

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION
APPEAL
TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

22nd 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.

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

Friday, 22 May 2026

(10.31 am)

Housekeeping

MR FACENNA: Good morning.

JUDGE LEECH: Good morning, Mr Facenna.

MR FACENNA: If you want to go first or I will. Subject to your views, there are a few points left to deal with on the composite order. I thought it might make sense, actually, if we go through the order from beginning to end to make sure we've covered everything. I think, between us, we think it might be unavoidable -- again, unless you tell us you're completely across the detail of those points -- to go into confidential session to deal with --

JUDGE LEECH: The view we've reached is that we would like to hear from you on the specific disclosure requests. I mean, as I understand it, the issue is one of relevance to the pleaded issues. Our provisional view is that we can't decide that those documents are not potentially relevant to the issues which you identify, having been through reasonably carefully.

MR FACENNA: Yes.

JUDGE LEECH: Therefore, if relevance is the only objection, we are minded to order disclosure. That's where we've got to. So I think the burden is on Mr Patton to explain to us why not. That's where we've got to, but we'd also decided that we wanted to hear from the parties anyway on that rather than simply go away and begin to do the paper crunching. If that's our provisional view, we'd like to at least give him an opportunity to explain why we're wrong.

MR FACENNA: Yes.

1 JUDGE LEECH: Given that the principal purpose of this hearing was now gone, we
2 think that a day plus on disclosure issues is more than enough. So I'm going to
3 guillotine the parties -- I'm going to give you half an hour or so on the -- so it may be
4 that you want to either choose your best examples or talk us through a worked
5 example and explain why the rest are -- or if you want to just do a fast overview. If
6 you bombard us with individual documents for a whole day we're going to glaze over.
7 We think it would be better if we get the general gist to make sure that we've
8 understood the point properly, then go away and do our own homework before we
9 actually give judgment on the individual issues. What we're going to do is I think we'll
10 take an hour, whenever you want that hour to start. But maybe if we go briefly through
11 the issues on the order and then perhaps take an hour between 10.45 and 11.45 on
12 the specific disclosure issues, and then that would leave an hour or so for pleadings
13 and experts so that we could be over by lunchtime. I don't know if that's reasonable
14 or whether you pessimistically think the afternoon --

15 MR FACENNA: I think that that seems reasonable, particularly if you've had the
16 opportunity, at least, to get the gist of what we say in our skeleton argument about
17 the --

18 JUDGE LEECH: Well, I think the burden is on --

19 MR FACENNA: Yes. Well, that's fine. In that case, that sounds fine to me.

20
21 Submissions by MR FACENNA

22 MR FACENNA: Just to deal with it chronologically, I think I was only going to take
23 a few minutes, actually, to deal with where we are on the order. The first meaty section
24 was really the Appendix 1 documents.

25 JUDGE LEECH: Yes.

26 MR FACENNA: If you have the composite order there, everything up to paragraph 6

1 is agreed. There's some green wording in one of the recitals which was inserted late
2 by Google, I think, but that was just to append the appendices from Majumdar 1.

3 JUDGE LEECH: Yes.

4 MR FACENNA: So the first section which is in dispute is on the disclosure of the DOJ
5 and Texas documents. So that's paragraphs 7 to 12. You heard our submissions on
6 that yesterday but just to remind you how this would operate. Under paragraph 7,
7 Google would write in the first instance to the Class Representative by 5 June
8 indicating which of the existing search strings they say should be applied to the DOJ
9 investigation documents. We would then seek to agree those search strings by the
10 19th, and there would then be production. Then 10, 11 and 12 are the same exercise
11 but for the Texas documents.

12 JUDGE LEECH: Because we do have a reasonably complicated judgment to write,
13 I'm on duty all next week on interims in the Rolls building. I'm not quite sure how long
14 it's going to take us to write a judgment. So there will be some slippage, inevitably.
15 I just wanted to raise that with the parties. I mean, I always hate asking this question
16 because it imposes a burden on us. But is there a drop-dead date? And which are
17 the most time critical provisions. That would be helpful, if you could indicate those
18 through your --

19 MR FACENNA: I'll get instructions on that because my instinct is probably a week or
20 so wouldn't make much difference. But I know that there's thinking behind getting
21 everything at once to do the exercise with the TAR and so on.

22 JUDGE LEECH: I think, also, if we are going to order -- and this is a question of
23 principle, obviously, rather than pragmatic -- let's say we're against you on the timing
24 issues in relation to contacting the class members or however we define the biggest
25 class members or the largest publishers. It seems to us that it's quite important for
26 that, just simply so that everybody knows where they stand by the time we get to the

1 autumn, and the heavy lifting really begins in relation to these proceedings and
2 preparation. I know it seems a long way off now, the trial date, but it'll begin to loom.
3 But it does seem to us important that whatever we order -- there's one point I want to
4 come back to, but we can deal with it perhaps at the end -- if we do make an order in
5 Mr Patton's favour for the class members, it seems to us important -- by the end of
6 July before people start going away -- that what they get and when they get it is settled
7 and the process of getting in touch with them is properly underway by then. That's if
8 we're against you in principle.

9 MR FACENNA: Understood. When you say settled, I mean, our fall-back proposal is
10 that you should, if you wanted to order, make the directions we've suggested. Which
11 is: we would come up with our proposals for gathering information from the class
12 members, there would be a discussion between us and, if necessary, we'll come back
13 in November.

14 JUDGE LEECH: Yes. This really engages the point that I want to ask both of you
15 about. But I don't want to get hung up on that now because I want to get on with the
16 disclosure. So it's really in terms of the timing of any decision that we hand down, is
17 really what I'm asking.

18 MR FACENNA: Yes. I mean, on the disclosure issues, the absolute priority is the EC
19 decision.

20 JUDGE LEECH: Yes, EC decision.

21 MR FACENNA: I understand that's really critical to us being able to make serious
22 progress.

23 JUDGE LEECH: Right. Let's say it took us two or three weeks to produce a judgment,
24 which is really the time frame that I'm looking at.

25 MR FACENNA: Well, just to make sure my instructions are clear, can we come back
26 to this? We'll probably take a break at some point and I'll make sure I've fully

1 | understood the position on timing.

2 | JUDGE LEECH: Do we just push back the timetable in the order? Let's say that it
3 | takes us a bit of time to produce a judgment. Or do we have to really focus our minds
4 | on some key dates as well?

5 | MR FACENNA: I suspect my instructions will be, at least in relation to the EC decision,
6 | that that will be critical and it would be good not to lose time on the difference that will
7 | make. I'll confirm that. It may not be quite so urgent in relation to the bits and pieces
8 | from the --

9 | JUDGE LEECH: Well, perhaps you could both consider that, so ...

10 | MR FACENNA: I'll take detailed instructions.

11 | JUDGE LEECH: At the end, it is what it is and you'll have to wait for the Tribunal to
12 | deliver a decision --

13 | MR FACENNA: Understood.

14 | JUDGE LEECH: -- but I want to accommodate the parties' own timing as much as
15 | I can (inaudible).

16 | MR FACENNA: Something I was going to say, I think it's inevitable we're probably
17 | going to be coming back in November. So one of the things that isn't in the current
18 | order is that we should try and list the dates, realistically, in November to come back
19 | and deal with any other issues that are still outstanding on either disclosure or the
20 | class member pieces and so on.

21 | JUDGE LEECH: Yes, that's sensible.

22 | MR FACENNA: Yes.

23 | So that's the DOJ and Texas documents. Actually, the next item in the order which is
24 | in dispute is paragraph 18, which are the Appendix 1 documents. So, subject to
25 | anything anyone wants to say in open court, my suggestion would be that we --

26 | JUDGE LEECH: Just to be clear, if we're in your favour we make the order in 7 to 12,

1 subject to any slippage in terms of timing. 13, I think is Mr Patton's alternative; isn't it?

2 MR FACENNA: Yes.

3 JUDGE LEECH: That's an alternative, either/or in relation to the --

4 MR FACENNA: Yes. Google's alternative, as you'll recall, is that we should have

5 a discussion about which expert reports are relevant and they might be willing to give

6 us the exhibits from those expert reports, subject to agreement. And you've heard

7 what I say about that (overspeaking).

8 JUDGE LEECH: So it's either/or. 7 to 12 or 13 to 15.

9 MR FACENNA: Yes, I think that's right.

10 JUDGE LEECH: Just so that we can be clear.

11 Yes, thank you.

12 So the French Competition Authority goes away.

13 MR FACENNA: Yes, and same with the EC pre-decision requests and RFIs.

14 JUDGE LEECH: Appendix 1, which we'll deal with.

15 MR FACENNA: Appendix 1 we can deal with in close. That's those five or six

16 categories. Do you want me just to run through the rest of it while we're ...?

17 JUDGE LEECH: I think it might be helpful, yes. I mean, as long as we're not going to

18 get sidetracked.

19 MR FACENNA: No, no, no. I can sort of add and break the points and then, if

20 necessary, come back to them.

21 On the DR and EDQ, it's not a freestanding item on the agenda but I do want to make

22 some short submissions to explain why we've made a proposal that we should be able

23 to ask questions about the DR and EDQ, that Google should be directed to respond

24 to those implicitly reasonable and proportionate questions. That will then enable us,

25 if necessary, to come back and make specific requests from the further disclosure.

26 To shortcut the point, the submission I'm going to make, I'd show you the DR and EDQ

1 is extremely high level. The essential message that Google gives is, "You've already
2 got everything you need" and their only proposal is to make two very narrow searches.
3 So without wishing to get into a ding dong about it, it's not really adequate for the
4 purpose for which it was ordered, but our proposal is that we should be able to have
5 exchanges about it and gather further information, and then if necessary, we'll come
6 back towards the end of the year when we have a clearer idea of what gaps there are,
7 and what we might need to ask for from the further disclosure. So that's the point on
8 that.

9 There's a point which is in dispute in paragraph 22 in relation to this, Google's proposal
10 in green is that if we do make any requests from the further universe, if you like, that
11 we need to justify that by reference to the materials already disclosed -- and again, I'll
12 develop the submission when the time comes -- but we say that's circular and
13 unnecessary, essentially because reviewing what you already have doesn't
14 necessarily tell you what's in the further disclosure and what would be relevant. So I'll
15 develop that.

16 Then paragraphs 24 to 33 are the EC decision. I think you heard everything you're
17 going to hear from either of us on that yesterday. 34 is now gone, as I indicated, to
18 the mapping keys.

19 Then we deal with expert evidence, 35 to 41. There, the principle that the Class
20 Representative should have two experts and the defendants have two experts is
21 agreed. But there's an issue about whether we should be permitted to reserve our
22 position on having an auction economics expert. I can explain why we say that's
23 necessary in the interests of equality of arms and efficiency at this point.

24 DR MAHER: To add on that, on the number of experts, I think I would like to hear on
25 a clearer division of what the two competition experts will be addressing and the
26 division of labour on that.

1 MR FACENNA: Yes, I can address you on that.

2 DR MAHER: Okay.

3 MR FACENNA: Then there's a related issue on whether there should be permission
4 to adduce evidence from technology and industry experts. Again, I can make
5 submissions on that.

6 JUDGE LEECH: What's the issue between you there?

7 MR FACENNA: Well, actually the issue is essentially whether you should order it so
8 that we have permission to do that. We say you should. Or Google's position is that
9 there should be liberty to apply at some point towards the end of this year, so defer
10 that. I think realistically that's what that boils down to.

11 Then, 42 onwards are the directions on class member disclosure. Actually we have
12 internally considered how you might amend the order if you wanted to go for our
13 suggestion of setting down dates in September for there to be an exchange about this,
14 and so I can, when we come back to that, make the suggestion as to what that would
15 look like. Otherwise I think you've heard everything on that.

16 Then everything else in terms of pleading amendments and trial bundles is currently
17 agreed.

18 JUDGE LEECH: There is no issue about the agenda, or is there?

19 MR FACENNA: I think it was item 4 on the agenda, but there's now agreement on
20 that.

21 JUDGE LEECH: So I needn't worry about that.

22 MR FACENNA: You don't need to worry about that. That's 1 to 6.

23 JUDGE LEECH: There's no issue about timetable anymore, which item 4 on the
24 agenda?

25 MR FACENNA: No. We've agreed the timetable set out in the order. Essentially it's
26 a practical sequence.

1 JUDGE LEECH: Then the expert issues are the ones you just identified?

2 MR FACENNA: Yes. So I think after we've dealt with the closed material, I don't think
3 it'll take us very long, hopefully -- famous last words -- to deal with those one or two
4 other points.

5 JUDGE LEECH: What would you like us to do: to rise for a moment while we? Is
6 there anybody who shouldn't be here, or?

7 MR FACENNA: There are certainly people in the courtroom who are not in the
8 confidentiality ring, yes.

9 JUDGE LEECH: Well, should we rise for five to ten minutes? Do I need to give any
10 direction in relation to the livestream.

11 MR PATTON: It had better be switched off, I think.

12 JUDGE LEECH: Just be switched off; is that right?

13 MR PATTON: That's my understanding.

14 JUDGE LEECH: It's been switched off. Okay.

15 MR FACENNA: So it's been switched off. Okay.

16 JUDGE LEECH: In which case we'll rise for a couple of minutes, and you tell us when
17 you're ready.

18 (10.40 am)

19 (Confidentiality ring discussion in private session)

20 (10.54 am)

21

22 Private session concluded

23 JUDGE LEECH: Do we need to rise briefly or we can just go on?

24 DR MAHER: We can stay. (Pause)

25 MR FACENNA: There are others. The advertising claim people, for instance, are not
26 in court and they'll want to come back.

1 JUDGE LEECH: If they want to come in they're very welcome to. Would you like us
2 to rise, or ...?

3 MR ALTY: I don't think so.

4 MR FACENNA: No, I don't think so. (Pause)

5 JUDGE LEECH: Fine. Well, let's move on.

6 MR FACENNA: Let's move on.

7 There's a brief point, which I mentioned earlier on, about the disclosure report and the
8 EDQ. Again, going back to paragraphs 20 to 23 of the draft order. I indicated what
9 I was going to say earlier on. The DR and EDQ, you'll recall, were required in relation
10 to further disclosure. So documents and data sets not within the pre-existing
11 disclosure. The intention, obviously, is that the DR then describes the repositories of
12 documents that might be relevant and the EDQ identifies the searches.

13 The purpose of that, that we argued about last time we were here, was really to, again,
14 try and reduce the information asymmetry between Google and the Class
15 Representative at the moment. The problem that we've got with it is that the process
16 hasn't really performed that function.

17 Labouring the point, let me just show you quickly what those documents look like.
18 We're in bundle C.1. The disclosure report is page reference 2679. I think it starts the
19 page before, but 2679 is where table 1 starts. This is the table that identifies potentially
20 relevant repositories, but it does so at an extremely high level. Just on that page you'll
21 see that [REDACTED – CONFIDENTIAL]. So it doesn't really tell you any information
22 about what's in those repositories or how they're structured or what period they cover
23 or what products or business lines they relate to, or how they might map on to the
24 pleaded issues.

25 So you have the high-level table 1 in the disclosure report. If you then go to table 2,
26 which starts at 2685, it works through the list of issues and purports to identify where

1 documents relating to those issues can be found. But it won't take you long to see
2 that, when you go through that table -- with two exceptions -- Google simply asserts in
3 every row that the Class Representative already has sufficient material from the
4 pre-existing disclosure or from public sources. So there are just bare assertions all
5 the way through that table, in relation to every item but two items, making the point
6 that, essentially, the Class Representative already has what they need. Again, going
7 back to what the purpose of this exercise was, it doesn't really enable the Tribunal or
8 the class rep to assess whether there are relevant materials outside pre-existing
9 disclosure and where they might be found.

10 The two exceptions, just so you can see them, are issue 18(1)(c). Now, this whole
11 document at the moment is marked confidential so I won't read out the context, but
12 you'll see --

13 DR MAHER: Can you give the reference again?

14 MR FACENNA: Sorry, it's 2691.

15 JUDGE LEECH: Have you got the tab number? I'm just finding it difficult.

16 MR FACENNA: The tab number is 40. C.1, tab; 40.

17 JUDGE LEECH: Just finding it rather difficult to read that table on the screen. I might
18 look at it in hard copy.

19 MR FACENNA: Well, the issue itself can't be confidential, that's from the list of issues.

20 So that's:

21 "The alleged prohibition on third party SSPs advertising the fact that they have access
22 to Google Ads demand, compared to Google's advertising of AdX on that basis."

23 Then you see what Google says about that in the second column. So unlike
24 everywhere else where it says you've got enough, see what the answer is. Then they
25 say in the third column that the enclosed EDQ sets out what they propose to do about
26 that, so custodians and date ranges and so on.

1 The only other exception is issue 18(2)(a) which is on the same page, at the bottom.
2 There you'll see that's the allegation in the list of issues that Google gave AdX
3 exclusive access to DV360 demands when certain features were enabled. So that's
4 the point we were just mentioning. What they say about that, you'll see, is that a gap
5 will be addressed by disclosure of certain further documents.

6 So those are the only two places, in relation to all of the list of issues in the entire
7 proceedings, where Google says that we don't already have enough and it's proposing
8 to do anything else.

9 So the EDQ, as you would expect, is correspondingly somewhat limited. That starts
10 at 2696 in the bundle and it proposes searches only for those two issues out of,
11 obviously, a much broader list of issues. If you have a look at 2699. At the top there,
12 where there's reference to the keywords to be used, you'll see Google proposes that,
13 for the further disclosure, there should be additional searches conducted by reference
14 to the custodians and date ranges identified in the attached schedule.

15 Then the schedules themselves, if you go ahead, are at 2705. At 2705 there is a small
16 list of custodians and at 2706 there is one page of search terms, which you'll see are
17 very much based on the wording in issue 18(1)(c).

18 So the difficulty is that that exercise has left us in a place where Google's approach is
19 essentially, "We've already given you enough" on almost everything. It's not what the
20 Tribunal ordered, we believe. The Tribunal was intending to require Google to explain
21 what further disclosure repositories exist and how they relate to the issues. Rather
22 than reducing information asymmetry, essentially, this process has largely preserved
23 it.

24 Now, our proposals in the circumstances -- we think they're modest and practical
25 ones -- are that we should be able to raise questions about these documents. We've
26 proposed a date in September. We've proposed that Google should respond to those

1 questions a couple of weeks later, and once we have the responses to those
2 questions, we will then be able to formulate any requests which we think we ought to
3 be able to make from the further disclosure. Really, we've designed that as we want
4 to avoid further satellite disputes about this. The hope is that by having a Q and A,
5 any requests that we do make will be ones that will be at least informed by those earlier
6 exchanges. So that's the proposal.

7 There is, as I said earlier, a proposed restriction from Google that any requests that
8 we make have to be justified by reference to the existing disclosure. As I said earlier,
9 that's circular. Reviewing the existing disclosure is not going to tell us what's contained
10 in [REDACTED – CONFIDENTIAL], for example. So we don't think that's
11 a justification which should be included. So that's everything I wanted to say on this
12 aspect of the order.

13
14 Submissions by MR PATTON

15 MR PATTON: So my learned friend has used this very narrow dispute as a platform
16 to make criticisms, I think for the first time, of the DR and the EDQ and the approach
17 that's been taken. These have been relatively recent, in the last month, but if they had
18 been raised with us, we have answers to them and there will be an occasion when you
19 will be addressed on that. But it was not suggested to us that this was going to be the
20 occasion and that seems to be really just a run-up to dealing with these particular
21 paragraphs.

22 I mean, among other things, we will say that the disclosure report that you get in this
23 case is much more informative than the sort of disclosure report one commonly gets
24 in litigation. It's the product of a huge amount of work that has gone into analysing the
25 disclosure that's already been given. Though, in fact, there's nothing at all surprising
26 about the conclusion given the various regulatory proceedings and pieces of litigation

1 that have happened all around the world in relation to these sorts of issues, that there
2 may not be many issues in the case where it isn't covered by the existing disclosure.
3 But that's really all a matter for another day.

4 Two very narrow points, because we make no objection to paragraph 22 in principle:
5 they should have an opportunity to make requests arising from the disclosure report
6 and EDQ, and there should be a timetable for that. So 22, it's common ground there
7 should be an order in those terms, subject to a point I'll come to in 23.

8 In relation to 20 and 21, the only point that we have made -- and it's made in Mr Frey's
9 evidence. He says -- it's paragraph 72(a) of his statement at confidential bundle,
10 page 1009 -- that the parties should simply correspond in the usual way, to the extent
11 that there is reasonable and proportionate queries arising. Certainly in other cases,
12 the president of the CAT, Mrs Justice Bacon, has said it's not really the Tribunal's role
13 to micromanage the correspondence. That's something that she can leave the parties
14 to. One doesn't need an order made in advance of knowing what questions are going
15 to be raised by the Class Representative, that the defendant shall provide responses
16 to those and has to justify each and every case where they don't answer. That's
17 something that should be left to the common sense of the parties knowing that,
18 ultimately, they'll be before the Tribunal and, if a party has behaved in a way that isn't
19 appropriate, then obviously that will be a matter that the Tribunal will raise concerns
20 about. And both parties here know that. So we simply say, 20 to 21, it's not necessary
21 because we've made clear we are happy to correspond to the extent that they raise
22 reasonable and proportionate queries. But it's a very narrow point and it didn't really
23 require the sorts of points that my learned friend has just made.

24 In relation to 22, we do submit it's surprising that the Class Representative resists an
25 order that the requests it makes should be necessary, reasonable and proportionate.
26 Because that is what the rules require, a point that we've gone to many times over the

1 past day and a half. We do submit, as we did earlier in general in relation to disclosure,
2 that the time has arrived where the Class Representative should be saying, "We have
3 reviewed the disclosure and, having regard to that review, we consider these further
4 requests are justified". It shouldn't simply be a question of, "Please give us more and
5 more material" in addition to the millions of documents that have already been
6 produced. These are two very narrow points on the form of the order. (Pause)

7 JUDGE LEECH: 20, 21 not necessary?

8
9 Submissions by MR FACENNA

10 MR FACENNA: Well, they are necessary. Our experience is that we've been asking
11 a lot of questions on a lot of issues since the end of last year and we have not been
12 making very much progress on some of these issues. We can't do it in the usual way
13 because, at the moment, we have a disclosure report, an EDQ in the form in which
14 you've seen, where it's such a high level it's actually quite difficult to formulate what
15 requests we might want to make. So that's why we've arrived at the position where
16 there -- one can characterise it as micromanaging. From our perspective, it would be
17 helpful in ensuring that the parties can make pragmatic and proportionate progress, if
18 there is a direction, that we can raise questions and that there should be answers to
19 those questions within a certain time. That will then enable us to, we think, be able to
20 make more directed requests when the time comes at the end of September. The
21 necessary, reasonable and proportionate language is simply unnecessary.

22 JUDGE LEECH: It seems to me the key word in that is "additional". It's likely to
23 generate disputes between you. "Necessary", you know, it's either in or taken as read.
24 Necessary, reasonable and proportionate. But it's the word "additional" there. It's like
25 are you asking for a --

26 MR FACENNA: I think I had rather read that as simply reflecting the fact that the

1 section is concerned with additional disclosure, about further disclosure. But you
2 might be right. I would certainly want to have a fight --

3 MR PATTON: We intended it in the same sense.

4 MR FACENNA: 22. We can get to 22, but the difficulty is that we think we're not in
5 a position, really, to get to 22. 22 is about the requests for actual further disclosure.
6 We would like to be in the position to do that but we can't do it without having a process
7 where we can actually get some more useful information.

8 JUDGE LEECH: Okay.

9 MR FACENNA: So that's the point.

10 I don't think there's anything else on that.

11 JUDGE LEECH: What about the wording in 22? The last part of 22.

12 MR FACENNA: Well, that's the point I made that it's completely unnecessary. It's
13 both unnecessary and illogical because why would we have to justify requests about
14 the further disclosure by reference to the materials already disclosed? That seems to
15 be something which is going to lead to further disputes.

16 Now, if it simply means -- well, that's the point; it's vague about what it means. To give
17 you the example, if we decide that there's something in the [REDACTED –
18 CONFIDENTIAL] which is actually relevant to some aspect of the pleaded case, how
19 are we supposed to tie that to the material that's already been provided to the
20 European Commission or to the other regulators. Provided it's relevant to the pleaded
21 issues, that ought to be enough. By definition, this further disclosure is something
22 that's beyond what's already in the pre-existing disclosure. It's not going to be the
23 same material.

24 Are there any other questions on those parts of the order? No. So I think that only
25 really leaves expert evidence.

26 So this is in the composite order. It's paragraphs 35 to 41. There are three points.

1 First of all, the split between our two competition experts.

2 Secondly, whether there should be special expert evidence in auction economics, if
3 that becomes necessary.

4 Thirdly, the need for technical and industry expert evidence on the class side.

5 Now, I should say, our starting point -- which I think is common ground -- the evidence
6 from the experts must be non-duplicative. We don't want more than one expert
7 covering the same topic. The scope of it has to be controlled, we accept that. And
8 the process itself will need to be cost disciplined. So that is our starting point. The
9 issues are, however, very complex in this case. There are market definition,
10 dominance abuse, auction mechanics probably, causation loss, quantum effects. So
11 there's a lot to cover in this case.

12 Now, Google has, of course, already addressed all of those issues in numerous
13 regulatory cases all over the world. The Class Representative has to prove its case
14 for the first time. It's partly for that reason that we have sought permission to rely on
15 up to two competition experts. The principle that we should have two is not objected
16 to but, as I understand it, Google's position is that we should not only ensure that their
17 evidence is non-duplicative and that we avoid additional costs -- which are obviously
18 controls that we accept -- but that we should split up the work between our two experts
19 in the same way that Google proposes to split up the work between its two experts.
20 The split that Google proposes you'll see at 36(a) and (b). Google's proposed split is
21 they'll have one expert for everything other than auction theory, essentially.

22 We don't think there's any good practical reason for that in a case of this sort of
23 complexity; we don't think it makes sense. The issues are such that the expert
24 meetings are likely to proceed on an issue-by-issue basis. That's true of the joint
25 statements as well, likely to be structured on an issue-by-issue basis. If we have
26 concurrent evidence or hot tubbing, you're likely to have the relevant experts do it on

1 an issue-by-issue basis.

2 So the correct control, we say, is that there should be no duplication; a clear allocation
3 of topics; sensible management between the experts; and cost discipline. But it's not
4 necessary for the Class Representative's experts to have to mirror Google's own
5 internal architecture.

6 All of that said, in response to the query you raised this morning, Dr Maher, to be clear,
7 we would be talking about two experts from CRA, so we're not expert shopping. It
8 would simply be a case of Dr Latham sharing the workload with a colleague within
9 CRA.

10 They have some preliminary thoughts as to how they might split up the topics. But
11 we're not quite in a position to say now who's going to do exactly what. But it would
12 simply be a question of two economists from the same, from CRA, dealing with those
13 issues separately.

14 DR MAHER: In general I think that's fine, as long as we can be clear that there is no
15 duplication. In looking at 36(a) a priori, it would seem to me a reasonable split, where
16 market definition, dominance and abuse usually tend to go together. That's not
17 something you would normally have two experts splitting up, but it's quite logical you
18 might want to split off the causation, loss and quantum and interest to ...

19 MR FACENNA: Without waiving privilege or committing myself to anything. That's
20 exactly the kind of split which has been discussed internally.

21 DR MAHER: I'm perfectly happy with that.

22 MR FACENNA: So that then leaves this question of auction theory. I mean,
23 effectively, Google is proposing to rely, as it's entitled to, on a specialist auction
24 economics expert. Our position at the moment is that we expect that our economist,
25 our competition economist, will be able to address auction theory insofar as that's
26 necessary to prove the Class Representative's case.

1 But the auction issues that Google is proposing to address are very broad. You'll see,
2 for example, the impact of auction models as well as the auction mechanism design.
3 So we are seeking permission at this stage, if it's necessary, to serve responsive
4 evidence from a separate auction expert, after we've seen Google's auction evidence.
5 Really, that's designed as a safeguard to avoid unnecessary cost, if it turns out that
6 actually our competition experts can deal with the issues, but it will also preserve
7 equality of arms, if you like. It ensures that we won't be prejudiced if the specialist
8 auction evidence goes beyond what the competition economist can fairly answer.
9 Google's raised a concern about that being a second bite at the cherry, but that can
10 be answered by the safeguards that we've proposed, which would be that the
11 responsive auction evidence again must be non-duplicative of the evidence that's
12 given by the other experts. It has to be a proportionate volume, and there should be
13 a provision for Google's auction expert to provide a reply, if necessary. That's all
14 reflected in our proposed wording at paragraph 37. So that's why we asked for that.
15 Essentially, Google's the party choosing to introduce specialist auction expertise. We
16 ought to be able to see that case, we say, before we are committed to saying whether
17 a separate responsive expert is needed. If it is needed, then Google will have the
18 opportunity to reply to anything we say.
19 Technical and industry experts, then. The issue here, so paragraphs 38, 39, and 40,
20 it ultimately boils down to timing as opposed to a significant dispute about whether
21 there might be merit in having a technological or industry expert.
22 We are seeking permission to rely on an expert in tech technology and/or an expert in
23 the online publishing industry. Again, from our side, that's likely to be reasonably
24 required by us and to assist the Tribunal, because we're in a situation where these are
25 Google's systems, their products, technology that they've designed. They understand
26 the interaction between their own products and third-party tools. As I showed you from

1 some of the documents yesterday, they appear to have a lot of internal resource,
2 which is monitoring the entire market and the position of their products relative to other
3 developments in the market.

4 Obviously, neither the class rep nor an individual class member can give that sort of
5 comparable factual evidence that Google can rely on. Certainly, class members can't
6 give industry-wide evidence. So that's why, on our side, we will need expert
7 assistance to understand the way in which the market operates, the interaction
8 between Google systems and its rivals, and the commercial operation of the relevant
9 markets.

10 It's not going to be replacing factual evidence insofar as there will be factual evidence.
11 It's essentially expert input needed to assist the Tribunal in understanding the
12 marketplace and this technology, and the industry context.

13 We've provided in our skeleton argument, paragraph 61, examples of a number of
14 other proceedings where this sort of industry expert evidence has been permitted in
15 circumstances where the class would otherwise face the difficulty of proving their case.
16 You see there's a number of references in the footnote. Those don't have the authority
17 bundle's references, but then I don't have them in my speaking note either. I was
18 going to offer to give them to you. I can give you those if it would be helpful to have
19 them.

20 Again, on timing of this and the controls, although it's not in the order, we have
21 proposed that there could be a timetable by which we provide a detailed list of the
22 questions that the expert is expected to address. Obviously, we've got no objection in
23 principle to Google serving responsive factual evidence, where appropriate. That's
24 now, I think, reflected in the draft order at paragraph 39. We are anxious to ensure
25 that there's no real prejudice to Google. I've explained why that evidence is likely to
26 be necessary.

1 On the question of timing, our position is that permission for that should be granted
2 now, subject to the controls which I've identified. Because essentially that expert input
3 is required now to be able to prepare the case efficiently, and assist with going through
4 the disclosure materials and starting to shape the evidence.

5 I think that's everything I want to say on experts.

6
7 Submissions by MR PATTON

8 MR PATTON: Again, it's a relatively narrow issue here. Both sides are proposing to
9 call people who are experts in the traditional competition economics points of abuse,
10 dominance and so on, and who are able to give evidence on auction theory, because
11 that's something that, as you see from paragraph 35, the Class Representative's
12 competition economics experts are going to have to address, or at least are being
13 permitted to address. That's 35(vi); auction theory is already in there.

14 There's really a practical issue here, which is what one doesn't want to have in the
15 run-up to the trial is a misalignment between the experts who are dealing with points
16 on either side. That creates difficulties in having effective joint meetings. Ultimately,
17 it may cause problems for the Tribunal's ability to hear from the experts at trial, which
18 often in competition cases, first of all, involves what we call hot tubbing, where the
19 experts are sat, and usually an eponymous member of the Tribunal may ask
20 questions.

21 I'll take you to a case in which that sort of issue has been considered, in a moment.

22 So the reason we have proposed that the split be between the -- as it were -- common
23 or garden competition economics issues that one always gets and auction theory, is
24 that that is a more specialist field. Auction theory obviously does arise in this case as
25 you'll have picked up from the pleadings. The questions about the differences
26 between first price auctions and second price auctions, what the incentives are, what

1 are the problems that may arise from different designs of auctions. So there are
2 undoubtedly issues in the case in that regard.

3 It hasn't really been explained why that split isn't acceptable to the Class
4 Representative. It said that the reason why they want to call two competition
5 economists is to split the workload and I'll take you to what the cases say about that
6 in a moment. But there isn't actually any evidence as to why that's necessary, whether
7 there's some practical difficulty in Dr Latham, whose evidence is the basis on which
8 the case was certified, and who dealt with all the points in that report, why there's any
9 difficulty in him dealing with those traditional competition economics points at trial as
10 well. There has certainly been no evidence to that effect.

11 My learned friend said, "Well, Google has prepared expert evidence in many
12 jurisdictions and the Class Representative hasn't". But as I understand it, Dr Latham
13 has given expert evidence on ad tech in cases against Google in a number of other
14 jurisdictions already. So it's not quite right to say that they're starting from behind.
15 Dr Latham has been involved in giving evidence in a number of different sets of
16 proceedings, raising these ad tech issues against Google.

17 DR MAHER: Outside of the one for the French Competition Authority, there are other
18 jurisdictions.

19 MR PATTON: I believe it's in multiple jurisdictions. Obviously, my learned friend will
20 be best placed to help you on the detail of that.

21 Just in terms of the authority I said I would show you, if you have the Authorities Bundle
22 at tab 10, page 286.

23 DR MAHER: Can you repeat that?

24 MR PATTON: 286. (Pause)

25 The decision of the Tribunal chaired by Ms Lucas again in the Coll case against
26 Alphabet and Google. And first of all, paragraph 18, she said that:

1 "The convenience of an expert who simply 'has a lot of work on' is not, in our view,
2 a determinative factor when considering whether permission ought to be granted for
3 a second expert, and we doubt whether it's a relevant factor at all."

4 But the situation in that case was more complicated, because there were essentially
5 similar cases being brought against Google and against Apple, and Mr Holt was
6 having to give evidence in two cases before the Tribunal, in relation to the essentially
7 similar issues and that was why they thought an accommodation might be appropriate
8 in those specific circumstances, but there's nothing of that kind suggested here.

9 Then if we go on to page 288. At paragraph 24, the Tribunal says:

10 "If a sensible division of the issue of competition economics is capable of agreement
11 between the parties so that the risk of duplication is minimised, then it seems to us
12 that the balance lies in favour of permitting two competition economists ..."

13 And at 25, they say:

14 "Is a division of the issues possible? The CR hasn't yet made any attempt at a division
15 of the competition economics issues, and we agree ... it would have assisted the
16 Tribunal if that had been done before the CMC ... they indicated that there had been
17 internal discussions as to a workable division of issues ... this is an unsatisfactory
18 situation ... which the Tribunal ought not to be required to take this assertion on trust."

19 They make the point which I think tallies with what Dr Maher was saying, that:

20 "Google submitted that the economic analysis is likely to be interconnected across
21 various issues ... it is suggested that market definition and dominance are unlikely to
22 be capable of separation ... issues of dominance are likely to be capable of separation
23 from [abuse] ... and that quantum depends on the counterfactual ..."

24 So that's actually according to Google's submission.

25 And then in 27:

26 "We consider that the appropriate courses is for us to grant permission for each side

1 to adduce two experts ... and to require the proposed experts to seek to agree an
2 appropriate division of the issues between the experts on each side ... that should
3 provide Google with a clarification of it requires ... without being prescriptive, it seems
4 to us that it is likely that the same approach to the dividing lines ought to be adopted
5 by both sides; it would plainly be undesirable for the division of issues as between one
6 party's experts not to reflect the same division as between the two experts on the
7 other. If there were to be any disparity then that would present challenges for any
8 hot-tubbing exercises in due course, and may create the risk of duplication which
9 ought to be avoided. If the parties are unable to agree ... they should return to the
10 Tribunal ... and the battle lines will have been drawn. We should make clear that this
11 is the practical solution to the position the parties now find themselves in. That fact
12 remains the CR ought to have been able to explain her proposal and discussed this
13 with Google prior to the CMC and not afterwards ..."

14 So that's what we've sought to do: we sought to say, "Well, look, auction theory is
15 a specialist field, and one can understand why someone who is steeped in that field
16 may be the appropriate expert". For all of the more routine competition issues, that
17 can be dealt with by a competition economist, and as I said, there's just no explanation
18 as to why that isn't possible on the Class Representative's side.

19 And then it goes slightly beyond that, because it's not simply that the Class
20 Representative is seeking permission for two experts; it's seeking permission today
21 for a third expert, an expert in auction theory, even though as I showed you in 35, the
22 two competition economics experts are themselves going to be permitted to address
23 auction theory in their reports and although it's presented to you today as just an
24 option -- we'll see whether we need it or not -- the relief they're actually seeking is that
25 you give permission now for that expert evidence to be given, and that follows from 37
26 of the draft order, so you would be giving permission now and therefore that is likely

1 to be the position.

2 And so in reality, what the Class Representative -- what it comes down to is that they're
3 not seeking two experts to deal with these issues, but they're seeking permission today
4 for three experts to deal with these issues and we say there isn't actually any
5 justification for having three experts when two experts plainly could deal with them;
6 that's going to increase costs, it's going to increase complexity and there isn't any
7 justification for that.

8 And there is a practical problem here, which is that if we only get an auction reply
9 expert in accordance with what they've suggested in 37, if that only comes in reply
10 from the Class Representative, we don't see how that could fit within the existing
11 timetable for the expert process to take place. You've got your order at bundle B3,
12 page 32.

13 DR MAHER: Page 32?

14 MR PATTON: Yes. This is the CMC 2 order, and it's paragraph 27. And you can see
15 how the timings work. And we don't see how -- if the Class Representative is going to
16 introduce a further step observing auction economics expert evidence for the first time
17 in reply to Google's auction expert economics evidence, there's plainly not time. If that
18 happens, for example, at the end of March, there's plainly not time for Google to put
19 in reply expert evidence to that before the expert meeting in April.

20 And what was suggested in a letter sent the other night was, well, Google shouldn't
21 do that. What it should do is that the meeting should go ahead, and Google should
22 then serve its reply report after that meeting. I mean, that simply doesn't make any
23 sense at all; that means that the meeting can't take place on the basis of the reply
24 report, as it were, the rejoinder report, and the meeting therefore won't be effective.

25 A report will then arrive at a much later date, and it won't have been factored in to the
26 experts' discussions. So we don't consider that the Class Representative has come

1 up with a workable solution, even as a matter of timing, to the idea that if they reserve
2 the right to serve this new auction report in reply, how is Google going to have an
3 opportunity to serve a reply response to that, and then factor that into the existing
4 expert meeting timetable?

5 Just on the technology and industry experts: we're not seeking to shut out the Class
6 Representative from seeking permission for these types of expert evidence, but the
7 position before you at the moment is that it's a completely undeveloped proposal. It
8 doesn't really identify very specifically what the expertise would be. But more
9 importantly, there is no identification at all of what the issues are that are going to be
10 addressed, and given the Tribunal's duty to control the expert evidence -- because it's
11 notoriously expensive -- we submit that it would be wrong to give a blank cheque now
12 for that type of expert evidence when you don't know even what topics are going to be
13 addressed and you should instead revisit that if the Class Representative decides to
14 apply once it's considered the disclosure.

15 That marries up with the approach that was taken in the Bulk Mail case, and that's in
16 the Authorities Bundle at tab 21, page 766.

17 MR ALTY: Authorities -- sorry.

18 MR PATTON: 766. This is a decision of Mr Malek sitting as the chair of the Tribunal.
19 At 766, you can see in paragraph 11 what the application was:

20 " ... the Class Representative wrote to the Tribunal applying to adduce industry expert
21 evidence from a trade witness ... the precise matters this witness would address,
22 Class Representative stated, would depend on what emerged from disclosure [and
23 that's exactly what you're being told]. Its best assessment ... was that it would be
24 expert evidence, drawing upon the witness' expertise within the mail industry ..."

25 And in fact, it gives some more detail than you've been given as to the sorts of topics
26 that would be looked at.

1 And then if you read the following paragraphs, the Tribunal, first of all -- at
2 paragraph 13 -- said that the Class Representative acknowledged "the difficulties as
3 to the status of trade witnesses" in the case law, about whether that really is expert
4 evidence at all, which requires a close examination of the nature of the evidence itself.

5 They record at 15:

6 "Royal Mail submitted that ... granting the application would amount to giving open
7 ended permission to adduce expert evidence, with the issues [identified only after] ..."

8 And at 16, they say:

9 " ... the application doesn't provide the name of the proposed witness, nor has it been
10 clarified in sufficient detail what issues the expert's going to address."

11 And so:

12 "The Tribunal decided that the Class Representative has liberty to apply to make an
13 application for permission to call a trade witness, whether as factual evidence or expert
14 evidence within four weeks of the completion of the disclosure ruling ... before the date
15 for exchange of witness statements."

16 18: "That ... will specify the precise issues, by reference to the pleadings, that the
17 witness is going to cover, as well as the legal basis for why that person's evidence is
18 admissible, either as fact evidence or it's going to be expert evidence."

19 "The Tribunal doesn't think that's straightforward, and [it's] therefore going to come to
20 a view [about that later] ..."

21 And that's essentially what we have put in our draft order in relation to that.

22 I'm grateful.

23 MR FACENNA: On the issue of Dr Latham's involvement -- and I've sought
24 instructions on that -- but there's a more general point in relation to that, which is unlike
25 Google's experts, if Dr Latham has worked for other clients in relation to ad tech, there
26 are obvious restrictions on the extent to which he can rely on the work product that's

1 | been produced for other clients.

2 | In terms of the split between experts, some of the issues that were identified in Coll,
3 | some of the difficulties, they won't arise here by definition, because Google has
4 | decided that almost everything is going to be dealt with by one expert and it will have
5 | someone else for auction economics, so there isn't going to be a mismatch in terms of
6 | multiple sets of experts on both sides and as I indicated, the current thinking, which
7 | I understand we will be able to confirm within a matter of weeks, is that we would split
8 | it in precisely the way that you identified would make sense Dr Maher. So that
9 | addresses some of the issues that you see were raised in the judgment that you were
10 | taken to.

11 | On the question of timing for the auction evidence, if we get there, we -- so there are
12 | in fact cases where experts have been directed to meet up and discuss it even before
13 | they produce their own reports, let alone the joint statement, the different views about
14 | whether that's useful or not. Again, it's purely a contingency at the moment. It's our
15 | hope and expectation that we won't need to have a separate auction expert, but we
16 | don't know yet exactly what the scope of the evidence is going to be from Google. If
17 | we do have to do that, we believe, as proposed in that letter you were taken to, that
18 | there is sufficient space in the timetable for that to work. So any responsive evidence
19 | from Google could be filed, we say, in the week or two after the without prejudice
20 | expert meetings which are the last week of April 2028. If necessary, there can be
21 | further discussions. That still leaves until 2 June 2028 before the joint statement has
22 | to be served. Bearing in mind it's going to be reply evidence only. By definition, we'll
23 | only be relying on an auction expert if there's something broad that we're not expecting
24 | in the evidence that comes from Google.

25 | DR MAHER: I actually should have asked Mr Patton this. In the sense that the Class
26 | Representative has suggested that their competition economist will deal with auction

1 theory matters, and you're proposing that auction theory be dealt with separately. In
2 many cases, competition economists are quite capable of dealing with matters of
3 auctions within the context of competition economics. My fear is, given the new
4 practice directive that the Tribunal has issued on expert evidence, that if you call an
5 auction theory specialist, that what they do address is still within the confines of this
6 market itself and how it interrelates to that, and not just go down a rabbit hole on a lot
7 of auction theory aspects that might not have a bearing so much on the issues of the
8 abuse or market dominance or things like that.

9 MR PATTON: That's very helpful. I'm sure we'll be very mindful to make sure the
10 evidence is really focused on the issues that arise in this case. But as you know from
11 the pleadings --

12 DR MAHER: So is there a reason why Google's competition economist could not deal
13 with the competitive nature of the auctions within the market as we're looking at?

14 MR PATTON: I think it's simply that we felt that, given auction design is an important
15 issue in this case, having someone who is particularly well qualified on auction theory,
16 rather than being just a general competition economist, that that would be more useful
17 to the Tribunal. That's not been objected to, of course. That would still only give us
18 two experts overall, compared to the three that the Class Representative has made.

19 DR MAHER: Bear in mind that, really, we do need to have that still within the
20 boundaries of the definition of the case, rather than going off on tangents.

21 MR PATTON: I'm sure we will be very, very conscious of that. I mean, when I say
22 auction specialist, what I mean by that is in the field of economics in relation to --

23 DR MAHER: No, no, I understand that. (Pause)

24 MR PATTON: Thank you.

25
26 Submissions by MR FACENNA

1 MR FACENNA: You've identified the thinking on our side as well. Our expectation is
2 that there is not going to be specialist auction evidence, in this case, that Dr Latham
3 and his colleague won't be able to deal with. But we don't know yet what an auction
4 expert is going to be asked to give evidence on and, if we end up with something which
5 is much more wide ranging, then we'll obviously have to take a view as to where that
6 leaves the class rep. It might be we have to revisit that.

7 DR MAHER: Is this something that the parties can take away, then? If the Tribunal
8 was minded to go with that direction, to sort of agree, maybe on an adjustment to the
9 timetable.

10 MR FACENNA: Sorry, to understand the question, are you saying we defer the
11 question now as to whether there should be permission for it and we come back and
12 ask later if it turns out that we think we do need to serve reply evidence.

13 DR MAHER: No, I think the point that Mr Patton had made is that the timetable as it
14 currently stands -- if the Tribunal was minded to go along with what is
15 suggested -- does not allow for a reply report by Google's auction expert in reply to
16 your reply.

17 MR FACENNA: Yes. I think we say it does. Should we bring up the order again,
18 rather than speaking about it in the abstract.

19 DR MAHER: Yes. Where's the timetable in the order.

20 MR PATTON: It's at B3, page 32.

21 DR MAHER: It's paragraph 32?

22 MR PATTON: No, it's page 32, paragraph 27.

23 MR FACENNA: So the defendant's signed expert reports would be received
24 28 January. We would then be serving reply expert reports on 24 March. I think the
25 thinking is that, if we are going to put in something from an auction specialist, we would
26 also be doing that on the March date. We think that's how that would work.

1 Google's objection is that that doesn't leave enough time between 24 March and when
2 the experts are due to meet on 21 and 28 April. To which we said, well, it might leave
3 enough time because, if you're only dealing with reply evidence, you might not need
4 that much time. But also, even if you needed to push that deadline into the first week
5 of May, there's no reason why that couldn't be accommodated. The experts can have
6 another Teams meeting, if necessary, before they end up on a settled joint position on
7 2 June.

8 MR ALTY: Basic question on timing. Therefore, presumably, you wouldn't be
9 appointing this auction expert till after 28 January.

10 MR FACENNA: Unless there's some other indication before then that changes our
11 view. Our current view is that we likely won't need this person.

12 JUDGE LEECH: But you're going to serve it -- it's going to be reply evidence anyway.
13 He's going to reply or she's going to reply to Google's auction expert.

14 MR FACENNA: Yes, it would --

15 JUDGE LEECH: So it may not even be necessary to give Google an opportunity
16 to -- there's no permission to call whatever evidence in rejoinder. If your guys haven't
17 dealt with the actual auction theory expert's evidence that they've said, you want an
18 opportunity to reply to that.

19 MR FACENNA: To deal with that, and it might be someone other than Latham or the
20 other competition economist. That's essentially the point. We've suggested this
21 additional reply really as a sop to the complaint that this is giving us a second bite of
22 the cherry. But you're quite right. On a different analysis, it's not at all. It's simply us
23 replying to something which we don't yet know what the scope of it will be.

24 JUDGE LEECH: Well, if it is demonstrated by their evidence that this is so specialist
25 that our two experts can't deal with it, you'll get somebody else.

26 MR FACENNA: Yes, that's our point. Maybe an alternative if you are with us on that

1 and there is a genuine concern about the timetable, then it might be that we need to
2 come back to the Tribunal once we've served our reply evidence. If Google says, well,
3 this goes beyond the scope of reply evidence, there needs to be some further process
4 built in. As I say, we think there's enough time to deal with that, if that contingency
5 arises.

6 On the technical industry experts, the question really is why not wait? I think that's the
7 way it's put. The answer to that is that expertise is needed now to help us review the
8 disclosure intelligently and to identify the gaps. We've proposed controls on the scope
9 of it. We've proposed that there should be a detailed list of issues that those experts
10 will address and, again, that it should be provisioned for Google to serve responsive,
11 factual evidence if it's appropriate.

12 My learned friend relied on the Bulk Mail decision. That's also referred to in Mr Frey's
13 witness statement. That, we say, doesn't assist. It's distinguishable because, in that
14 case, as is clear from the judgment, the Class Representative itself was content to
15 defer the decision on expert evidence. But here we're not satisfied with deferring that
16 decision because, as I say, we need that industry wide expertise early to be able to
17 prepare the case efficiently. So we say it's not a case where the Tribunal can safely
18 postpone that decision without causing prejudice to the Class Representative.

19 The only other point I had was to give you, if useful, the Authorities Bundle references
20 to the cases which are in footnote 8 of our skeleton argument. These, as you recall,
21 are cases where permission has been given to call this kind of industry expertise in
22 appropriate circumstances. So Kent is authorities, tab 8, page 254, and that's 16 to
23 19.

24 In the Coll v Google case it's authorities 296.

25 In Qualcomm, it's authorities 829.

26 In Merricks v Mastercard, it's authorities page 270.

1 The final reference is the Gutmann v SW Trains order is in the Authorities Bundle at
2 page 825.

3 So the only other point on which I have something to say briefly is on the question of
4 timing that we discussed first thing this morning. Again, if we go back to the draft
5 order.

6 MR PATTON: May I just make -- one minute, just on the expert point. Just two things.
7 One is the suggestion that it was just a sop to us, that there should be an opportunity
8 for what you might call a rejoinder report. I mean, that was a concession that the Class
9 Representative made because we identified that, if there was some brand new expert
10 who comes on the scene who presents their analysis, albeit responsive, but a new
11 analysis that we haven't seen before, it would be manifestly, we say, unfair for us not
12 to have an opportunity to address that. That was conceded. It's now called a sop, but
13 it is actually very important.

14 In terms of the impact on the timetable, I mean, we have repeatedly made the point to
15 the Class Representative that we don't see -- this is a timetable that has to be ready
16 in time for the PTR at the end of July, with a trial starting the next October. We're
17 two years out from these dates at the moment. If we're pushing them up closer to the
18 trial two years out, then there is a real problem there.

19 The only other point is that my learned friend said, I don't think this is covered in the
20 evidence, but he said that they need this technical expert now to help them reviewing
21 the disclosure. Of course they do not need permission to call evidence in the litigation
22 in order to retain anyone they wish to advise them to help them look at the disclosure.
23 That happens all the time. It's not dependent on the Tribunal's order.

24 MR FACENNA: On the timing issues in the order, bearing in mind the indication you
25 gave about the homework that you all now need to go away and do, paragraphs 7 to
26 12 of the order concern the DOJ and the Texas materials. There would be no concern

1 on our side if the timing of those dates were to be pushed out by two or three weeks.
2 Perhaps one option might be to have rolling disclosure of those.
3 On the confidential EC decision, which is 24 to 33. So at 24, we had previously asked
4 for seven days and we were content with giving Google three weeks to disclose
5 a version which only removes the redactions over its own material. Given the
6 importance of that document, if there is going to be a squeeze, then it doesn't seem to
7 us they really need three weeks to unredact their own materials. So that, we would
8 suggest, is a timetable that could be shortened.
9 Paragraph 25, again, that was giving Google 14 days within the date of the order to
10 write to the European Commission. Again, that could be shortened to 7 days if
11 necessary.
12 Paragraph 26 gives the Commission 14 days. That's ought to be maintained, I think,
13 realistically.
14 Paragraph 27, the reasonable endeavours to notify third parties. Again, realistically,
15 it's difficult to see that that can reasonably be shortened beyond the three weeks that
16 we've given to notify them. Again, the other timings which follow on from that, given
17 they recognise the involvement of other parties, it may not be possible to shorten
18 those. But the critical thing really is getting the document with the Google redactions
19 removed and that, we say, can happen quite quickly.
20 JUDGE LEECH: Disclosure of the pre-existing disclosure, 5 June is your --
21 MR FACENNA: Is that the individual bits and pieces that -- sorry, is this paragraph 7 --
22 JUDGE LEECH: I was just looking at paragraph 7, yes.
23 MR FACENNA: So that was for Google to write to us with their proposals about the
24 search strings that should be applied to the DOJ investigation materials. If you're not
25 in a position to give an indication today as to where you're going -- I mean, if you were,
26 we could start that process. If you're not then I suppose we'll have to wait for them to

1 do that. We'd be happy to have the discussions in the meantime on a contingent basis.

2 JUDGE LEECH: In relation to 7?

3 MR FACENNA: It would be 7 and 10. So which search strings can we agree between

4 us.

5 JUDGE LEECH: I think it would be useful if you had those discussions. I'm not

6 prepared, I think, to give an indication. But if you could start the ball rolling. It may be

7 that we will stick by those dates. 5 June is only a week or 10 days away, isn't it?

8 DR MAHER: Yes.

9 JUDGE LEECH: It may be that those will have to be pushed back slightly.

10 MR FACENNA: So the first step would be for Google to write to us with their proposals.

11 I think that's still what we would anticipate would be useful, and if you're indicating that

12 you think that would be useful as well --

13 JUDGE LEECH: Yes, we are indicating that that would be useful. And if they say,

14 "Well, that's such a complicated exercise, we need to wait for the Tribunal's decision",

15 then so be it. I don't think we can compel them to do that. But there is a quid pro quo,

16 which I'm about to come to, which may mean that it's in their interests to engage with

17 you on paragraphs 7 and 10.

18 The quid pro quo is 42(a) and this is really a point for Mr Patton, rather than for you,

19 Mr Facenna. We've obviously heard full arguments and are going to decide the issue

20 in principle. I think we do have a concern about this. It's not the schedule of

21 appendices 1 and 2, it's Appendix 3. Mr Facenna, I think, makes a very fair point that

22 when you're going to fire that across somebody's bows immediately: one, they might

23 just refuse to engage; and secondly, that's getting a real frisson to say the least.

24 We do think 42(a) -- but if we were, in principle, in your favour, we wouldn't want to

25 refuse to make the order simply because we think Appendix 3 is too wide. Since you're

26 actually contemplating a refinement process anyway, if we make an order in your

1 favour, I think we're going to want you to go away and rethink Appendix 3. We do
2 think it's important that the ball should be clearly set rolling before the summer so that,
3 by the time we get to exchange of witness statements, particularly factual witness
4 statements and experts obviously -- which will be a year from now or whenever that
5 material is available, particularly to the experts but also they may choose to call some
6 of the large publishers.

7 So I think what I would propose at least is that, if it's possible for you to consider
8 potential refinements to Appendix 3 -- I'm not promising you there's any value in that
9 but it seems to me that, if we make an order in your favour, we're going to want you to
10 reformulate Appendix 3 and also for Mr Facenna and his side to engage with
11 Appendix 3. So the quid pro quo, really, is I can't force you to engage on these issues
12 either, but it's in both your interests at least to co-operate with each other. You with
13 him on paragraph 7 and 10, him with you in relation to 42(a). If I can put it in terms of
14 a bargain, really, that if you can get working on those two things. Because I think if
15 we do make an order in your favour in relation to the large publishers, we will want you
16 to go away and engage with each other about what the content of the disclosure
17 request should be.

18 I think we might also want to see that done. In a sense, less is more. If we make an
19 order -- which is going to be unusual in these proceedings -- in your favour on your
20 application, which goes part of the way to address Mr Facenna's point about survey
21 evidence or whatever, it may be that publishers are going to be much more willing to
22 engage and give you the kind of evidence which you want. And also meet his point
23 about that there's a motivation behind this which isn't directed simply to getting
24 disclosure. If you give them a much simpler, more targeted request.

25 I mean, we won't formulate it but, ultimately, it seems to me if the parties can't agree
26 about what goes into Appendix 3, we are going to have to rule on that. So it's going

1 to be a two-stage approach. We're not, at this stage, going to be prepared simply to
2 make an order that Mr Facenna must approach large publishers with Appendix 3.

3 MR PATTON: Yes.

4 JUDGE LEECH: Without making any order at the moment, it seems to me those are
5 the two bits of homework that we would leave with you while we're considering our
6 decision. How you choose to structure those engagements -- can't force you to do
7 that but I think it's in the interests of both parties that you at least start work on that so
8 that you kick off both items. So that, once you get a decision, you're in a good position
9 to give effect to it.

10 Which then leads me to the final question which is that, let's say we give a judgment
11 in two to three weeks' time. What I had in mind was actually sticking the -- so that we
12 don't have to have a further hearing or a round of correspondence between you and
13 the Tribunal which we've then got to consider, is actually give you the dates, giving
14 you permission to reply if you think they're too tight.

15 So what I would anticipate is if we're making an order in your favour, we will actually
16 specify a date for an agreed form of Appendix 3, if you like, and an agreed form of
17 search, effectively to accelerate the form that you anticipate.

18 MR FACENNA: Yes. I forgot that I had said this morning that we had worked out
19 internally what our backup might look like, and it might not be what you go for. But
20 effectively, our proposal was that you would make a direction that by X date -- and our
21 preferred date was 18 September because that lets us make some real progress on
22 the disclosure -- but by X date that we would provide Google with our proposals.

23 JUDGE LEECH: Yes.

24 MR FACENNA: That's the information to be sought from class members.

25 JUDGE LEECH: Yes.

26 MR FACENNA: We agreed that we would do that with reference to their existing

1 requests in Dr Majumdar's evidence. So we would address both the data and the
2 questions and the manner in which any information ought to be sought.

3 JUDGE LEECH: Well, if we're going to make an order in that form, it's going to be
4 pretty -- the timetable is going to be quite swift.

5 MR FACENNA: I inferred that. The only point I'd make is that I am told by the experts
6 that the process of identifying not just the gaps and the sort of things that might be
7 useful -- I think they probably already have some idea of that -- but the large publishers
8 or a representative class, that is quite complicated. So it's not a matter that could be
9 done in a space of seven or 14 days.

10
11 Discussions on timetable

12 JUDGE LEECH: I think we also need to work through precise directions that we're
13 going to give. But what I had in mind is rather than giving a decision in principle and
14 then saying, well, we'll hear submissions from the parties on timing or mechanics,
15 because we'll actually make an order. If you disagree with it, then you can come back
16 to us.

17 MR FACENNA: Yes.

18 JUDGE LEECH: Or you can ask for an extension of time. Because otherwise we're
19 going to effectively end up re-arguing, having part of the same argument again. I think
20 it's in everybody's interest that you know where we -- we'll obviously be receptive to, if
21 you say, "Well, that's just not doable".

22 MR FACENNA: Understood. So you have it, our proposal is in that letter that I handed
23 up yesterday.

24 JUDGE LEECH: We've got that, yes. In a sense, I think where we'll end up is we'll
25 decide the issue of principle and we'll probably end up with, if we're in Mr Patton's
26 favour, we'll end up with a sort of blended solution because of our concerns about the

1 width of Appendix 3.

2 MR FACENNA: The only other issue is whether we want to try and list something for
3 November.

4 JUDGE LEECH: Yes. I think what would be useful is if we could have some dates
5 from the parties in November. We've got various availability issues ourselves. So if
6 you could give us a -- when did you anticipate? Have you got a specific date in mind?

7 MR FACENNA: Well no, but I think vaguely, on our side we thought it probably needs
8 to be around mid-November.

9 MR PATTON: I don't think we've discussed this.

10 JUDGE LEECH: If you want to discuss between yourselves, and let us know. We do
11 have some availability issues in November for getting the Tribunal together, but we'll
12 try to accommodate you if we can.

13 MR FACENNA: Understood. It might be that you might decide it's something that
14 could be done online; it depends on the scope of it, I suppose.

15 JUDGE LEECH: Yes. I prefer myself to do it in person if we can, but we could do it
16 online. In principle, I think we're going to need another hearing, if this one is anything
17 to go by.

18 Anyway, thank you all. I'm sorry that we've eaten into lunchtime, but it means that
19 nobody has to come back at 2.00. I wish you all a very good bank holiday weekend.

20 (1.19 pm)

21 (The hearing concluded)

22

23

24

25

26

1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	

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?