside the scope of
5 competition on the merits. So if we then go to 8.3.4.1, which is on page 171 of the
6 bundle. (Pause)

7 So 8.3.4.1:

8 "By engaging in the Buy-side Conduct, Google acts against the interest of Google Ads
9 and DV360 as well as ... advertisers and media agencies."

10 So that's where this section starts. You then get recitals (955) and (956). There's then
11 a section about Google Ads' demand being channelled preferentially through AdX.
12 You can see the various heavy redactions in the paragraphs in that section. But the
13 section I wanted to show you just to make my point good is the next one, 8.3.4.1.2,
14 which is over the page, at 173 of the bundle.

15 The Commission's numbering is pretty horrendous really to navigate your way through
16 this. In that section, so it starts at "(973)". These paragraphs address matters which
17 are directly relevant to the aspects of the third abuse, which I just showed you before,
18 including the practice of deliberately second pricing itself on a substantial number of
19 AdX impressions. You see that at (973) onwards.

20 Just running through that section, (973) refers to the practice of deliberately pricing on
21 AdX, (974) describes how that works as referenced to Google internal documents
22 quantifying something which is redacted. Then you can see the extent of the
23 redactions at (975). So another Google document confirms we don't know. The
24 footnote itself is redacted. So there's no way, when you go through those paragraphs,
25 (976) is entirely redacted, (978) refers to another internal Google email. (979) to (980)
26 are redacted in their entirety, including the footnotes. So it's not possible to identify

1 | what documents are being referred to or what the Commission found that those
2 | documents show. This is just one example where one can read it directly across to
3 | one element of the list of issues in our case.

4 | So having the confidential version of this document will immediately allow the parties,
5 | well, the Class Representative, to identify those. They're going to be highly relevant
6 | documents. We can understand why they matter. We can then immediately be able
7 | to train the review tools which are being used on the underlying documents, and to
8 | identify genuine gaps in the production.

9 | As Mr Streatfeild explains, that's going to lead to direct time and cost saving. It is, we
10 | say, entirely consistent with the principle of the approach that the Tribunal has
11 | endorsed in our previous two case management hearings, and it is, moreover,
12 | consistent with the practice which has been adopted in other cases.

13 | Just on those points, so far as these proceedings are concerned, I don't need to
14 | remind you, I don't think, that at the last CMC, this Tribunal accepted simply as
15 | a matter of common sense that having the non-contemporaneous DOJ materials
16 | would be useful in exploring the issues and identifying the key relevant documents. If
17 | you need the reference for that, it's in the transcript of the last CMC at bundle 3,
18 | page 216, lines 17 to 21.

19 | The same logic which underpinned the decision the Tribunal took last year applies
20 | here, we would say, with greater force. This is a single decision by the European
21 | Commission applying a substantive competition regime and law framework, which is
22 | much more similar to the framework in which we are operating than the US
23 | proceedings. It's dealing with directly overlapping EU conduct, which actually
24 | intersects with the pleaded claims in this case, which do include a pre-2020 claim
25 | under article 102 of the TFEU.

26 | You may recall that the pleaded geographic market in this case is also either a UK or

1 an EEA market. So there's a direct read across, directly relevant. It is plainly going to
2 be a highly useful document to enable the parties in this case to make progress
3 through the substantial body of disclosure documents.

4 It's also consistent, we say, with what the Supreme Court said in Evans. There's
5 a point in Evans taken against us, but as I hope I've made clear, we are in no sense
6 seeking to rely on this to circumvent Hollington v Hewthorn, or to rely on the
7 Commission's findings. It's really to identify the underlying evidence and find a way
8 through that and that is one of the -- well, it's described as an exception to
9 Hollington v Hewthorn. I think in Evans at paragraph 159, they say it's actually not an
10 exception, because that kind of use is not inconsistent with the rule.

11 JUDGE LEECH: 159?

12 MR FACENNA: It's 159. My learned friend might take you to Evans, but it's Authorities
13 Bundle 757. (Pause)

14 Should we just look at it quickly?

15 JUDGE LEECH: If you want to. (Pause)

16 MR FACENNA: Yes, authorities 757. It's actually 158 and 159. And effectively what's
17 said there is that it's consistent -- or it's not inconsistent with
18 Hollington v Hewthorn -- to rely on findings of another decision maker for the purpose
19 of identifying evidence which can reasonably be expected to be available at trial and
20 that is essentially the use to which we're proposing to put the European Commission's
21 decision. What evidence is there in the documents that we already have? What do
22 those documents say? Where are we going to find the most relevant documents and
23 then use that as a guide through the body of evidence that we already have?

24 Indeed, we would say that Evans actually supports the position that we adopt. If, as
25 we now know, post Evans, the position is that you cannot rely on findings of another
26 decision maker, it makes it all the more important, we would say, not less, to be able

1 to identify and understand the underlying evidence itself and to be able to do that in
2 an efficient way.

3 So those are the headline points on disclosure of the Commission's decision on
4 notification and confidentiality of third parties and we obviously recognise that that
5 needs to be addressed at the second stage, once you've gone through the
6 unredactions of Google's documents and we've dealt with this in our order at
7 paragraph 25 onwards and the approach that we've taken there is consistent with -- in
8 fact, it largely mirrors the approach that actually Google is undertaking in another case,
9 in this Tribunal. That's the Stopford case. So there's an order of Mr Justice Meade in
10 that case from last year, which perhaps I could show you first. That's the Authorities
11 Bundle, page 846. (Pause)

12 And it's paragraph 15 onwards in the Stopford order, you see that what's been put in
13 place there is, first of all, notification to the European Commission within 14 days, and
14 you'll see that included within the documents to be disclosed are the confidential.

15 JUDGE LEECH: I'm sorry, I've lost the page.

16 MR FACENNA: It's on page 851.

17 JUDGE LEECH: Thank you.

18 MR FACENNA: So the defendants -- that's Google in this case -- to write to the
19 Commission within 14 days, of notifying them of their intention to disclose and provide
20 inspection of the materials listed below and you'll see at B that includes a confidential
21 version of the Commission's decision. And then there's a period of 14 days for the
22 Commission to make an application to the Tribunal.

23 16(a) in this order provides that the defendants can withhold initially from inspection
24 documents in respect of which they owe any duties of confidentiality to third parties.

25 And then 16(b) sets out a process by which the third parties will be notified and the
26 recipients can themselves raise any objection or apply to the Tribunal to vary the order

1 and so on.

2 Now, without going through the detail of it, essentially what you have in paragraphs 25
3 to -- I think it goes through to 33 of our draft order, basically mirror exactly what has
4 been done in Stopford.

5 JUDGE LEECH: While we're there, what about 34? Because there was some debate
6 in the skeletons, I think, about --

7 MR FACENNA: Yes, that's gone. You can assume that. I think that's been agreed;
8 it's been dealt with in correspondence. So that's --

9 JUDGE LEECH: Are we being asked to make an order?

10 MR FACENNA: No. I think on the basis of the correspondence, you can treat that as
11 going all together, I think.

12 JUDGE LEECH: Yes.

13 MR FACENNA: So that would be row two on the Redfern schedule; you should treat
14 it as being green. So it's 25-33, and if you do a comparison side-by-side of the
15 Stopford order and our order, it's basically the same thing.

16 JUDGE LEECH: I mean, the rubric that you propose to us. If we're with you in
17 principle; the rubric you've proposed looks sensible.

18 MR FACENNA: Yes. I mean, it essentially shows that Google -- I mean, you could
19 hear my learned friend on them, but they raise a surprising number of concerns about
20 whether they have contact details, can they get the contact details, what if there are
21 some people they can't find, how they deal with all of this, that's going to take a long
22 time and so on. I think the basic point is Stopford shows that those concerns can
23 be -- to the extent there's any merit in those concerns, there's a way to manage them.
24 I mean, essentially, the role that's left for Google -- under the Stopford mechanisms
25 and the ones we've proposed -- are first of all to notify the Commission, then to notify
26 relevant third parties, paragraph 28 of our order requires them -- or it might be 27 -- to

1 use reasonable endeavours to do so and then they would need to report any
2 non-responses to the Class Representative. So this is not an open-ended consultation
3 exercise; it's a notification exercise.

4 JUDGE LEECH: The burden is then on the third parties to apply.

5 MR FACENNA: Precisely, and you'll see -- I don't think I showed you in the Stopford
6 order, there's a deemed notification provision in paragraph 9.

7 JUDGE LEECH: Now on the screen.

8 MR FACENNA: Yes. So --

9 JUDGE LEECH: Are you asking for a similar order? There's no deemed notification,
10 so I --

11 MR FACENNA: No I don't, I -- well, I think our view was that it wasn't necessary.

12 JUDGE LEECH: Okay, right. (Pause)

13 MR FACENNA: So that's everything I want to say on the EC decision.

14 So, in agreement with my learned friend, let me deal briefly then with the other
15 elements of the productions from the pre-existing disclosure again. So this concerns --

16 JUDGE LEECH: This is not a specific document request, is it?

17 MR FACENNA: Well, there are two different elements to it. There are first of all
18 materials from the DOJ and the Texas proceedings --

19 JUDGE LEECH: Yes.

20 MR FACENNA: -- and the process by which there should be further targeted searches
21 of those existing repositories. So that's in the Redfern schedule, rows five and six,
22 I think.

23 And then secondly, there's a limited number of very targeted requests, tied to specific
24 issues. That's in the Redfern schedule rules 9 to 14. (Pause)

25 Again, the issues -- I should say the issues are substantially narrower than they were
26 at earlier stages. On quite a lot of these we've managed to reach agreement, so either

1 various things are no longer pursued, or we've agreed to defer it for further discussion
2 between the experts and so on.

3 So the issue in relation to these items again is having a proportionate process --

4 JUDGE LEECH: Paragraph 7 onwards, just so we know where we are in the order.

5 MR FACENNA: Yes, so our proposals are paragraphs 7 to 12, and I believe that
6 includes -- does that include the reference to annex -- oh, and then 18 are the
7 individual items in the annex. I'm not going to deal with the individual items now,
8 I think; I'm going to deal with the DOJ and Texas items, and then you can hear my
9 learned friend on what I've said.

10 JUDGE LEECH: Yes.

11 MR FACENNA: We'll see where we get to. I mean, I can say now about those
12 individual items -- unless you're interested in getting into a deep merits discussion
13 about the relevance, I don't intend to say anything beyond what's in our skeleton and
14 in the Redfern schedule, which is: we've clearly identified where those explanations
15 can be tied to pleaded issues and on that basis, it doesn't seem to us why those
16 repositories shouldn't be included so that they can be properly searched and
17 interrogated.

18 JUDGE LEECH: Can we just make sure we've understood which bits -- what they just
19 refer to. These are the --

20 MR FACENNA: Well, yes, they're the residual categories. So they're in rows nine to
21 14 of the Redfern schedule and in the order they're covered by paragraph 18.

22 DR MAHER: And are they the ones covered in Appendix 1?

23 MR FACENNA: Appendix 1, yes. They're in Appendix 1.

24 JUDGE LEECH: And you've dealt with them, paragraphs 31 onwards. Apart from
25 Texas and DOJ, you've dealt with all those individual ...

26 MR FACENNA: Yes, so we've dealt -- our position summarised in the Redfern

1 schedule, in rows nine to 14, and it's also in our skeleton argument at paragraphs 45
2 to 51.

3 JUDGE LEECH: So are you leaving us to make up our minds about those?

4 MR FACENNA: Well, we'll see. I mean, if there's time and we need to get into it, then
5 I can take you through some of those points, but they're quite detailed, and we've dealt
6 with them in a bit of detail on the skeleton argument.

7 On the DOJ and Texas documents -- again, the issue is having a proportionate
8 process for finding relevant material within them. These are existing repositories
9 which Google already has. Our proposal effectively is that we would agree some
10 search string filtering of these additional bodies, which will narrow and target the
11 particular sets of documents amongst that body of evidence, which by definition has
12 already been captured by targeted requests by the US authorities.

13 Google's primary proposal, which you'll no doubt hear my learned friend on, is that any
14 further production should be limited only to documents that were actually cited by
15 experts in the DOJ litigation itself, in the trial. We have obvious difficulties with that,
16 given the limited --

17 JUDGE LEECH: Could you just tell us what they are, please. Because: why is it that
18 at least on the first round, what you get out of the litigation is not -- why you need the
19 investigation documents as well as the litigation?

20 MR FACENNA: Well, so the way it works --

21 JUDGE LEECH: Just -- for someone coming to this cold, I should -- the relevant
22 documents are likely to be the ones that everybody spoke to or put to witnesses in the
23 actual litigation.

24 MR FACENNA: I should have explained this. So the way it worked was: in response
25 to essentially three requests, Google produced about roughly three million
26 documents -- which are the DOJ investigation documents -- those were the documents

1 on the basis of which the various attorneys general started the proceedings. Now,
2 once the proceedings were on foot, Google also produced around the same number
3 again, and that's what's been referred to as the "DOJ litigation documents", So they
4 were disclosed in the proceedings. And those are this 2.8 million documents that
5 we've previously been discussing.

6 It's since become clear that when Google produced those documents in the DOJ
7 litigation, it removed anything that it had already disclosed in the investigation.

8 JUDGE LEECH: So you say, well, it's more likely that the stuff they produced first time
9 round is going to be the most relevant, or at least it's got relevant documents in it.

10 MR FACENNA: Exactly, as a minimum. And again, if you see in our skeleton
11 argument, those were targeted requests in relation to the investigation documents and
12 so on.

13 Now, I can give you chapter and verse on the correspondence references and so on,
14 but I don't think anything of what I've said is disputed. I mean, they've said that the
15 DOJ litigation documents didn't duplicate anything that had already been provided in
16 the investigation. That's a letter from 29 April 2026.

17 JUDGE LEECH: Just give us the reference.

18 MR FACENNA: The reference to that is C1, 2675, and it's paragraph 24. And so
19 where we've ended up -- and again I don't understand this to be disputed -- is that
20 2.8 million DOJ litigation documents have been produced, but we believe that only
21 about 2 per cent of the DOJ investigation documents have been produced, and that's
22 in Mr Streatfeild's statement, number 4.

23 JUDGE LEECH: How did they come to be? I mean, did they do a filleting exercise,
24 or was it just that there is that 2 per cent overlap?

25 MR FACENNA: We think that there's that 2 per cent, because if you recall some of
26 the debates that we had in the previous CMCs, we got slightly more than just the

1 DOJ litigation documents. I think there were other data sets. Yes, those might have
2 been in the group of documents that were provided to the Commission.

3 JUDGE LEECH: So at the moment, they have not independently disclosed anything
4 in the DOJ investigation documents --

5 MR FACENNA: No.

6 JUDGE LEECH: -- other than that you've received through other sources.

7 MR FACENNA: Exactly. No, we haven't had those. So the relevance of those
8 documents, we say, it's pretty obvious that there's going to be relevant material in
9 there because there's a very substantial overlap between the DOJ process and these
10 proceedings. Again, this is dealt with in Streatfeild 4.

11 DR MAHER: Just so I can clarify something: the DOJ litigation documents, the overlap
12 of those documents which were provided during litigation, the overlap with the DOJ
13 investigation documents is minimal.

14 MR FACENNA: There's none. They were completely non-duplicates. Well, there
15 might not be none but --

16 DR MAHER: But it's minimal.

17 MR FACENNA: Google have said in correspondence, they were additional documents
18 and there was a deduplication exercise.

19 DR MAHER: Okay.

20 JUDGE LEECH: So the dividing line between them is not one of relevance, or the fact
21 that they were deployed in the litigation. It's just purely timing. Some were disclosed
22 before the start of litigation and some were disclosed after.

23 MR FACENNA: Precisely. That's our understanding.

24 Now, in terms of what was actually relied on at trial, some of the investigation
25 documents would have been relied on at trial. One point that's taken against us is
26 that, well, those are likely to be the most relevant things and they are in the public trial

1 exhibits.

2 JUDGE LEECH: They're in the public ...?

3 MR FACENNA: Most of the DOJ trial exhibits have been made public.

4 JUDGE LEECH: Yes.

5 MR FACENNA: So to the extent that there were documents which were actually relied
6 on --

7 JUDGE LEECH: You were able to get them from a different source.

8 MR FACENNA: We would be able to get them. But on our analysis -- which again,
9 I think, is set out in Mr Streatfeild's evidence -- there are about 300 DOJ trial exhibits.
10 There's two points here.

11 JUDGE LEECH: Can you just give us a reference in Streatfeild?

12 MR FACENNA: I don't have them easily to hand but someone can find it.

13 Now, there's an analysis which indicates that fewer than half of the public DOJ trial
14 exhibits are among the DOJ litigation documents that have been produced already to
15 the Class Representative. So the implication of that is that most of the remaining
16 public trial exhibits -- so that's around half of them -- are probably derived from the
17 DOJ investigation documents, which shows the importance of that body of documents.
18 Now, Google will say, "Well, those are the ones which are in the public trial exhibits.
19 That ought to be enough". But on our analysis, the number of those DOJ trial exhibits
20 which have not been disclosed in the litigation documents are about 300, which is
21 obviously less than 0.01 per cent of the original body of the DOJ investigation
22 documents. Have you followed that? Sorry, I hope that was sufficiently clear.

23 JUDGE LEECH: What do you expect to find? I mean, I understand that the cutoff
24 point is arbitrary from the point of view of relevance. But what about the trial exhibits?
25 Just to answer the point that might be made, which is that if you're going to find
26 a smoking gun, that's where it's going to be.

1 MR FACENNA: It's the same point they make, which is you should just have the stuff
2 that the experts refer to. There would have been a highly selective process focused
3 on the cases that were being proved in those foreign proceedings under different
4 procedures, seeking different remedies. Let me put it this way: the appropriate
5 disclosure in this case should not be determined by litigation decisions that were taken
6 by foreign litigants in foreign proceedings.

7 JUDGE LEECH: Anyway, they're not saying that there are no relevant documents in
8 litigation.

9 MR FACENNA: Absolutely not. No, they (overspeaking) --

10 JUDGE LEECH: In the investigation documents.

11 MR FACENNA: No. Absolutely not. They've never suggested that.

12 So what do we do about it? We're not saying, "Hand over those three million
13 documents". What we have proposed -- which is in the draft order at paragraphs 7 to
14 9 -- is that Google should set out which of the search strings, which are in schedule 14
15 to the explanatory note, should be applied to those documents. Then we'll try to agree
16 that with them by 19 June and then they'll produce the documents responding to the
17 agreed search terms. The point here is that what we're then doing, really, is applying
18 a second-stage filter. Because the repository itself -- the original three million -- was
19 created, for the most part, already using search strings which Google had to apply to
20 its internal document universe.

21 Again, they're in schedule 14 to the explanatory note. They're pretty incomprehensible
22 when you just look at them on the page. The basic point is this: there were three
23 investigative demands; two of them were based on search string searches and that
24 accounts for the vast majority of the three million documents; and we are now
25 proposing an approach where we, between us, seek to agree which search strings
26 might be best suited to find the material that's relevant to these proceedings.

1 JUDGE LEECH: Where is the reference to the DOJ documents in the draft order?

2 MR FACENNA: Paragraph 7 refers to the documents provided by Google to the DOJ.

3 JUDGE LEECH: Yes. (Pause)

4 MR FACENNA: Then we have basically the same approach in relation to the Texas
5 documents. The Texas documents, I mean, the same principles apply to that. There
6 were around 150,000 documents which were produced to the Texas attorney general
7 in connection with their investigation. Those were, again, later reproduced during the
8 DOJ proceedings without duplication. Google has identified a limited selection which
9 have now been disclosed to the Class Representative. But we have repeatedly sought
10 an explanation of how many of the Texas documents have been reproduced and we
11 haven't had an explanation as to that. So we know that we have some of them but we
12 don't know how many of the 150,000.

13 Again, as Mr Streatfeild explains, there's a very significant overlap. Schedule 15 to
14 the explanatory note sets out the specifications that were used to locate the Texas
15 documents and a number of those are highly relevant to issues in these proceedings,
16 including dynamic allocation and header bidding and so on.

17 Again, that's a body of documents which was already pulled together using search
18 strings relevant to those proceedings and we're proposing that there should be
19 a second-stage filtering where we apply some other, narrower, set of search strings to
20 find the documents that should then be disclosed. The idea is that we end up
21 narrowing the search down, something less than the 2.8 million that we got in the DOJ
22 litigation, and that will be something which we can then efficiently review with
23 a combination of human review and the AI review processes that we're undertaking.
24 I'm just thinking that I do have some other points to make about Google's alternatives,
25 but you should probably hear my learned friend on those first.

26 JUDGE LEECH: When you say pre-existing disclosure, is that a misnomer? Because

1 they've not actually disclosed these documents; have they? Or have they disclosed
2 them, they've just not enabled you to identify --

3 MR FACENNA: Yes. That's the terminology which we have collectively been adopting
4 in the orders to date to describe the material they've disclosed in other proceedings.

5 JUDGE LEECH: In other proceedings, yes.

6 MR FACENNA: Yes.

7 JUDGE LEECH: Sorry, go on.

8 MR FACENNA: No, no.

9 JUDGE LEECH: Senior moment there.

10 MR FACENNA: Not at all. There's a lot of detail in this case and we've barely got
11 started.

12 DR MAHER: Just for clarification, then, the DOJ litigation documents; you have the
13 vast majority of those documents?

14 MR FACENNA: Yes. We received those pursuant to the Tribunal's order last year.

15 DR MAHER: And so it's just the investigation documents and then the Texas
16 documents.

17 MR FACENNA: Yes.

18 DR MAHER: And there's not been a filtering of the Texas documents to check whether
19 those are duplicated in the litigation or in the DOJ proceedings.

20 MR FACENNA: Well, I think Google says that they weren't deduplicated. But my
21 understanding is that we haven't been able to get clarity about how much of the original
22 150,000 found its way into the DOJ litigation documents.

23 DR MAHER: Okay.

24 JUDGE LEECH: There's bound to be some overlap, but --

25 MR FACENNA: There'll be some. But we don't know.

26 DR MAHER: You don't know the extent.

1 JUDGE LEECH: You don't know the extent of it.

2 MR FACENNA: Again, if the purpose of this exercise is to use the existing repositories
3 and apply a proportionate search into them to try and find the things that you then
4 review in a more intensive basis to get to the relevant material, then why on earth
5 wouldn't you just agree search strings and apply them to the repositories that you
6 already have? It's not the right approach to try and limit it to only the things which
7 experts referred to in the US trial.

8 I should say, just on a final point before I hand over to my learned friend, this is an
9 approach which is consistent with that which has been used elsewhere. If I can show
10 you the Kent case which was dealt with in our skeleton at 43. If we go to the Authorities
11 Bundle, page 238. That's where the disclosure ruling starts and you'll see at
12 paragraph 3 of Mr Tidwell's judgment:

13 "The documents in question are the output of disclosure exercises which Apple has
14 carried out previously, in ... the United States and Australia. I will refer to those ... as
15 the Repositories, as that is how they have been described by Apple."

16 You see at paragraphs 4 to 5, there's a description of what those documents are.
17 There had been between 11 and 12 million documents that had been collected,
18 reviewed and then reduced to 6 million documents which were then disclosed in the
19 US proceedings and, subsequently, the Australian proceedings. You see that at
20 paragraph 5.

21 The parties actually agreed the appropriate process, paragraph 7. You'll see at 7(b),
22 the proposal was that each party would formulate proposals for search terms using
23 search strings.

24 7(d), they would:

25 "... then meet to finalise the appropriate search strings to determine the production of
26 documents to the Class Representative, and will apply those ... to the Repositories ..."

1 Just finally on this, at 13 to 16, the Tribunal rejected a concern that was raised by the
2 Class Representative, that the Class Representative would be overwhelmed by
3 relevant documents given. You see, if you read what Mr Tidswell says at 13 to 16,
4 essentially, given the subject matter overlap and the process that was being adopted,
5 that wasn't accepted as being a particularly serious concern.

6 So the same logic applies here. We've got overlapping regulatory and litigation
7 repositories. We're proposing there should be issue-specific search strings and we
8 will end up with something which is a body of documents which will include a large
9 amount of relevant material.

10 In reality, I should add, finally, Google doesn't actually take issue with the overall
11 approach. I mean, we are already operating, and have been from the outset, within
12 a repository and search term framework so the dispute at the moment is really simply
13 whether the universe to which you're applying that approach should be confined to
14 documents which were selected by the DOJ experts at trial or to something more wide.
15 So those are my submissions on those parts of the draft directions. Unless there are
16 any other questions.

17 JUDGE LEECH: Thank you very much.

18 Yes.

19
20 Reply submissions by MR PATTON

21 MR PATTON: I was going to begin, unless you think it's unnecessary, by just taking
22 you to the rule. It's in the Authorities Bundle, tab 2, at page 55.

23 JUDGE LEECH: Always useful to look at the rules.

24 MR PATTON: May be part of your task.

25 It's rule 60 which is about disclosure by parties to the proceedings, which is now the
26 territory we're in. I draw attention particularly to the foot of page 55, rule 60(2)(b):

1 "... the Tribunal shall decide, having regard to the governing principles [so that's the
2 effectively the overriding objective in CAT terms] and the need to limit disclosure to
3 that which is necessary to deal with the case justly, what orders to make in relation to
4 disclosure."

5 Although that doesn't expressly refer to proportionality, the CAT has issued a separate
6 practice direction in 2017, and that's at page 1009 of the bundle. So it's separately.
7 That is tab 29, which says the proportionality -- the rules are to be construed as taking
8 proportionality as a further requirement for disclosure.

9 Then just in terms of the guidance, I'm sure this will be familiar. Briefly, I think you
10 were taken to this earlier by my learned friend, but the Ryder case, in the authorities,
11 is often cited. I think because it's both Hodge Malek and Sir Peter Roth sitting
12 together. That's at tab 5. At page 190, there's a helpful and familiar summary of what
13 the broad principles are for disclosure in the CAT. That begins at paragraph 35.
14 I would particularly draw your attention to item 2. Paragraph 35 on page 190:

15 "Even in cases where broad disclosure is required, it is possible to lay down some
16 broad principles that are applied by the CAT. These are:

17 Are:

18 "(1) Orders for standard disclosure will not in general be made.

19 "(2) Disclosure will be confined to relevant documents. Relevance is determined by
20 the issues in the case, derived in general by reference to the pleadings, although in
21 appropriate cases disclosure can be in relation to matters not specifically pleaded.

22 "(3) A strong justification for .. Peruvian Guano ...

23 Then, in particular, (6):

24 "Ordinarily disclosure will be by reference to specific pleaded issues and specific
25 categories of documents.

26 "(7) Disclosure will only be ordered and the order will be framed to ensure that it is

1 limited to what is reasonably necessary and proportionate, bearing in mind a number
2 of aspects, [and some familiar considerations there] ..."

3 Then if we could then go on to page 193. This is the continuation of paragraph 40.
4 Just at the letter D subparagraph (5).

5 "It is not therefore simply a question of relevance, as some of the skeleton arguments
6 we received seemed to suggest. Disclosure will only be ordered in relation to a specific
7 category of documents if the Tribunal is satisfied the documents sought are relevant
8 and that disclosure would be necessary and proportionate. The Tribunal will not make
9 an order merely because it determines that the documents are relevant to the issues."

10 So relevance is necessary but not sufficient.

11 The reason for taking you to what you may think are relatively trite or well-established
12 propositions is that this application has to be considered in the context of where the
13 proceedings have reached to date. That's because when you're considering necessity
14 and proportionality, any further disclosure request has to be assessed in the light of
15 the totality of the disclosure that has been already given, or that is agreed is going to
16 be made available.

17 That proposition probably doesn't require authority, but if you wanted authority for it,
18 at tab 17 of the Authorities Bundle, which is a decision again of Mr Malek in the Rodger
19 case. It's page 552.

20 He says at paragraph 27:

21 "... the Tribunal will consider the following which are relevant to the current
22 applications:

23 "(2) The disclosure that has already been provided or has been agreed to be provided
24 at the time of hearing the application."

25 Indeed, the gravamen of my learned friend's submissions this morning in opposition
26 to our application for disclosure from the class was, "No, you've got to review what's

1 already out there before you go on to consider any further disclosure. So that point
2 really shouldn't be controversial.

3 Just to bring home to the Tribunal the disclosure that has already been given in this
4 case, Google has already disclosed around 2.8 million contemporaneous documents
5 to the Class Representative. The first tranche was provided last September, and
6 further extensive disclosure was given in February.

7 Following your orders at the last CMC, the Class Representative was also provided
8 with a large number of secondary materials from the DOJ litigation, by which I mean
9 expert reports, depositions, transcripts, responses to interrogatories and requests
10 from the DOJ for admissions to be made.

11 You may recall that the rationale that was given to you for ordering that material to be
12 produced was that it would provide a route map to the key evidence that would be
13 needed for trial, and that was the basis on which you acceded to that application. I'll
14 show you a little bit more of that in due course.

15 So the 2.8 million are contemporaneous, then the large volume of
16 non-contemporaneous. In addition to that, in the run up to this CMC, Google has
17 made a further offer or agreement to produce further material. It is set out in the
18 composite draft order at paragraph 16 and 17. That's to produce Google's responses
19 to, first of all, the French competition authority's request for further information, and to
20 the European Commission's request for information before its decision on liability,
21 subject to redactions of any privileged material or any irrelevant material. So that is
22 another very substantial body of material that's going to be produced following your
23 order at this hearing.

24 Then in addition to that, if you look at paragraph 13 of the composite order in green,
25 what's proposed is that the parties identify the expert reports from the US litigation that
26 are relevant to the issues in this case. Then Google would then produce, as you see

1 at paragraph 15, every Google document that is referred to in those expert reports,
2 the expert reports that are agreed to be relevant. So anything any of the relevant
3 experts cited as an exhibit to their reports, that material would then be produced,
4 subject to a point about the protective order, if that arises.

5 DR MAHER: So is this from documents from the DOJ litigation or from the DOJ
6 investigation? Paragraph 15 refers to DOJ litigation.

7 MR PATTON: Yes. Well, since they've been referred to in the expert reports, they
8 obviously found their way into the litigation, whether that's because they were originally
9 looked at in the context of the investigation or because they were disclosed in the
10 litigation. But ultimately, if the experts have got them, they must have ended up in the
11 litigation.

12 DR MAHER: Right. The Class Representative already has most of the DOJ litigation
13 documents, so I'm not quite sure what in addition is being disclosed here.

14 MR PATTON: It may be my point was wrong. As I understand it, these are documents
15 that are, irrespective of whether they come from the litigation or from the investigation,
16 if they've ended up referred to by the experts in the litigation, then they will be
17 produced.

18 DR MAHER: If they're referred to by the experts in the litigation, they would have been
19 produced in the litigation documents?

20 JUDGE LEECH: Not necessarily.

21 MR PATTON: I think that's right; not necessarily.

22 JUDGE LEECH: So some of them will if they're disclosed before the litigation was
23 issued.

24 MR PATTON: The DOJ already had them, for example.

25 JUDGE LEECH: Yes. Their experts may have referred to those documents. So it'll
26 be a subset of the entire litigation/investigation documents.

1 MR PATTON: I think you've got it right.

2 JUDGE LEECH: Yes. You say that those are most likely to be the most relevant.

3 MR PATTON: Exactly. That harks back to the whole basis on which you were asked
4 to order those expert reports be produced, which is this is going to be the route map
5 to the key documents needed for the trial and this action. Effectively now we're
6 changing to a different route map. That's the submission I'm going to make in due
7 course.

8 The purpose of disclosure is obviously for the Class Representative if it needs to, to
9 use that to particularise its case further, but, of course, ultimately to prove its case at
10 the trial, if it's able to do that. In my submission, what you would have been expecting
11 to happen by this CMC, CMC 3 in this litigation, and given that the Class
12 Representative, as you'll recall, was pressing for disclosure to be given early, that has
13 been its consistent position in the litigation, is that the Class Representative would be
14 progressing its review of Google's disclosure and making, at this stage, narrow and
15 targeted requests for further disclosure that it was reasonable and proportionate by
16 reference to the outcome of that review. I mean, that's how disclosure applications
17 are generally dealt with.

18 That's not actually what has been happening here. I think you'll have seen
19 Mr Streatfeild's fourth witness statement, so the one that was filed in accordance with
20 the directions, if you take that up at C, tab 4, page 337, paragraph 8.

21 If one starts actually five lines or so in, at the end of the line:

22 "It is wrong to suggest, as Google does, that drip feeding the CR relevant documents
23 from the Pre-existing Disclosure will be more efficient, or that it is necessary for the
24 CR to review the pools of documents it has received to date first, before receiving any
25 further relevant material ..."

26 So their position is "We don't actually have to look at the disclosure that we've been

1 demanding that you give us quickly until now on the litigation, before we identify what
2 further material is necessary or proportionate to produce". That's because at least as
3 one could understand matters from this witness statement, the suggestion was that
4 one could simply feed more and more documents into the TAR and AI models, and
5 leave it to work out what the relevant documents were. That was also being put
6 forward as a justification for saying, "Well, more disclosure is always going to be
7 proportionate, in terms of cost and so on, because you can leave it to the AI and the
8 TAR to review it and work out what's relevant, and it won't actually really require human
9 involvement by lawyers who cost money, and therefore there's no proportionality
10 problem about that".

11 Certainly the way in which the application is put before you for the Commission
12 decision today, that is put solely on the basis that the identification of the documents
13 relied on in the decision will be used to train the AI and the TAR models. It's not being
14 said that this is something that is needed in its own right because of some other
15 disclosure purpose, ie the normal purpose, which is seeking to prove your case at trial.
16 We are not aware of any authority which supports the notion that training the AI is
17 a valid ground for seeking disclosure in and of itself. Obviously, it's a developing area,
18 but we're not aware that that's ever even been argued before.

19 The main authority in which the Tribunal has considered the use of AI, is in the
20 Gormsen case, which we cited in our skeleton. I don't know, it may be helpful just to
21 show you briefly how it was looked at there. It's in the authorities, tab 19, at page 627,
22 and it begins at page 701, the relevant analysis.

23 DR MAHER: Can I have the page reference?

24 MR PATTON: 701. (Pause)

25 So paragraph 221 is where the Tribunal begins and they make the observation that
26 the use of technology is both a curse and a cure. It's a curse because it's led to an

1 explosion of documents and data which may need to be disclosed, but it does provide
2 a cure in the sense that the technology, if used appropriately, can speed up and
3 reduce the cost of the disclosure process. In some cases it's been of assistance and
4 others a hindrance, but one has to trust the judgment of the solicitor.

5 If one then goes on to the next page, page 702, one sees in subparagraph 3 -- this is
6 setting out what the Class Representative was proposing to do -- the need for a prompt
7 document to be refined through an iterative process, which involves running the
8 prompt over a small sample of documents from the view pool, which have been
9 reviewed by human reviewers for relevance. And the point which emerges clearly
10 from this decision is that AI is not a substitute -- it may be something that assists, but
11 it is not a substitute for having qualified lawyers reviewing the documents by reference
12 to the pleaded issues and making sure that they are relevant.

13 And one also gets in the judgment a summary of the position that's being taken by the
14 defendant Meta, and that begins at the foot of page 704. And just at the top of 705,
15 they quote from the evidence given by the Meta solicitor, I think, and he refers to an
16 AI tool that predicts:

17 "... based on human tagging decisions, which documents undergoing disclosure
18 review are most likely to be relevant to the case. RAL maintains a single dynamic
19 queue across the full document universe. As human reviewers tag documents for
20 relevance, RAL learns from those decisions and re-orders the remaining documents
21 so that those most similar to the documents tagged as relevant appear earlier.
22 Accordingly, the more the review team [i.e. the human beings] tags, the better the
23 relevancy predictions become."

24 And that point is reinforced in paragraph 230, that:

25 "The first stage involves a human review whereby documents are tagged as 'relevant'
26 or 'not relevant' ... The accuracy of the system's predictions are reviewed by humans

1 conducting sample checks to confirm how many relevant documents likely remain ..."

2 And at 232, just at the foot of the page, he emphasises that the AI tool:

3 "... cannot, by itself, eliminate human review of all documents in a disclosure exercise
4 and it is generally still necessary for human reviewers to review large portions of
5 documents."

6 And if one then just goes to page 708, you can see the Tribunal's conclusions on this
7 aspect. At 242:

8 "The Tribunal does not consider [it] ... to be 'experimental' when used to supplement
9 and assist human review, as described in ... [the evidence]. [It] will achieve significant
10 reductions in time and cost of review ... It is clear [it's] ... reduced the cost of
11 conducting disclosure review exercises. Evidently, this alters what disclosure may be
12 'reasonably necessary and proportionate' ..."

13 And then just in the last two lines on that page:

14 "However, technological advances in disclosure and document review do not provide
15 parties requesting disclosure a complete answer to opposing parties' proportionality
16 concerns, as: (i) not all documents are amenable to AI led review; and (ii) AI led review
17 still requires the expenditure of significant financial and human resources."

18 I'm conscious of the time -- I don't know --

19 JUDGE LEECH: Have you finished your general address, or are you going to go on
20 to deal with the specific issues?

21 MR PATTON: I will -- I haven't quite --

22 JUDGE LEECH: Well, then maybe that's a better time to break. If you want to finish
23 your general submissions, then we'll have a quick break before you make your detailed
24 submissions on --

25 MR PATTON: On the specific request, yes.

26 So what one sees in the Meta case tallies with the evidence that Mr Frey has given

1 that it's essential to have close human review by qualified lawyers. And I don't know
2 whether the Tribunal looked at the statement that came in at about 7.40 last night,
3 but --

4 JUDGE LEECH: We haven't yet.

5 MR PATTON: You haven't yet. But I mean --

6 JUDGE LEECH: Are you objecting to us looking at it?

7 MR PATTON: I'm not objecting to you looking at it, and in fact, what -- and obviously
8 there's a great deal of consternation about the timing, but I know you won't want me
9 to take up too much time about that. But what's actually rather striking about it, when
10 you read it, is that there is a volte face from the position that appeared to be presented
11 in Streatfeild 4, which said, "Oh well, don't worry, because it all just goes into the
12 system, it only costs £3,000 a month to host it, and so there's no real proportionality
13 issue". And instead, perhaps stung by the criticisms of that, what you find in
14 Streatfeild 5 is this constant refrain, "No, no, no, experienced, qualified lawyers are
15 looking at all of this very, very carefully".

16 So there's a completely different tack that's now taken. Now, perhaps
17 understandably -- but what that does mean is this idea of just keep ordering more
18 disclosure and we'll chuck it in the AI -- that point cannot survive scrutiny and it won't
19 survive, in my submission, your reading of last night's further evidence.

20 Now, obviously the point that was being looked at in Gormsen was whether the use of
21 AI might assist with review of documents that were valuable in their own right as
22 evidence for the case and what Gormsen wasn't addressing or suggesting is the
23 argument that's made before you, which appears to be a completely novel one, that
24 you should order the disclosure simply because it will help the AI -- that's the basis on
25 which the Commission decision is now being sought. It's being said, order it, to help
26 us identify materials to train the AI. And as I say, that's a novel point, and we submit

1 it's wrong in principle, and that's for three reasons.

2 First of all we say it's circular, because it's using the approach they've adopted to the
3 disclosure review methodology to dictate what disclosure should be given next, and
4 that's really the wrong way round. The disclosure that's needed to resolve this case
5 justly, that's what should dictate the methodology; that's the right way round.

6 Secondly, we say that their approach ignores the fact that it's inevitable in litigation
7 that you will have disclosure in tranches, and it's completely unworkable if parties say:
8 "Just keep giving me more and more documents and feed them into the AI, and we're
9 not going to look at them until we've reached the end of that", because that would be
10 inefficient for the AI, and we submit that that is simply not workable, given the way
11 litigation in this country has conducted.

12 And we also say, thirdly, that the evidence doesn't really come up to proof on this idea
13 that it's much more efficient to keep ordering more and more material now and leave
14 it to be all reviewed and sorted out by the AI later. Mr Frey has made the point -- I'll
15 just give you the reference -- at paragraph 26 of his statement, which is bundle C,
16 tab 6, page 983, that AI deployment and training is inherently iterative; it's an iterative
17 process, so there isn't a problem about doing it in stages. They review what they've
18 got and they come back to the Tribunal if there's something further that's needed. And
19 indeed, it's not really clear whether that point can survive last night's witness evidence
20 and I refer to paragraph 9(e) of Streatfeild 5, which really doesn't grapple with this
21 difficulty.

22 So we have pointed out that they've had the DOJ trial exhibits for over a year. They
23 have been using -- they say in the evidence -- those exhibits to train the AI. It's
24 absolutely no explanation as to why that isn't sufficient. No proper explanation. We
25 also say that this idea that you should simply keep handing over more material, and in
26 the world of AI it's always going to be proportionate because you're simply paying

1 a hosting fee, that is wrong in principle, and we would ask the Tribunal to reject that
2 approach.

3 Proportionality is about looking -- at least in part -- at the totality of the disclosure that's
4 been given, was agreed to be given, and asking: "what is the value of the incremental
5 disclosure that's now sought?" That's the correct way to approach it. It can't be: simply
6 add more and more.

7 And we do say also that they are significantly underestimating the true cost associated
8 with further production. On Google's side -- that's because there's going to be a need
9 to co-ordinate with advisers across relevant jurisdictions, addressing third-party
10 confidentiality, preparing the documents for disclosure, and then actually making the
11 actual production -- on their side, we submit that they have significantly
12 underestimated the true technological cost of having more and more documents
13 available. We don't think that is captured by this £3,000 a month hosting fee, because
14 it really depends on how the service provider has allocated the fees. But Mr Frey has
15 said at paragraph 25 of his statement that the parties are going to be incurring
16 hundreds of thousands of costs on this technology on an ongoing basis, and he's set
17 out the heads of cost that will have to be paid for.

18 And that point, interestingly, has not been answered in the evidence that was served
19 last night, so that really remains unchallenged.

20 So those were my overarching points and I'll come after the break, if I may. (Pause)

21 MR FACENNA: I was just going to say, given the indication about Streatfeild 5, if you
22 wouldn't mind glancing at that before you come back, that might be helpful. (Pause)

23 We've got hard copies if you need them.

24 DR MAHER: I think we've been given them.

25 MR FACENNA: You were given them?

26 JUDGE LEECH: Yes.

1 (3.21 pm)

2 (A short break)

3 (3.35 pm)

4 MR PATTON: So I was going to turn to the Commission decision, the confidential
5 version, and just as a starting point, one of the ways in which the application has been
6 presented is, "Oh, this is done all the time and always has -- the production of the
7 confidential decision in competition cases", and indeed in the evidence they said this
8 is routinely ordered. And my learned friend took you to the order that had been made
9 in Stopford. And you know my point on this, which is, of course, routinely this
10 happened in cases where follow-on damages actions were being brought founded on
11 the decision which would be binding on the English court in relation to questions
12 effectively of liability, and so one can understand why that has happened, and as far
13 as we know that's always been the position when these sorts of orders have been
14 made, or at the very least, it's been assumed that the decision was going to be very
15 helpful and admissible guidance to the court on the questions before it.

16 But as you know, that isn't the position here, because the decision postdates the Brexit
17 date, IP completion day and as I understand it it's common ground that it won't be
18 admissible in evidence for that reason, Hollington v Hewthorn evidence.

19 Now, I'm not contending that just because it's inadmissible, that completely operates
20 as a bar to disclosure; that's not my submission. But it's clearly an important factor
21 when you consider the purposes for which disclosure is given, ie to prove your case
22 and normally disclosure is sought for documents that are going to be admissible in
23 evidence and that's not the position here.

24 My learned friend took you to Evans, although I don't think the point I made is
25 controversial, but he took you there for a different point. He went to page 757.

26 DR MAHER: Which bundle?

1 MR PATTON: I'm sorry, in the Authorities Bundle. I'm so sorry. Page 757. (Pause)
2 Paragraphs 158 and 159, and he seemed to suggest that this was endorsing what
3 they are doing in this case, which is seeking a document in order to identify what the
4 underlying evidence referred to and it is, and then training the AI. But if you read these
5 two paragraphs -- 158 and 159 together -- what they're actually dealing with is
6 a completely different situation, and you can see it begins in the fourth line of 158, the
7 argument was that the rule:

8 "... doesn't preclude reliance on findings made by another decision maker for the
9 purpose of defeating a strike-out of summary judgment application or otherwise
10 demonstrating the strength of claims at an interlocutory stage. In support of this
11 argument, reliance was placed on cases holding that a party could rely on findings of
12 another court for the purpose of demonstrating there was a serious issue to be tried."

13 And it was said that's fine. And in 159, the Supreme Court said:

14 "... reliance on findings ... for the purpose of identifying evidence which can reasonably
15 be expected to be available at trial is not inconsistent with the rule in
16 Hollington v Hewthorn and ... isn't an exception to it." So what that's dealing with is
17 someone saying, "Well, don't strike me out on the basis my claim is hopeless. Some
18 regulator thought there was merit on it". Or, "Don't give summary judgment against
19 me for that reason. A regulator has already thought that this was a good point". That
20 isn't seeking to prove anything at trial and so that's permissible. It falls outside the
21 scope of the rule. But that isn't the purpose for which this disclosure is being sought.
22 It's being sought for a completely different purpose, and nothing in these passages in
23 Evans really touches on that point.

24 JUDGE LEECH: Why isn't it a sensible use of the EC report? What's been proposed?

25 MR PATTON: Yes. Well, that's exactly what I was going to come to. But the way in
26 which I'm going to approach it is, first of all, by looking at the other materials that the

1 Class Representative has sought and obtained for exactly the same purpose
2 previously. The question is why, in addition to those materials, does it need the
3 Commission decision? In relation to that, first of all, it's got the trial exhibits from the
4 US litigation. The Class Representative's position has been -- and if you would like
5 the reference, C1, tab 7, page 1694. This is a letter from the Class Representative.
6 It's just a letter in which they said that the trial exhibits are a helpful proxy for the
7 documents which will be key in these proceedings. So that was their position at the
8 time.

9 JUDGE LEECH: The trial exhibits in the US.

10 MR PATTON: In the US litigation. Would be a helpful proxy for the documents which
11 will be key in these proceedings before this Tribunal.

12 DR MAHER: Which paragraph are you reading?

13 MR PATTON: I'm so sorry. I'll just go to it, I'm sorry. That might be more efficient.
14 So it's paragraph 8 of the letter. Page 1694, paragraph 8, and it's the fourth line from
15 the bottom:

16 "At this early stage of the disclosure process, the DOJ v Google trial exhibits are
17 a helpful proxy for the documents which will be key in these Proceedings."

18 MR ALTY: And what's the date of that, roughly?

19 MR PATTON: That is dated 7 April of this year.

20 MR ALTY: Right.

21 MR PATTON: So it's not a long time ago, a bit over a month ago. (Pause)

22 DR MAHER: But you have now agreed to provide documents in the investigation that
23 are referred to by the experts in the litigation.

24 MR PATTON: We have. Yes, whether that's encompassed within the concept of trial
25 exhibits. But yes, we have.

26 And they've been using -- according to their evidence and, indeed, the point is made

1 in paragraph 18 of their skeleton -- they've been using those trial exhibits to train the
2 AI to date. So that's consistent with their position in this letter, that they are a helpful
3 proxy for the documents which will be key in these proceedings.

4 We say nothing has changed. Nothing detracts from the statement that they made
5 earlier. The US trial exhibits should be ample for the purposes of training the AI model.
6 A point was made in the evidence and my learned friend made it again today.
7 A suggestion that there are issues that are covered by the Commission decision that
8 wouldn't be covered by the exhibits. My learned friend took you to the Commission
9 decision at B4, page 173. This was a passage about double bidding. That was
10 addressed by Mr Frey in his witness statement at bundle C, tab 6, page 990.

11 JUDGE LEECH: Is that his most recent witness statement?

12 MR PATTON: Mr Frey's only witness statement. Sorry, this is Mr Frey of Freshfields.

13 MR ALTY: What page, sorry?

14 MR PATTON: Sorry, 990.

15 MR ALTY: Okay. Yes.

16 MR PATTON: I won't read it out because it refers to some confidential material. But
17 it's --

18 JUDGE LEECH: What was the paragraph?

19 MR PATTON: Sorry. It's a long paragraph. It's paragraph 35.

20 JUDGE LEECH: I've got that.

21 MR PATTON: Then at page 990 there's a large (ii) at the foot of the page and he
22 refers to the double bidding conduct and he explains that that's addressed in the DOJ
23 non-contemporaneous materials that have been disclosed to the Class
24 Representative. He gives, then, a confidential example of that.

25 He's gone through each of the examples that the Class Representative suggested
26 wouldn't be covered by the trial exhibits, and has explained why those are, in fact, all

1 covered by material that's been disclosed to the Class Representative. So that's the
2 US DOJ trial exhibits.

3 You'll also recall that the Class Representative has a copy of the French competition
4 authority's decision. As it were, the national equivalent to the European Commission.
5 In that version of the decision, Google's confidentiality redactions have already been
6 lifted. So it's got that in a semi-unredacted form. There was an application originally
7 due to be heard today for an even more unredacted version of that. But that's not
8 been pursued, for reasons I think you will see. But the logic of that application was
9 that the French competition authority decision was also another very helpful route map
10 to the identification of evidence, and that's something they've already got.

11 Then beyond that, at the last CMC, they contended before you that
12 non-contemporaneous materials from the DOJ litigation would be a route map to the
13 key evidence. If I can just draw your attention to the transcript. That's in bundle B3 at
14 page 158. It's lines 5 to 7 where it was said:

15 "Certainly, receiving a deposition or an expert witness statement that explains
16 a particular aspect of Google's product is likely to provide far more valuable evidence
17 than half a million documents or the raw data that sits underneath that explanation."

18 So they were being pursued as route maps and that was the basis, as I said, on which
19 you ordered those materials to be produced.

20 MR ALTY: Sorry, that was 158; did you say?

21 MR PATTON: 158. Yes, exactly. Oh, I'm so sorry. There are two passages. Can
22 we begin, sorry, at 158. The relevant lines -- I've given you the wrong reference -- are
23 lines 10 to 14.

24 MR ALTY: Right. Ah, okay. Yes.

25 MR PATTON: I'm so sorry:

26 "So it's obvious that having access to that expert evidence, which has already

1 analysed and marshalled the underlying documents, will be of very real assistance in
2 these proceedings, both for the Class Representative and for Google and for the
3 Tribunal, and to orient within the material and make effective use of the pre-existing
4 disclosure and the work that's already been done."

5 That's lines 10 to 14. The second reference, which I brought up on my own screen, is
6 page 161. That is lines 5 to 7. It's a similar point:

7 "Certainly, receiving a deposition or an expert witness statement that explains
8 a particular aspect of Google's product is likely to provide far more valuable evidence
9 than [further material]."

10 So that's how it was put to you on the last occasion. But if you then go now to the
11 Class Representative's skeleton for this hearing, at paragraph 18. (Pause)

12 You can see that all of these other route maps that were relied upon are effectively
13 discounted. In particular, if you look at the last sentence of paragraph 18:

14 "Using the extensive non-contemporaneous material from the DOJ Litigation ... would
15 be significantly less efficient than using the Confidential EC Decision ..."

16 Why that would be the case, just because it's a single document, really isn't explained.

17 We submit that really one should hold the Class Representative to what it has told you
18 on previous occasions and accept that the logic of their own applications of the
19 materials they previously sought were going to be the route map to the key evidence.

20 On top of that, there's the Google explanatory note and proposal -- a very, very long
21 document, as you may recall, which the Tribunal ordered be produced -- which
22 explains types of documents that have been produced in other investigations and
23 gives search terms and so on. That's a further route map that's available.

24 We do submit that, having received all of those materials on that basis, it's not really
25 open to the Class Representative now to say, "Well, actually, none of that really assists
26 and what we need is something else, which is the confidential version of the

1 Commission decision".

2 The other justification they put forward is that this would reveal the reliance that the
3 Commission placed on the underlying evidence, ie what did the Commission make of
4 the underlying materials? We say that's simply wrong in principle because the Class
5 Representative has got access to the substantial disclosure that was given to the
6 Commission. It's got the actual materials itself. It's got the non-confidential version of
7 the decision. It's going to receive the RFI responses to the Commission. It is in
8 a position to consider those materials for itself and to decide how best to deploy that
9 material to prove its pleaded case. It doesn't need the Commission's analysis on top
10 of that.

11 That resonates with a point that the Tribunal made in the Trucks case, which is in the
12 Authorities Bundle at tab 13, page 390. (Pause)

13 It's paragraph 56 of the foot of the page, and I accept there's some factual distinctions
14 between this case and ours, but I'm really focusing on the logic of the Tribunal's point.
15 They say:

16 "... it is not essential for the experts to have access to [a particular decision that had
17 been made against one of the truck manufacturers, Scania]. They have access to the
18 underlying primary evidence on which the Scania Decision is based. The Scania
19 Decision might enable a sense check in that it would set out the findings that the
20 Commission had come to on the basis of the primary evidence in relation to Scania.
21 It will not replace the need for the experts to address the primary evidence. As the
22 Court of Appeal stated in Emerald, the advantage to the claimants of having an
23 unredacted version of the Decision is more apparent than real."

24 We say it's really the same position here. They've got lots of other route maps already
25 disclosed. They've got the underlying materials and they should form their own view
26 as to how they want to prove their case on the basis of that.

1 Just coming back to answer, a bit more directly, the chairman's question. We don't
2 actually accept the premise that the decision is going to be particularly useful in relation
3 to the identification of the underlying evidence. There are a few reasons for that.

4 The first is that the issues for the Commission are not the same as the issues in this
5 case. There's obviously an overlap, but there's important issues in these proceedings
6 that are simply not addressed at all in the Commission decision. They include, for
7 example, whether there's a single two-sided Ad Tech market. That's issue, as it
8 happens, 1.1 in the list of issues, that point isn't considered by the Commission.
9 Whether AdX is in a dominant position, which is part of issue 3. Very importantly, you'll
10 know that there are three abuses pleaded in this litigation. Abuse 2, which is obviously
11 a very substantial part of the case, that isn't covered by the Commission at all.
12 Abuse 2 just doesn't feature in the decision, whereas these issues were all covered in
13 the US litigation. There are further points one could make, for example, the Class
14 Representative leaves open whether the UK is the correct geographic market. That
15 wasn't a point for the Commission. There are aspects of the third abuse that aren't
16 covered by the Commission, and the minimum bid to win point, that's not considered
17 by the Commission either.

18 DR MAHER: Can I ask for a clarification on that? So you said that there are things
19 that are in the list of issues here that are not at all covered by the Commission?

20 MR PATTON: Yes.

21 DR MAHER: But that doesn't address the issue of whether the Commission
22 addressed things that are (overspeaking).

23 MR PATTON: No, I entirely accept that they address some points that are in issue in
24 these proceedings. But the question is, given that you've got all of the other materials
25 and where, for example, abuse 2 has been looked at in the US litigation, what is the
26 justification for going further and now requiring production of the EC decision which

1 doesn't address that point? That's really my submission.

2 DR MAHER: I'll wait for Mr Facenna to reply.

3 MR PATTON: We'd also ask you to bear in mind that the Commission isn't focused
4 on the question that you, the Tribunal, will have to decide, which is an award of
5 damages to the class members. In fact, the question of whether loss has actually
6 been suffered or in what amount, that's usually something the Commission doesn't
7 have to consider because it's a regulatory authority.

8 If one reads the decision, one can see where they were coming from was a possible
9 remedy of divestment. That was something they had raised in the statement of
10 objections. It's in the unredacted form of the Commission decision at recital (2161),
11 that's B4, page 348.

12 DR MAHER: But the Commission would have looked at issues of abuse of dominance
13 in order to ...

14 MR PATTON: They would have looked at abuse of dominance, so they would have
15 had to be concerned: is there a potential effect on competition?

16 DR MAHER: Yes, and this is a stand-alone in this case. So even though the
17 Commission was not dealing with damages, there was one of whether there was an
18 abuse, which is something that we need to consider.

19 MR PATTON: Absolutely. Some of the abuses. No, no. So my contention is not that
20 the Commission decision is completely irrelevant to the issues in the case. My position
21 is: what is the necessity for production of this confidential version of the decision in
22 circumstances where you have been repeatedly told that there are route maps to the
23 key evidence needed for trial, and yet now they come along and they ask for yet
24 another one. These are reasons why it's either not necessary or not useful, or not as
25 useful as the materials they've already got.

26 More generally, the Commission decision is structured in a way that's required under

1 its own procedures and practices. It's got to comply with its own rules as to how much
2 material it cites to support its points.

3 My learned friend said it orally today, and it's in their skeleton at paragraph 41, where
4 they said, about eight lines in:

5 "... the DOJ Litigation was conducted in a foreign jurisdiction under different
6 procedural and substantive rules and legislation, and involved claims for distinct
7 remedies."

8 That's just as true in relation to the Commission decision. The Commission prepared
9 its decision in the way that it does, because that's how it operates. But there's no --

10 DR MAHER: Can you give me the reference on that?

11 MR PATTON: Paragraph 41 of the Class Representative's skeleton. They're talking
12 there about the DOJ litigation. But my point is that the same way in which they seek
13 to distinguish the DOJ litigation would be precisely the same can be said in relation to
14 the Commission decision, but that's functioning under its own rules and regulations,
15 which are different from the way things are done here.

16 Against what we say is there really isn't an adequate justification for this, one has to
17 consider what are the downsides. The major downside is that there will have to be
18 a significant consultation exercise with third parties, whose confidentiality interests
19 may be engaged. That involves, first of all, identifying who they are and finding contact
20 details from them, and there's a very large number of them in this case. If I could ask
21 you to look at E2, page 120.

22 This is a letter from Freshfields, yesterday. Look at paragraph 6. They clarify what
23 the position is in relation to the third parties. You can see at (a) they say they don't
24 hold any list of contact details of the third parties who requested confidentiality
25 redactions.

26 "(b) Where a third party responds to an RFI, they may, but don't always provide contact

1 details for the representative of the company. It may be possible for Google to identify
2 contact details by reviewing their RFI responses. That would require an extensive
3 exercise of extracting the details across many RFI responses, cross-checking them
4 with the third-party information, referenced in the decision. Identify which of them
5 made confidentiality claims. Where a third party responds to a Request for Information
6 (RFI) by the European Commission, they may (but do not always) provide contact
7 details for the representative of the company who signed the response. As a result, it
8 may be possible for Google to identify contact details for certain third parties by
9 reviewing their RFI responses for this information. However, that would require an
10 extensive exercise of (i) extracting these details across many RFI responses and (ii)
11 cross-checking with the third party information referenced in the Confidential EC
12 Decision to identify which of these third parties might have then made confidentiality
13 claims.

14 "(c) Following that process: (i) it is unlikely Google would have a complete set of
15 contact details for all third parties; and (ii) those contact details might in any event be
16 out of date, given the responses were provided a number of years ago."

17 So that's an exercise that would have to be gone through. My learned friend pointed
18 to the Stopford order and said, "Oh well, you know, if you miss people out, it doesn't
19 really matter because the order will say, 'don't worry about it'". But this is an exercise
20 that will have to be gone through in order to comply with your order if you were to
21 require this to be done, and it's going to have a cost. We submit that it's just not
22 justified, for the reasons I've given.

23 If you then manage to make contact with the third parties, there's then going to be
24 potentially objections from them. The Class Representative says that's not a problem
25 because they will deal with them rather than Google having to deal with them. That's
26 not realistic because the people from whom the third parties are going to be hearing

1 is Google. They're likely to, on receipt of a request like that, they may raise questions,
2 they may seek clarification. They may want to know what is the confidential
3 information that is at issue. That is going to draw Google into the cost and expense
4 of having to deal with that.

5 Because my learned friend referred to the Stopford case, the lead counsel for Google
6 UK who's dealing with Stopford case is actually in court today. He has told me, and
7 I'm sorry that this is not in evidence, but he has told me that in the Stopford case, that
8 process of considering the objections has already run up a bill on Google's side of
9 £450,000. So it's not an insignificant amount.

10 So one's got to weigh that against what are you really achieving by ordering this in the
11 light of what has already been given. Even if it's the Class Representative that does
12 the work of dealing with these third parties, that is a cost which is going to be incurred
13 by the Class Representative. It's a cost they will be seeking to recover from Google if
14 the claim succeeds at the end of the day. We would submit that the Tribunal wish to
15 control those costs and make sure that costs are not incurred unnecessarily.

16 So having regard to the absence of a need for this decision to be produced in
17 a confidential form, having regard to the cost and work that will be created if you do
18 order this to happen, we submit that the balance comes out against disclosure.

19 MR ALTY: There were two stages to what the Class Representative was asking. One
20 was about Google's own information and one was about third parties. So have you
21 covered Google's own information?

22 MR PATTON: Yes. Well, so, I mean, on that, my first set of points really apply: that
23 there's no justification for this. It's not needed, given the route maps that the Class
24 Representative has already obtained from the Tribunal. There is a practical problem
25 which is addressed in the evidence, which is that if Google has claimed confidentiality
26 over a particular recital, what it doesn't know is whether a third party has also come

1 along later and claimed confidentiality in respect of the same recital. So there is that
2 difficulty of identifying. It's not just a case of Google saying, "Well, these are the ones
3 that we claimed". What if a third party also claimed confidentiality because suppose,
4 for example, it's a communication between Google and a third party. Both may have
5 confidentiality interests engaged by that.

6 So it's not a straightforward exercise. If you were to order the Google redactions to
7 be lifted, I would expect that you would want Google to take a conservative approach
8 to that so as not to imperil some third party's confidentiality interests who is not before
9 the court. I query how useful that really would be.

10 That's the Commission decision.

11 Can I turn to the DOJ investigation documents. As you know, this is a request for
12 hundreds of thousands of documents from the DOJ's investigation of Google. The
13 argument is that while Google has produced millions of documents from the litigation,
14 it has produced a relatively small proportion of what we have been calling the
15 investigation documents.

16 It's a point, I think, that the chair, put to my learned friend earlier. We submit that that's
17 an illogical criticism, because the DOJ investigation led to the DOJ litigation, and it
18 stands to reason that the most relevant documents from the investigation are highly
19 likely to have found their way into the litigation. Obviously, the most relevant of all,
20 one would expect to be the trial exhibits, which, as I said, the Class Representative
21 has been using to train the AI.

22 MR ALTY: What I don't understand about the split, as I understand it, a big tranche of
23 disclosure was given before the complaint was filed in the US proceedings, and then
24 a big tranche afterwards.

25 MR PATTON: Yes.

26 MR ALTY: But one might say, "Well, it's more likely that you disclosed the key

1 documents beforehand because you were answering a request. You know, you were
2 under investigation by the DOJ and then the Texas AG."

3 So, and then, you know, it could be for all we know, it could be a sweeping-up exercise;
4 it was done afterwards. I agree that the expert reports that were filed for the purposes
5 of trial and the trial exhibits are likely to be the most relevant documents within the
6 confines of that. That will include both some investigation and some litigation
7 documents. But what is being said is that there will be a lot more of other relevant
8 documents.

9 MR PATTON: Can I just show you the evidence on this. Most of this is confidential,
10 so I won't read it out. But can I just take you through.

11 MR ALTY: Yes, certainly.

12 MR PATTON: It's in bundle C.

13 MR ALTY: I mean, really what I wanted to ask you is: is my understanding of the basic
14 split, right?

15 MR PATTON: You have correctly understood the split, but there is an important point
16 about the scope of the investigation, which I'm just about to, I hope, help you on.

17 So it's bundle C, tab 6, page 997. This is Mr Frey's witness statement. It's
18 paragraph 47. Could you just read first of all the chapeau, as it were, to the paragraph.

19 MR ALTY: Whose document is this?

20 MR PATTON: This is Mr Frey of Freshfields for Google. It's our witness statement.

21 So if I can just take it a little bit more slowly just to draw out the points of significance,
22 I'll do this delicately. Paragraph 47:

23 "Google produced to the DOJ approximately" x number of documents in connection
24 with the investigation in response to something, which is a type of administrative
25 process to demand discovery. And then (a) and this is all confidential. But the first,
26 administrative process. You can see that it sought documents in relation to something.

1 Can I just draw your attention to the words in the fourth line, which, divorced from
2 context I think, can't be confidential, "did not relate to". I just want to make sure that
3 you've got that piece of evidence.

4 Then two lines further beyond that, if I can just draw attention to words, "beyond the
5 scope". Then on the fifth line, you can see unrelated is the third line from the end.

6 Then (b), you can see what it describes about the administrative process. Then again
7 in the third line, not relevant. Then you can see what's said in (c). Then over the page
8 at paragraph 48:

9 "As explained in the Explanatory Note~... Google proposed producing to the Class
10 Representative the circa 2.4 million documents from the DOJ proceedings ..."

11 The explanation is given as to how they ended up in the disclosure.

12 DR MAHER: I'm just a little bit slow, but going back to.

13 MR PATTON: I'm so sorry.

14 DR MAHER: Yes, quickly, it said that it included things that -- some, and some that
15 were not.

16 MR PATTON: Totally. But, so my point is that it's important to --

17 DR MAHER: But we have no idea what the percentage of relevant --

18 MR PATTON: No.

19 DR MAHER: -- out of the large number of documents.

20 MR PATTON: No, so this is the evidence I've got on this. In B.

21 MR ALTY: Except that C gives us some --

22 MR PATTON: It does.

23 DR MAHER: Okay.

24 MR FACENNA: So can I just clarify something, in case there's a misunderstanding as
25 well. In paragraph 36 of our skeleton, I think we've made it clear that the search strings
26 that we propose should be applied to the first group of documents -- they are in

1 47A -- would only be to the smaller set, not to the full number. So that's paragraph 36
2 of our skeleton, which I don't think is marked as confidential, but I won't mention it for
3 the moment.

4 JUDGE LEECH: Sorry, 36?

5 MR FACENNA: 36 of our skeleton, about halfway through (b), you'll see that we
6 propose -- we've got this process whereby we agree the search strings, but we're
7 proposing in relation to that first group of documents, that the search strings would
8 only be applied to the smaller subset.

9 JUDGE LEECH: All documents in B and C. Is that right?

10 MR FACENNA: Yes, subject to agreement of the search strings and that that would
11 be the filtering process there.

12 MR PATTON: But just to be clear in relation to A, you can see the qualifications are
13 in both (i) and (ii), which I think go back to Dr Maher's point, that you have both in
14 there.

15 And then just looking at paragraph 48, Google produced the Class Representative of
16 "2.4 million documents from the DOJ Proceedings" and explains how that why that's
17 come about.

18 "This included the vast majority of documents from the DOJ Litigation. The document
19 collection process for the DOJ Litigation was developed by reference to ..."

20 And if you can just read to the end of that sentence. (Pause)

21 MR ALTY: If I understood it correctly -- I mean, take what you say there, but that the
22 investigation documents -- they already had -- so they wouldn't be -- but they haven't
23 been disclosed, so the fact that they've developed this by reference to the investigation
24 disclosure exercise -- sorry -- that it was developed in a particular way is not going to
25 help in terms of a class of documents that haven't been disclosed.

26 MR PATTON: Well, it does suggest that it's a more focused category -- focused on

1 the issues in the DOJ litigation, which are very similar to the issues in this litigation.
2 And it does support the submission I made earlier that therefore these are likely to be
3 the most relevant documents -- it's not likely, as the chair was creating -- you know,
4 one possibility that actually all the most relevant documents would have been early on
5 and not later -- that's contrary, I think, to the way in which the DOJ --

6 JUDGE LEECH: I'm just saying that you -- it doesn't necessarily --

7 MR PATTON: It doesn't necessarily --

8 JUDGE LEECH: -- follow that all the documents in the litigation are more relevant
9 than the investigation -- we've just got no idea of that.

10 MR PATTON: Well, except that the evidence that you've been given as to how they
11 were arrived at does suggest that they are going to be more relevant, because they
12 are focused on the very issues that arise in the --

13 JUDGE LEECH: Well, more of them may be relevant; they may not be the most critical
14 documents. So it's just hard to tell, you know.

15 MR PATTON: And --

16 JUDGE LEECH: It may be -- I mean, I don't know, for instance, whether each of the
17 requests which are being under -- you know, in each of the three administrative
18 processes, as you call them, were targeted. I mean, they may have said, "We want to
19 see XYZ, ABC", and we just don't know, because we've got -- this is always a difficult
20 problem when one is faced with -- one party says, "Well, they're really going to be
21 relevant; we're going to find everything we need in these documents", and the other
22 says, "No, there's nothing to see here", and what's the Tribunal -- who has even less
23 understanding of what these documents are than the parties themselves -- supposed
24 to do? I usually just throw up my hands and say, "Well, if you can't agree, I'm going
25 to -- you know, we'll just cut the Gordian Knot".

26 You know, it may be that a certain amount of rough justice is going to have to be done.

1 But it's very difficult to assess, particularly in a case of this complexity, arguments
2 which are based on shades of relevance. Well, you're saying, "Well, there may be
3 some relevance, but they're only partly relevant", and he's saying, "Well, no, these are
4 going to be really relevant", how do we know?

5 And also we've got no real understanding of what the cost is going to be. I mean,
6 Mr Facenna is saying, "Well, if you attach these search strings, you know, hopefully it
7 will be a targeted exercise". We accept that, but who knows how many days we're
8 going to have to wait while you sit in a locked room until we let you out to actually
9 agree those search terms? I mean, that's again, part of the problem.

10 MR PATTON: And I think in fairness to my learned friend, I don't think he's saying that
11 these are the ones that are really relevant. I mean, he's simply saying, "There's
12 something else out there; we've been given what we've been given, but we'd like
13 more". We're not doing that because we've looked at what we've got and we've
14 decided that there are obvious lacunae or areas that are not covered or, you know --

15 JUDGE LEECH: What you are saying is there's an obvious lacuna, isn't it? You're
16 saying that there's this whole tranche of documents which we've got next to nothing.

17 MR PATTON: Well, of which they've got the ones that were thought to be important
18 in the context of the litigation, in circumstances where you know that the investigation
19 was much broader in scope and covered irrelevant matters.

20 JUDGE LEECH: Well, I'm not sure I agree. That is what -- I mean, he's saying that.

21 MR PATTON: No, he's not saying this, I'm saying that. I'm saying that they've got the
22 ones that became exhibits for the trial, they've got the ones that the experts thought
23 were important to them --

24 JUDGE LEECH: You had the actual exhibits to the trial, as I understood your initial
25 submissions --

26 MR PATTON: The trial exhibits are public documents. They're public documents, and

1 he's going to get the exhibits to the expert reports, or at least that's what we've offered,
2 assuming the offer is accepted.

3 So really the question is: why would one embark on this exercise? At least why would
4 I embark on it now, when the Class Representative has chosen not to
5 review -- through its lawyers -- the materials it's got to see: has it got what it needs?
6 It's instead saying, "Well, just keep piling on more materials so that the AI can be fed".

7 MR ALTY: Can I just -- sorry, going back to your categories that were all in
8 a confidential material, the three of them. The way I read it, the last category means
9 that the second category is sort of irrelevant. But am I leaping to a conclusion
10 there -- the way it's described -- it just -- what we're really focused on, on the last
11 category?

12 MR PATTON: The logic of what we say. We do think you're right about that.

13 MR ALTY: Yes, okay.

14 MR FACENNA: Can I refer you to our skeleton argument, 35.3, which has the
15 references there? So they're separate productions and not simply a subset of the
16 other group -- is, I think how it's been explained to us. (Pause)

17 MR PATTON: Okay.

18 JUDGE LEECH: Well, is it saying that the investigation was substantially the same,
19 but more documents were produced, or was saying that the same documents were
20 produced in response to the --

21 MR PATTON: The administrative process is substantially the same (several inaudible
22 words).

23 MR FACENNA: Maybe we can clarify. As we've understood it, the specifications were
24 the same, ie the questions were largely the same, but the documents that were
25 produced were different -- they're different documents.

26 JUDGE LEECH: That's right. That's how I understood it to begin with, but we

1 maybe -- I might need clarification.

2 MR PATTON: We'll take that away, if we may. Can I just make this point: in terms of
3 how much this is going to cost, which is obviously a very important factor, the
4 suggestion seems to be that there's no need to do any relevance review, see
5 Kent v Apple, you were taken to that, that's in the authorities at page 238 and in
6 particular page 242. And it is very important to understand what was happening in
7 Apple; it was a very unusual scenario. (Pause)

8 Authorities, 242. And you can see it in paragraph 8:

9 "The dispute between the parties is whether Apple [ie the disclosing party] should be
10 required to conduct a relevance review of the documents ... prior to the production ...
11 to the Class Representative. The Class Representative says that this is not only the
12 established practice, but also necessary, as she will otherwise need to review large
13 volumes of irrelevant documents ..."

14 So it's a disclosing party saying: "I don't want to review these, I want to, some might
15 say, dump the documents on you, and you find out whether there's anything relevant
16 or irrelevant in there".

17 JUDGE LEECH: Keys to the warehouse approach.

18 MR PATTON: Exactly. It's sometimes, you know, "I'd rather just not incur the cost".
19 But it's not a case of a Tribunal saying, "I'm going to order you to disclose documents
20 relevant or irrelevant", which is not something a Tribunal would ordinarily do. If you're
21 requiring documents under compulsion of law to be produced. At the very minimum,
22 a party is entitled to say: "These need to be reviewed for relevance". And that's
23 certainly our position: we would be seeking to review these for relevance as is -- as
24 the Class Representative said in that case -- established practice -- and we submit
25 necessary -- so that we comply with our obligations, but we're not producing
26 confidential material that's irrelevant to the Class Representative.

1 So that is going to need to happen in this case. The Apple case really has nothing to
2 do with this scenario that we're -- and so there would need to be a relevance review
3 of these materials to see whether they're relevant to the legal issues in this case and
4 that obviously is inherently a time-consuming and costly exercise.

5 DR MAHER: So the question again that Mr Alty raised was the third bullet --

6 MR PATTON: Yes.

7 DR MAHER: -- that exercise has already been carried out.

8 MR PATTON: In the United States.

9 DR MAHER: Yes. Well, they relate to --

10 MR PATTON: Issues in the US litigation, yes. But so Google would wish to review
11 the documents for relevance, the issues in this case, and as I say, I don't think that
12 there is any authority for the notion that a party is obliged to disclose documents
13 without reviewing them for relevance. It's one thing if a party just doesn't want to, the
14 (inaudible) may allow it to do that.

15 In relation to the Texas investigation documents, I think it essentially comes to the
16 same point, and so I think I would be repeating myself. Insofar as documents from the
17 investigation were referred to in the expert reports, Google's going to disclose them,
18 and we say they've simply failed to establish why further disclosure -- using search
19 strings and requiring relevance review -- is necessary or proportionate.

20 Would you give me one moment? (Pause)

21 That's all I wanted to say. Maybe -- I'm not sure if my learned friend is intending to
22 open the individual requests. Maybe you want to take a look at those, since I think
23 we'll have expert evidence, for example, to deal with tomorrow. Sometimes, you will
24 know better than we do, but having to rummage around through the written
25 submissions and understand these individual requests can be quite a lot of work for
26 a judge or Tribunal. So if you wish to hear from us orally, certainly we are prepared to

1 deal with those. I would suggest we would want to go through them one by one.

2 MR ALTY: You want to go through them one by one?

3 MR PATTON: Well, if you wanted to hear oral argument from us. It may be that you
4 want to take a look first of all and see whether you think it's something you'd be happy
5 to deal with in writing. But you then will have to piece up a lot of different things
6 together. We've got the Redfern schedule which gives a summary of the position,
7 essentially, from the skeletons. But you may find that, once you get into it, you would
8 actually have wanted to be able to ask questions.

9 MR ALTY: But where is the Redfern schedule, sorry? Is that in bundles?

10 MR PATTON: I'm not sure if it is in the bundles. It was filed with the Tribunal
11 yesterday. I'm sure we can get you copies. It was filed at the same time as the
12 composite order with the colour --

13 MR FACENNA: E1, tab 6.

14 MR PATTON: Oh, it is. I'm sorry. Apparently, it's at E1, tab 6.

15 MR ALTY: Okay. I heard you referring to it and I was --

16 MR PATTON: It is. My learned friend is right. E1 at page 55, I think it starts. 54.

17 MR ALTY: Can I just ask one more question?

18 MR PATTON: Of course.

19 MR ALTY: Because you were talking about pulling together the most relevant
20 documents, including from the investigation, for the purposes of the litigation.

21 MR PATTON: Yes.

22 MR ALTY: But I'm still not clear. Okay, some of those documents will be public by
23 now and some you've offered to make, because they will have been referred to in the
24 reports. That wouldn't necessarily be all the documents that they had pulled together
25 for litigation. I think, again, just to clarify what I think is correct understanding: if they're
26 not in those two areas, they are not being disclosed because they're part of the

1 investigation's set of documents rather than the litigation.

2 MR PATTON: I think there's one further qualification to that, which is that if they were

3 provided to the Commission -- the European Commission -- on the basis of --

4 MR ALTY: Right, okay. Which they did acknowledge, I think.

5 MR PATTON: He did, I think. Yes.

6 MR ALTY: Yes, thank you.

7 MR PATTON: Thank you.

8 JUDGE LEECH: Yes.

9 DR MAHER: Just for clarification for myself, sorry. Going back to the three areas, the

10 first was that you're only proposing to search on this subset of --

11 MR FACENNA: In the third of those categories, the way that we put it in our skeleton

12 argument.

13 DR MAHER: Yes. On paragraph 35 in your skeleton argument.

14 MR FACENNA: Yes, it's 35. It's actually mainly 36, makes the point clear. It's not

15 clear on the terms of the draft order.

16 DR MAHER: Right. So we'd only do the subset. So 35(1)? We'd only do a search

17 on the subset using search terms.

18 MR FACENNA: Yes, exactly. Yes. That's the point of 36, yes.

19 JUDGE LEECH: Oh, right (overspeaking).

20 DR MAHER: Not 35(2), but you would then do 35(3) which is a subset of relevant

21 documents from (2).

22 MR FACENNA: No, it's not a subset. It's an additional set of documents, but they're

23 different documents from the second group.

24 DR MAHER: Right. That is not clear from the ...

25 MR FACENNA: That's the point. Dr Maher, do you have my skeleton argument?

26 DR MAHER: Yes, I do.

1 MR FACENNA: Yes. So at 35(3), you'll see we've quoted from Google's explanation
2 that the documents produced in response there are not simply a subset of --

3 JUDGE LEECH: Okay, right.

4 DR MAHER: Okay.

5 MR FACENNA: Produced in response to number 2. Just to be clear, we're also not
6 coming up with new search strings. There are search strings which were already
7 applied to find these documents, and our proposal is that Google would tell us which
8 of those search strings they think should be applied to find what might be most relevant
9 in these proceedings, and we would try and agree with that. So we're not reinventing
10 some additional set of searches across these documents.

11 Subject to that, just on the last point that was made about the individual requests,
12 rows 9 to 14. I'm perfectly happy to deal with those orally if you find that you would
13 like us to tomorrow, but it's almost all confidential so we would have to sit in closed
14 session if we want to deal with those.

15 JUDGE LEECH: We're going to read them overnight and decide whether or not to --

16 MR FACENNA: Yes. The Redfern schedule does give you a summary but, again,
17 I've given you the reference to the paragraphs in our skeleton argument which deal
18 with it in a bit more detail.

19 I probably should briefly reply on these points now and then we can start with
20 something fresh tomorrow. That's the expectation? Yes. Well, I can be very brief,
21 I think.

22 JUDGE LEECH: The only question I have for you is really a reverse of the position
23 from this morning, which is that you were saying to them this morning in relation to the
24 members of the class, you should wait until we've got a bit further down the track.
25 Then I was saying the same to you this afternoon in relation to -- why not carry out the
26 review, work out if there are any bits missing or at least have a look at the exhibits to

1 the expert reports in the US proceedings before you decide whether you need access
2 to a lot more documents.

3 MR FACENNA: First of all there's the EC decision, right. So that objection does --

4 JUDGE LEECH: Leaving that (overspeaking).

5 MR FACENNA: And there are one or two points, briefly, I wanted to make on that.
6 But, in relation to the second point, it's the explanation which is given in the witness
7 evidence, which is there's a process already ongoing. We are reviewing them. Our
8 experts have started reviewing them. But there is time and cost involved in that
9 process of validating the automated processes. If you have to do that more than once
10 on multiple occasions, it takes time and it takes money and you have to revalidate the
11 searches and so on. So if we already know that there is a bigger chunk of documents
12 and we already have the search strings that we can use to really get at the stuff that's
13 likely to be most relevant in it, then the proportionate and sensible thing to do is to get
14 on with that and do it all at once, rather than have to run that process multiple times.
15 Moreover, reviewing what we already have doesn't necessarily tell you what you don't
16 have. There isn't necessarily logic to the idea that we should review what we have
17 and then it'll be clear what else we might need. It might not be clear at all because,
18 once you've reviewed what you've got, we don't know what's in the original DOJ
19 investigation.

20 JUDGE LEECH: Is it not a fair assumption that most of the exhibits to the expert
21 reports, or in the actual factual exhibits in the DOJ proceedings, are likely to be the
22 most relevant material?

23 MR FACENNA: Well, subject to the points I made. I mean, you're dealing with a very,
24 very small percentage of them. I think it's 0.01 per cent of the DOJ investigation
25 documents.

26 JUDGE LEECH: Well, that's a sort of field width argument; isn't it? I mean, often there

1 is a needle in the haystack somewhere and (overspeaking) --

2 MR FACENNA: Yes. Many of the needles might already have been gathered
3 together, subject to the points I made about different proceedings, different law,
4 different forensic choices and so on.

5 JUDGE LEECH: What I'm troubled by is, I mean, I can accept the relevance of those
6 documents. I think that's not a problem. I think it's really Mr Patton's submission that
7 you need something more, really, at this stage of the proceedings, given the amount
8 of disclosure that has already been given. In order to justify at this particular stage yet
9 further rolling disclosure, you need something more than relevance. I'm perfectly
10 willing to accept the relevance of those documents. There's got to be a positive reason
11 to give you more disclosure at this stage. Looking at where we've been and also
12 looking at the position that you adopted, which struck me then, as now, as a very
13 reasonable one. That's why you got the disclosure last time round, is that all of these
14 documents you can see are going to be highly relevant, even if they're not admissible
15 to helping you organise and understand the underlying documents. But there's a point
16 at which now you're saying, "Well, we also need a whole load of other underlying
17 documents as well".

18 MR FACENNA: Mr Patton has done a nice job of, in a sense, reversing the burden by
19 focusing on what we're doing and our review of his disclosure. It's slightly odd to hear
20 a party who is under the obligations of disclosure to be focusing their attack on how
21 we are going about reviewing their documents. It's particularly odd to hear one of the
22 world's largest tech companies make submissions which were effectively a diatribe
23 against the use of AI. But, leaving that aside, it's important --

24 JUDGE LEECH: That's usually called playing the man, not the ball.

25 MR FACENNA: Yes. It's important to remember that -- you were taken to Ryder, for
26 instance; right? What the court was considering in Ryder was standard disclosure.

1 We are already in a world where, in a sense, by concession, the Class Representative
2 has said, "We're not asking for standard disclosure. We're not asking them to go back
3 and conduct a relevance review of all these documents". If Google wants to say we
4 will start from scratch and do a relevance review of everything which is in the Texas
5 documents and the DOJ documents, then they're entitled to come and say that. What
6 we actually have is we have agreed a process which the Tribunal has endorsed, where
7 we start with already-relevant, filtered repositories of documents. We have accepted
8 that that's the appropriate starting point. We haven't pushed for a standard disclosure
9 exercise, and what we now have is Google, by reference to them saying that we're not
10 getting on with it fast enough or we should be doing it in a different way, they're seeking
11 to restrict even the approach that can be taken to that already narrowed set of
12 documents, which we have conceded as the appropriate starting point.

13 JUDGE LEECH: I just want to make this clear. I mean, we're not necessarily
14 unsympathetic to the request, particularly given that those documents are likely to
15 contain just as much relevant material as the litigation documents themselves. We're
16 not unsympathetic. My concern, looking at the authorities and the rules, is whether
17 we should really be ordering documents to be disclosed at this stage on the grounds
18 of what looks like relevance alone to me. I just want to give you an opportunity to say
19 it's not just relevance. There's more to it than that.

20 I think that's my concern, having heard from Mr -- I mean, you're right. He's done
21 a very eloquent job of deflecting attention from the concern about the relevance of the
22 documents. But at the bottom, what you've got are another set of relevant documents
23 in what is a massive universe of documents. The concern for the Tribunal now, with
24 a very imperfect knowledge, is where is the right place to draw the line? I take your
25 point about you've taken a very practical approach so far and you shouldn't be
26 prejudiced for that. But should we be much more cautious and incremental about this,

1 is the --

2 MR FACENNA: Well, I would submit this is cautious and incremental. I mean, we're
3 not asking for all of the DOJ investigation documents. We've tried to propose
4 something which seems to us a continuation of the approach the Tribunal has
5 endorsed, which is to say let's find a proportionate, sensible way of filtering this
6 already-filtered universe of documents to try and get something manageable that can
7 be reviewed, and where we end up avoiding having to go through the costs and
8 expense and time of a much wider disclosure exercise.

9 JUDGE LEECH: So your point is that this is really just no more than a continuation of
10 what was ordered.

11 MR FACENNA: Yes. In fact, it's narrower than -- I mean, you did previously order the
12 disclosure of the full set of the DOJ litigation documents. We're not asking for that.
13 We're saying, "Let's have Google propose which subset of existing search strings
14 should be applied to a body of documents that's already been gathered using agreed
15 search strings and then we'll have disclosure of those". So in a sense, Google is still
16 in control, at least at the first stage, of finding the really relevant material within that
17 wider body of documents.

18 JUDGE LEECH: I think you've answered my point.

19 MR FACENNA: I have. I'm grateful.

20 Just briefly then. I've made the point about the reversal of the burden and just
21 reframing, actually, the context of where we are. We have made a concession. From
22 our perspective, it's a generous approach to say that the disclosure in this case should
23 start from what Google already has and if that's the approach that we're taking, then
24 we shouldn't now be in a world where Google's trying to shut down and constrain that
25 in the way that it is. It's in relation to the Commission decision.

26 The submissions that were made, we say were on an erroneous basis, that we were

1 only seeking that material to train the AI. We are explicitly not only doing it for that
2 reason. I can refer you to the Redfern schedule, row one, (b), and more importantly
3 perhaps, to our skeleton argument, paragraph 16 to 19, where we make the point that
4 it's not just about training the AI, it's to understand what the Commission's case was;
5 what did it find, what are the relevant decisions; what does the Commission say that
6 evidence shows? That's a way both to help improve the automated review and the
7 disclosure exercise in that respect, but also it's obviously sensible as a way through
8 this material when we're trying to get to a point where we'll be able to pull together the
9 expert evidence and prove the case. Again, without explicitly relying on the
10 Commission's findings directly.

11 So really, the submissions that were made about the Commission decision, were, we
12 say, beside the point largely, because they proceed on a misunderstanding or
13 mischaracterisation of why we're seeking that decision.

14 There were some points about matters which weren't covered. Well, the first
15 submission was made based on Mr Frey's evidence that an issue like double bidding
16 is already covered in the DOJ proceedings, so why would you need the EC
17 Commission's decision? That's a weak point. Even if there is not a complete overlap,
18 it's pretty obvious that the EC Commission's decision is highly relevant to a number of
19 the materials, a number of the issues in this case. In fact, it is much more closely
20 aligned to the law and the proceedings and the issues in this case than the DOJ
21 materials.

22 The DOJ expert reports. There isn't a wholesale agreement, by the way, to hand over
23 all of those exhibits. It's subject to Google accepting our position on which of those
24 expert reports are relevant to the issues. So there's a first stage filter in terms of which
25 expert reports are relevant. The expert reports are useful; they are useful route maps.
26 But they are constructed non-contemporaneous documents, and they're not

1 a substitute either for the documents themselves which will be referred to and
2 identified in all the redacted sections of the European Commission's decision or the
3 documents which will be within the body of the DOJ decision.

4 JUDGE LEECH: Have I misunderstood, you're being offered the expert reports are
5 just in the DOJ and Texas proceedings; is that right? But not in relation to the EC?
6 Just looking at paragraph 7. I think that's right. I may just have misunderstood you.

7 MR FACENNA: In the US proceedings we've already got the expert reports, and we're
8 now being offered the exhibits subject to agreement on which reports are relevant.
9 I don't believe that there will be expert reports in the Commission proceedings, which
10 was an investigation.

11 MR ALTY: Can I just ask a question? You may be coming on to it. But one of the
12 points was that previously you'd said that the documents you were asking for then
13 would be the ones you would use to train and give yourself the mechanisms to
14 interrogate the material. There's a suggestion you're basically repeating that point,
15 and therefore why we should be resting on your previous statement. Is that part of
16 your argument that he's trying to reverse the burden of proof, as it were, or, just deal
17 with that if you would.

18 MR FACENNA: Well, again, it's a neat point to say, "Well, I said last time we met that
19 the expert reports are really a very useful road map and a route through all this
20 material", and as I've just conceded, they are. They will be useful, and they are already
21 proving useful. But the EC's decision is an order of magnitude more useful. You can
22 simply see from the sections which I showed you that is one single document, not
23 trying to reconstruct from a bunch of different expert reports. It is a reasoned
24 document. It has clear references to individual documents within the materials and
25 what they show and what they prove and how they relate to each other. It's
26 a completely different document from the expert reports.

1 The expert reports can take you a certain way to where you should be looking within
2 the 3 million documents that we currently have. So, if you like, if you imagine an actual
3 road atlas, the expert reports might be the front two pages where you see the sort of
4 overall shape of things and roughly the direction you're going in; the EC Commission's
5 decision is going to tell you exactly where you need to go, where the destinations are,
6 and what the relevant documents are, and that's going to be a much more efficient
7 way of doing it.

8 Yes, there are also documents that the Commission had, which simply were not part
9 of the DOJ proceedings at all. Again, given the overlapping markets, the EEA market,
10 I mean, for example, it's unlikely there will be anything in the DOJ expert reports about
11 conduct which is focused in the EU, in particular, in the European market, and whereas
12 there will be Commission documents.

13 JUDGE LEECH: The EC report -- or the redactions to the EC report, a live issue in
14 which we sort of just didn't deal with -- has it been on the table for a while, or is that
15 a relatively new point?

16 MR FACENNA: In these proceedings?

17 JUDGE LEECH: Yes.

18 MR FACENNA: No, I think it's been one of those issues which has been deferred until
19 now. Yes, that's right, I'm reminded -- we were told to ask the Commission, which we
20 did.

21 JUDGE LEECH: And they said no, and so we're back. So it's something you always
22 flagged up as being relevant.

23 MR FACENNA: Yes, very much so.

24 DR MAHER: And to make maybe an analogous point, the DOJ litigation: you'll have
25 expert reports from both sides which could draw very different views and it's not
26 a judgment by the court yet, whereas the EC is actually a decision and what they have

1 taken on.

2 MR FACENNA: Exactly, looking at the overall universe of the documents. And so
3 there's a degree of -- Google might take issue with this, but it's a degree of objectivity
4 that you would find in the Commission's decision, which inherently you won't find in
5 the expert reports for the parties to the US proceedings. (Pause)

6 I think the only other reply point I wanted to make on the submissions are related to
7 the point on trucks, and --

8 MR PATTON: Do you mind -- just while my learned friend is finding his place -- I think
9 you know this, but you know that there is also a judgment in the US proceedings.
10 There is a reason -- yes, there is. I'm sorry, I just wanted to make sure you knew that.

11 DR MAHER: There are several US proceedings.

12 MR PATTON: In the DOJ decision, there is a reasoned judgment. It was a bench
13 trial, and the judge --

14 DR MAHER: In which court? Federal court?

15 MR PATTON: In federal court, yes.

16 DR MAHER: Which one?

17 MR PATTON: Virginia.

18 DR MAHER: Virginia.

19 MR FACENNA: Just to finish off on that -- I mean, the basic position on DOJ material
20 is: there are six million documents in the DOJ proceedings. It's entirely arbitrary that
21 we have had disclosure of the 2.8 million which were given in the second chunk, which
22 are a completely different set of documents from the three million which were in the
23 first chunk and all we're really asking for is let's try and agree a process to selectively
24 target what might be relevant from the first chunk. I mean, that's what it boils down to.

25 DR MAHER: So if I understand correctly, your request is not to do a search on the
26 three million documents, but on a subset of something that's already been filtered. So

1 it's not on all of them.

2 MR FACENNA: It's not on all of them, but it's on most -- it's would be agreed search
3 strings, that are then applied to those three categories that were in response to the
4 administrative processes. And in relation to one of those, it will only be on a small
5 subset.

6 DR MAHER: And that's laid out in paragraph --

7 MR FACENNA: 35 and 36 of our argument.

8 MR ALTY: What you're not asking for is disclosure of all that.

9 MR FACENNA: Certainly not. Actually, now that I see this point, I don't think I need
10 to make it a reply.

11 So I think that's everything I need to say. If there's anything I've forgotten, perhaps
12 I can --

13 JUDGE LEECH: If you want to say anything first thing tomorrow, please do.

14
15 Questions from THE TRIBUNAL

16 JUDGE LEECH: Can I just ask you about the specific disclosure requests? So what
17 you're anticipating is that we'll just work -- you've made your submissions, I think, both
18 orally. What you're anticipating is we'll just work through those and give you a decision
19 at the same time, as we deal with the other issues. Is that right?

20 MR FACENNA: Yes. I mean, in reality, if I were making oral submissions, I'm very
21 happy to answer questions if you have them. I won't really be saying much beyond
22 what's in our skeleton.

23 JUDGE LEECH: There's a limit to what you can say, given that we're talking about
24 confidential --

25 MR FACENNA: Well, I don't think realistically we could say anything in open court,
26 given -- I mean, I can't even tell you what we're asking for.

1 JUDGE LEECH: Okay. Well, in which case, I think what I'll do is I'll read carefully that
2 stuff and look at the references in both skeleton arguments again and see if we need
3 submissions. But hopefully we can deal with those on paper. Are you happy with that,
4 Mr Patton, or would you like to make submissions?

5 MR PATTON: I'll just check it out overnight.

6 JUDGE LEECH: Yes. Maybe there's something specific you want. We can always
7 sit confidentially if necessary.

8 MR PATTON: I think I agree with my learned friend: we would need to sit
9 confidentially, because we couldn't even begin the debate without saying something.
10 It would become --

11 JUDGE LEECH: I think the question for both of you is whether you think we would
12 actually be assisted by oral argument. But if we're going to have to get right down into
13 the weeds, looking at the individual documents and justification for each class, I'm
14 probably --

15 MR PATTON: Certainly very tedious. I mean, there's no doubt about that, but --

16 JUDGE LEECH: But also it's probably going to be easier for us to work through that
17 and then reach a decision and if there's some further issues that arise, you can come
18 back.

19 But if you -- I will reread the material overnight and decide -- but if you decide first thing
20 tomorrow morning you really want to make oral submissions about that, then that's
21 what we'll do.

22 MR PATTON: I mean, one possibility is that -- because we haven't responded to
23 the -- I think we got their Redfern Schedule response on Tuesday, which reflects their
24 skeleton. We haven't sought to answer those points. Maybe I can just check whether
25 there's anything new I can tell you that you haven't already said that we would say in
26 answer to those points.

1 MR FACENNA: No, I think that's a fair point.

2 JUDGE LEECH: So 10.30 tomorrow.

3 (4.46 pm)

4 (The court adjourned until 10.30 am on Friday, 22 May 2026)

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Key to punctuation used in transcript

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