IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1424/5/7/21
1589/5/7/23
1596/5/7/23
1636/5/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 18th November 2024

Before:

The Honourable Mr Justice Roth

(Sitting as a Tribunal in England and Wales)

BETWEEN:

KELKOO.COM (UK) LTD AND OTHERS
INFEDERATION LTD
WHITEWATER CAPITAL LTD
CONNEXITY UK LTD AND OTHERS

Claimants

v

GOOGLE UK LTD AND OTHERS

Defendants

A P P E A R A N C E S

Philip Moser KC & Hugh Whelan (Instructed by Linklaters LLP)
on behalf of Kelkoo and Ciao

Aidan Robertson KC & Matthew O'Regan (Instructed by Preiskel & Co LLP)
on behalf of Connexity

Meredith Pickford KC & Luke Kelly (Instructed by Herbert Smith Freehills LLP)
on behalf of Google

Tom Bolster (Hausfeld & Co LLP) on behalf of Foundem

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

Monday, 18th November 2024

(10.30 am)

MR JUSTICE ROTH: I start, as always, with a warning. These proceedings, like all proceedings in this Tribunal, are live streamed and an official recording and transcript of the proceedings is being made. It is strictly prohibited for anyone to make any unauthorised recording or take any visual image of the proceedings and doing so is punishable as a contempt of court.

I have received the skeletons of the parties and various documents. There are a number of documents that are marked confidential or passages in documents that are marked confidential. I trust that everyone will take care when referring to those passages, if it should be necessary at any point and I think that would only be in the course of the disclosure applications to go into closed session, we can do so and turn off the live stream, but we will see how we go.

As I understand it, but please correct me if I am wrong, there is nothing in the skeleton arguments themselves that is confidential. Is that correct?

MR PICKFORD: It is correct, yes.

MR JUSTICE ROTH: I think the first thing to do is to deal with the preliminary issues trial which has been directed. I understand the parties are available in the window starting on 17th March. The Hilary term ends on 27th March and I think it is highly desirable to do it in that first part of the window and get on with it. These are long running cases. We could either do it in the week of 17th March or starting the following week when there are four days available. There is some suggestion that Google prefers the second of those weeks, but I am not quite clear why.

MR PICKFORD: The availability of instructing solicitors. There's conflicting (inaudible) as I understand it.

MR JUSTICE ROTH: But you have a very large team of solicitors.

MR PICKFORD: We do and some are more involved than others. That is our preference. Obviously we are not holding that up as determinative. We are just giving that

MR JUSTICE ROTH: It is not a trial with - I can see if it is the main trial with witnesses and so on, then the presence of particular people from your solicitors are important, but this is really just analysing the decision.

MR PICKFORD: Yes.

MR JUSTICE ROTH: I think it is dictated by trial length. There is some suggestion that it could take five days. I find that very hard to understand.

MR MOSER: It was only a suggestion that a fifth day might be held in reserve in case it overruns, given the sheer length of the recitals. We looked at the previous example of the recital trial, which we see at paragraph 16 of our skeleton argument.

MR JUSTICE ROTH: Yes, but that was largely taken up, and I remember that trial, with a lot of legal argument about abuse of process, a lot of authority and abuse of process, which is not relevant to this trial and indeed some discussion of what the principles are as to what is binding in a recital. So all of that is now settled.

MR MOSER: That's very helpful. Rather like my learned friend, this is not something where we are dying in a ditch over the fifth day in reserve. It has been suggested in case the court were attracted to it, but it is not something which we are somehow insisting upon.

MR JUSTICE ROTH: I think it would be desirable from the point of view also of future conduct of the trial to do it as soon as possible. I think we appreciate what's said about Herbert Smith Freehills, but, as I say, it is not a trial where particular individuals are needed from the solicitors. I will fix it for 17th March.

MR MOSER: I am grateful.

MR JUSTICE ROTH: I will fix it for four days but there won't be anything else listed

on the Friday for Tribunal members. As I say, I would be very alarmed if it goes into a fifth day. I would have thought it is actually three days and one in reserve.

MR MOSER: Yes.

MR JUSTICE ROTH: So I'll fix it for a maximum of four days, but it does mean that there's a possibility if things go badly wrong.

Can I just say then should we have a direction for skeleton arguments? I know that submissions are being made of some length. Will you wish to put in skeletons?

MR MOSER: We will.

MR JUSTICE ROTH: So shall we then so if the trial starts on 17th, which is a Monday, if we say skeletons by 11th March?

MR MOSER: Yes.

MR JUSTICE ROTH: It will be a joint skeleton presumably for the claimants.

MR MOSER: I turn to my learned friend to see his view.

MR ROBERTSON: If there's an extra section in there with Connexity specific submissions, then that will be submissions from myself and Mr O'Regan. It won't be joint submissions. I just make the point Connexity is not an absolute facsimile of Kelkoo.

MR JUSTICE ROTH: I know you are not in your claim, but in terms of what's binding in the recitals.

MR ROBERTSON: We have not come to a final landing on that yet. We are endeavouring not to depart, but if there were a departure, then I just lay down a marker there might be an extra section in there dealing with the additional points that are Connexity specific. I would hope we don't have to do that.

MR JUSTICE ROTH: Yes, and I imagine, although they haven't got counsel or the same would apply to Foundem. You would want to reserve your position.

MR BOLSTER: Yes, sir.

MR JUSTICE ROTH: That's my understanding. There would be one counsel instructed for all claimants at that hearing.

MR MOSER: We don't feel strongly but it will only be necessary to have one skeleton and we will all speak with one voice. If it becomes necessary to have some sort of dissenting skeleton I use that term not as a term of art then we would give notice of that, but that is to be avoided if at all possible.

MR JUSTICE ROTH: Mr Pickford.

MR PICKFORD: Yes, we find it hard to see how to say why binding recitals issue has any claimant specificity aspect to it at all. It is simply a legal question about what's binding and what the meaning of those provisions are.

MR JUSTICE ROTH: I am with you completely.

MR PICKFORD: Certainly what we would strive to avoid is multiple skeleton arguments to bring the same issues. So if there really is literally a dissent, and I suppose we can't stop them having a dissent.

MR JUSTICE ROTH: You might welcome it.

MR PICKFORD: Quite, but I think on any points on which they are ad idem, it is important we just simplify and have one skeleton dealing with it otherwise we are going to be dealing with far more material than we need to.

MR JUSTICE ROTH: I will say a joint skeleton argument. If there is anything additional or claimant specific that any of the three or four technically wish to add, you have permission to do so, but no repetition.

MR MOSER: Absolutely.

MR JUSTICE ROTH: Can I just say about bundles, I think four bundles, one of the written submissions. Skeletons don't have to go in a bundle. Could we have the decision as a separate small bundle hard copy. Could we have the two judgments of the EU courts together as a third small bundle and then a fourth bundle for any other

authorities and the fourth bundle can be purely electronic but the first three in hard copy.

MR PICKFORD: That's very helpful. Sir, there is an issue you may wish to come back to in the future, but just to flag it whilst we deal with the scope of what we are going to be dealing with in March.

We have last week made an application to strike out the exemplary damages claim. Now obviously we are not expecting that to be dealt with in this CMC. It might be convenient, however I don't think it is going to take more than a couple of hours to deal with it in the March hearing, but it doesn't have to be then either. I am just raising that now in case it is convenient to consider it now.

MR JUSTICE ROTH: It only concerns Connexity.

MR PICKFORD: It only concerns Connexity.

MR JUSTICE ROTH: So we will not do it in a hearing where everyone is present. It is possible that we could do it on the fifth day and I think we should allow a day for it.

MR PICKFORD: Of course.

MR JUSTICE ROTH: It may be it is only half a day but frankly when you get to half a day in this Tribunal, you might as well say a day.

As I understand it but please correct me because I have not read anything about it, that's not based on evidence, it is based on legal principle. Is that right?

MR PICKFORD: Yes. It is a double jeopardy point.

MR JUSTICE ROTH: Yes. Have you served it yet?

MR PICKFORD: We served the application at the end of last week. The reason why it was then is because it only became apparent to us when we got the skeleton argument from Connexity how much was being loaded on to that part of the claim. Previously it didn't seem necessary to engage with a strike out. It now seems we have to grapple with that issue to determine

MR JUSTICE ROTH: It might be convenient once we have a Tribunal, a panel here that week to do that on the Friday. That doesn't affect your clients, Mr Moser.

MR MOSER: No, it doesn't, sir. I was just going to say we have no dog in that fight. That is a matter for my learned friend Mr Robertson.

MR JUSTICE ROTH: Mr Robertson, would that work for you?

MR ROBERTSON: One day at the end of that week, yes, that would work for myself and Mr O'Regan.

MR JUSTICE ROTH: Let's do that. Let's list it for then, because it also has some impact on disclosure I think.

MR PICKFORD: Yes, quite.

MR JUSTICE ROTH: It is good to get that settled. We will list that for the Friday, whatever that is. That's the 21st. If you can serve your skeleton for that at the same time as the other one. Is there anything else on the preliminary issue trial? We will not envisage another CMC before that trial. Is there anything else that needs to be addressed today?

MR MOSER: No.

MR JUSTICE ROTH: Fine. Then let's move to what I think has been called Trial 1 and I think perhaps logically the first issue raised is defining the issues for Trial 1, because I think there is an application on the Claimants' side to change the wording or slightly clarify the wording. I have a draft of an amendment to this is to paragraph 12 of 26th March order.

MR ROBERTSON: It is our application for clarification.

MR JUSTICE ROTH: It is your application. Just looking at what you have said, the original wording, I have the order of 26th March in front of me. It is:

"Whether on the assumption as to what the relevant markets were and that Google was and remains dominant on the relevant markets as alleged."

It is proposed that that part is changed to read:

"Whether on the assumption relevant markets were and are those defined by the European Commission in the Google Shopping decision and that Google was and remains dominant on the relevant markets as claimants allege."

That probably is a helpful clarification it seems to me. The wording of the original is not very elegant. So to substitute:

"Those defined by the Commission in the Google Shopping decision". So that's the first change. I think the only other substantive change is to instead of saying Google abused that dominant position, it says:

"Google abused its dominant position on each of the relevant markets."

I have not read the pleadings with this in mind. Is it because there may be at least two markets, one, the market for general search and, secondly, the market for shopping comparison sites. I am not sure it is alleged that Google is dominant in the market for shopping comparison sites, is it? I thought the whole point is that there is leveraging from the market for general search in which Google was dominant on to the market on which it is not dominant.

MR O'REGAN: Yes, if I may assist. The relevant product market is the market for general search services, but those markets were found by the Commission to be national, and different claimants' claims are based upon effects on their businesses in different national markets and they are not the same co terminus for each. That is why it is markets plural. It is not that we have different product markets but the geographic markets that the claimants say were affected by the conduct are national, hence there is more than one that would need to be looked at.

MR JUSTICE ROTH: Yes, that's helpful. Equally there is a relevant market for shopping comparison sites.

MR O'REGAN: Yes, but there is no finding by the Commission on that market. I don't

think any of the claimants' cases are predicated on there being dominance in such markets as opposed to (inaudible) in those products.

MR JUSTICE ROTH: It is only looking at wording proposed.

MR PICKFORD: Sir, can I make a suggestion, which I hope deals with this very point? In the newly proposed wording if it says:

"Whether on the assumptions that the relevant search markets."

If we insert the word "search", then I think that clarifies that the assumption that we are making is about dominance in search markets.

MR JUSTICE ROTH: No, I don't think that helps because we might need the other relevant market. If we put in (i):

"Google abused its dominant position as alleged on each of the relevant markets."

That will deal with it, I think. We might need the fact that there is a relevant market in which Google is not dominant, but that is a relevant market.

MR PICKFORD: The potential difficulty I see arising is this. In relation to the CSS markets there is no doubt an argument brewing about whether the findings that were made by the Commission on that are binding. We will be submitting that they are not, because they weren't necessary for the findings of abuse of dominance.

Now as long as we are not being shut out from ultimately contesting that market, then that's fine and obviously this just talks about assumptions. It doesn't talk about any findings, but we will have to determine I think which trial it is where that issue is going to be brought forth. Is it going to be, if necessary, at the first trial or is that going to proceed on an assumption in that regard and then it is going to be brought forth at the second trial? That's the reason I make this point.

MR JUSTICE ROTH: There is a dispute as to whether the Commission's view about the comparison shopping market is a relevant market.

MR PICKFORD: Not whether it is well, yes. In particular whether that is binding,

because the context for that is that there was a dispute between the Commission and Google about what the relevant market definition was in that context and Google was pointing to sites like Amazon and saying that they should be in it. What the Commission said is "(a) we disagree with you. We are not going to include them in that market, but (b), none of that matters, because even if they had been in that market, we still come to the same position as we did".

That then leads to a question about whether that point is binding, given it was not necessary for the decision. What I want to make sure is that we are clear about what it is that we are going to have to be arguing about and making findings about as opposed to proceeding on assumptions about that hearing.

MR JUSTICE ROTH: Yes. So that's why I had not appreciated that. Thank you. That's helpful. You are saying “the assumptions that the relevant search markets…”, is it, "...remains dominant as the claimants allege, Google abused its dominant position on each…."

Then it works.

MR PICKFORD: That accords with what the claimants are asking for. Effectively what that means insofar as one wants to argue that point, then it is incumbent for us to bring forward those arguments at Trial 1 rather than proceeding on an assumption and saying we had this instruction but now we are going to try to pull the rug away.

MR JUSTICE ROTH: No. Obviously you will be able to dispute if the dominance is not conclusively binding in the Commission recital, you will be able to dispute that at a later trial.

MR PICKFORD: Yes.

MR JUSTICE ROTH: But equally you will be able to then dispute whether that's a relevant market at all, the lesser market.

MR PICKFORD: Are we talking about the comparison shopping market?

MR JUSTICE ROTH: Yes, the comparison shopping market.

MR PICKFORD: Okay. That's understood. As long as we are clear.

MR JUSTICE ROTH: Yes.

MR PICKFORD: We can do that.

MR JUSTICE ROTH: The suggestion is it reads:

"Whether, on the assumptions that the relevant search markets were and are those defined by the European Commission in the Google Shopping Decision and that Google was and remains dominant on the relevant markets, as the Claimants alleged. (i) Google abused its dominant position on each of the relevant markets and, if so..."

Then I think it is enough to say in what respects and over what periods. I don't think we need the other words there. We will then amend paragraph 12 on that basis.

MR MOSER: I was going to say we are also content with that. It may be taken as read.

MR JUSTICE ROTH: Thank you, and Foundem any different view? Thank you.

Then there is the question of paragraph 13 of the previous order, that is to say whether we fix the first trial now or we fix it after judgment in the preliminary issue trial. That's Google's application.

Mr Pickford, I appreciate that judgment in the preliminary issue trial will be important and work for Trial 1, but I think these cases have been going on for so long particularly, not Connexity, but some of the others, that we really need to make progress. I would like to fix it unless you persuade me vigorously. I think it is a question of when we fix it for, but I think it is better to fix it and allow time for judgment.

MR PICKFORD: Sir, I certainly hear the Tribunal on that. We, of course, understand why the Tribunal is keen to get on. If I may just take a few minutes to explain why we actually think the best way of making progress still is to properly take stock of the preliminary issue judgment, because there is a real point there. This is not a delaying

tactic.

MR JUSTICE ROTH: It is a question of, if I can interrupt you, I can understand you want to take stock of it in terms of preparing factual evidence and so on and that seems to me a question of how one timetables, but Trial 1 is not a four-day trial. It is a several week trial.

MR PICKFORD: Yes.

MR JUSTICE ROTH: I will hear you all on how long. You are all busy successful silks. If we don't fix the trial for several weeks well in advance, we then get told "Oh, we can't have it then because Mr Pickford is booked up for the next 18 months and we can't possibly have our case with any other KC". Then we are told when you are free, Mr Moser is booked up and then we end up with a three year wait and that's just not acceptable.

MR PICKFORD: Sir, that is understood. I think in that context if I could nonetheless just explain this point, because I think it will be important for how the Tribunal then timetables it.

MR JUSTICE ROTH: Yes.

MR PICKFORD: So the issue for us is what is the level of interaction between the preliminary issue trial and the first trial and then what are the implications for that degree of interaction for how we should make directions now for the second trial. I entirely hear what the Tribunal says about at the very least wanting to get that in the diary and the question then is perhaps what are those directions and what is the timing of it.

The first trial is obviously to determine the two questions that we just considered. So it is about whether we abused a dominant position on certain assumptions and then what we would have done had we complied with the applicable law, so the counterfactual question.

The preliminary issue trial is to determine two issues, namely what's binding, but really critically in terms of the interaction between the two what the meaning is of certain provisions in the decision. The provisions that I have in mind are ones that I believe Mr Turner adverted to at the last CMC and they concern the issue of whether demotions are effectively per se abusive, which is what we understand the case of the claimants to be, or whether the demotion algorithms are only abusive in conjunction with, in combination with the favourable treatment that Google was found to have given itself. That is in our submission the crucial issue which is going to come out of that first trial, because we say it is very clear that it is a combination abuse and that demotions per se are not abusive. On the back of that the remedy that we have brought into place that the Commission has seemingly been content with, we still apply demotion algorithms amongst many other algorithms.

The point is we have now taken steps to ensure that there is no differential treatment in terms of the promotion of CSSs on our results page. So our approach to both what is abusive and therefore what could be abusive outside the time period considered by the decision is critically influenced by that question, as is the question of the counterfactual, because we say in the counterfactual world you don't just get rid of helpful demotions. You just have to make sure that you treat everyone appropriately equally.

Obviously that's not what the claimants say. They say the opposite. That's going to have in my submission very significant implications for how the parties approach the first trial, because at the moment each of our cases is predicated on our understanding of the Commission decision. So when it comes to our explanation of what could be abusive and our explanation of what the counterfactual therefore is, it is predicated on our version. Theirs is predicated on theirs. At some point there is going to need to be a reckoning. Whoever wins or loses on that core issue is almost certainly going to

have to consider whether they need to amend their case to reflect whatever the reasoning is of the Tribunal on that core point, because at the moment they are effectively ships passing in the night, and one can see that the economic analysis that follows from those cases, risks being ships passing in the night at the moment as well. That's the reason we say the preliminary issue trial very sensibly grapples with that first, because we need to know what the answer is and then we need to take it into account.

Now I quite hear that the Tribunal is potentially not content to say "Okay. Well, we are not even going to think about listing the trial" but what we do need to do, if that's going to be the approach, is make sure that there is sufficient time built into the timetable that the parties can take stock. They can potentially amend and it can then feed through, because what we want to avoid is a situation where there is a profound finding following that first trial and then everything is then disrupted, because the parties need to start adjusting their case.

Indeed, I have to say given how important it is, there is the possibility that one or other party may wish to seek to appeal. It may be the Tribunal says we will just have to deal with that as and when.

MR JUSTICE ROTH: I don't think we can programme for appeals, but I did see that what you had proposed as a fall back if you weren't successful in persuading the Tribunal not to fix at all was, for example, that factual witness statements should be three months after judgment in the preliminary issue trial. I will hear from the claimants, but they had suggested I think 1st August 2025. I would hope and expect that those two are very much the same. So I am not going to I am quite happy with the idea that it should be no less than three months after judgment. So if that's the period you are thinking about, I am with you on that.

MR PICKFORD: Okay. Thank you. To be clear, that timetable we have come up

with essentially assumes we have passed on this point, and we are doing our absolute level best to get in front of the Tribunal ASAP. We have not been particularly generous there. I understand your view, sir, is that hopefully we should be able to address the points that we need to in that more substantial time than has been allowed by the claimants, but nonetheless that's not padded out. That's assuming that we are going to have to really get on with things after we get the preliminary issue judgment.

MR JUSTICE ROTH: Yes. Well, some of the work obviously.

MR PICKFORD: Yes.

MR JUSTICE ROTH: It is clear certain recitals you know are going to be binding and that much. So there is a lot of work that can be done. It is not as though you are starting from nothing.

MR PICKFORD: Understood. Of course.

MR JUSTICE ROTH: On that basis, Mr Moser, I am going, we will come in due course to when the trial will actually take place, but I am going to fix it today, so you don't have to push against that. Are you able to say anything about estimated trial length for Trial 1? I appreciate it is early days and I appreciate that we have had a lot of pleadings and that there will be a CMC soon after the preliminary issue judgment I think. That would be a sensible time, but if we are going to list it we have to list it for a certain period.

MR MOSER: Yes, in our draft order which is at tab 8 of the bundle at paragraph 14 we have suggested five weeks.

MR JUSTICE ROTH: Is that something you have discussed I have not crosschecked with the other drafts. Is that a sort of consensus?

MR MOSER: I will have to remind myself what my learned friend says. Yes, they also say five weeks with one week in reserve.

MR JUSTICE ROTH: With one week in reserve. Mr Pickford, does that seem

reasonable to you?

MR PICKFORD: Probably, sir. I think given my earlier submissions, preference would be to certainly err on the more generous side initially, and then if it turns out that we can cut back following the first two hearings, then we can do so. If our aim is to make sure that we have a trial and it sticks, the last thing we need is to timetable something that's too short. I understand it was really five plus one that was being proposed.

MR JUSTICE ROTH: That's right.

MR PICKFORD: That's as best as we can currently estimate and seems reasonable, although it is quite difficult at this stage.

MR JUSTICE ROTH: I think we all understand that. Let's do it for five weeks plus one, six weeks. Then it is a question of working backwards from that. We have, as always, various steps that are involved. Perhaps we should come back to timetable after dealing with the question of expert evidence and how that should be structured. As I understand it, the position is, first of all, you now have a joint expert for the claimants. Secondly, that you are envisaging at the moment calling only one expert, that being an economist, and similarly Google has one expert, who is an economist. Both of those have been appointed already. The question is really about the counterfactual. There is some difference of view.

I have read what you have to say. I am not attracted by the idea of a sort of simultaneous liability and counterfactual and then a reply and then we end up with six reports I think. It seems to me the realistic choice is either that you put in your report covering the counterfactual as well as liability or a possible alternative is you put in your report covering liability. Google puts in a response to liability and its evidence on the counterfactual together. You have a reply on the counterfactual and any further response on liability and then Google has a reply on the counterfactual. So we have four stages.

MR MOSER: Rather than six.

MR JUSTICE ROTH: And four reports rather than six and that is a lot more efficient. If really you say you could not say much about the counterfactual at this stage, that seems to me is the only way it could sensibly work because we do not want six reports. The alternative is, which is I think Google's position, that you should set out your position on the counterfactual straight off.

MR MOSER: In my submission I am attracted to the latter and I agree respectfully that is the only sensible way to do it for the reason we say. We have seen what they say in their pleadings. We say it is not going to be efficient for our expert to guess at how that might turn out in their evidence on the counterfactual. So that effectively in my submission squares the circle between the parties. I don't know what my learned friend will say about it, but we are content. So is Connexity and Foundem.

MR JUSTICE ROTH: Let me hear Mr Pickford.

MR PICKFORD: May I just take some brief instructions just to see whether the proposal has changed the shape of our position on it? It is certainly, we say, more sensible than what was being proposed by Kelkoo, but it still has some possible problems. If I may just ...

MR JUSTICE ROTH: Absolutely, yes.

MR PICKFORD: Sir, if I may, I am going to seek to persuade you that the simpler and orthodox, ordinary approach is still better here. There are two reasons in essence for that. The first is the premise for this whole reordering, certainly as advanced by the claimants and implicitly as adopted in the Tribunal's suggestion, is that the claimants don't understand our case on the counterfactual and they need us to bring that forward so that they can then respond to it. That's the premise.

Then the second point is we say that's wrong and I am just going to come on to deal with that. The second is that we say I think even with, sir, your reordering, I think it is

better but I still fear that there may be some difficulties that even arise out of that in terms of potential confusion.

So starting then with the premise, it is probably helpful to pick up Kelkoo's as an example, Kelkoo's approach to the counterfactual, which is in their pleadings as they were in the run-up to the CMC. So I am going to be dealing with the existing pleadings as opposed to the draft pleadings that were submitted after skeleton arguments, it is hard to deal with those at the moment. That's to be found in the main bundle at 164, page 2669 as regards the counterfactual.

MR JUSTICE ROTH: Yes.

MR PICKFORD: We see there 109B and then (a):

"The reasonable counterfactual is one in which:

(i) Google would not have implemented algorithmic demotions of CSSs or applied manual penalties to CSSs."

So far, so good. That's at least relatively well defined. Then the difficulty becomes:

"Alternatively, there would not have been algorithmic demotions of CSSs or the application of manual penalties of the nature or scale that there were in the real world."

The difficulty that I foresee with a structure where we go first on counterfactual is what are we and our expert supposed to make of the idea that there wouldn't have been demotions of the same scale. We really need to understand what it is being said that is the benchmark for determining what the scale of demotions would have been.

We can grasp the first bit, no demotions at all. We can address that. In my submission after the preliminary issue trial, hopefully if we have won, that is not going to be a credible counterfactual anymore, but obviously I am allowing for the possibility that we might lose at that stage. That's the first point. If one looks at an example of the claimants' approach to counterfactual, it is not entirely clear what they are saying.

If you then go to what we say in response to that, that is responded to at page 2729

of the bundle, which is the next tab on.

MR JUSTICE ROTH: Yes.

MR PICKFORD: And that is at 81B. In particular over the page at 2730 we say we have a split counterfactual, because it depends on what was appearing on our SERPs at the time. We say:

"During the period 2008 to 2013, Google's Product Universal would not have included any links to the Google Product Search page."

We say that's the only change that would have been necessary from the real world, because that is what was found by the Commission in the Decision to have been the pernicious element of what Google did during that period.

Then in the second subparagraph:

"During the period from 2013 until the date of the Shopping Decision, Google would have offered CSSs the opportunity to feature product offers from merchants in Shopping Units in the same way as the Shopping Remedy."

So that obviously brings into play the nature of the Shopping Remedy and we are going to be no doubt discussing that a bit further when we come to issues about disclosure. Although it is fairly concisely expressed, we say that is a sufficiently clear and definite articulation of the counterfactual that we say would have prevailed in the absence of the abuse. We are content I might add to expand upon that if it would be of assistance to the parties when we are due to replead at the beginning of next year. So we don't have a problem with providing even more detail in terms of what we mean at those paragraphs, but the reason why they are relatively short is that we say the differences are actually relatively discrete and they are sufficiently articulated there.

Where that then leads me, sir, is that the whole premise for this reordering is it is said "We don't know what your position is and so until we know what your position is, we can't bring forward our evidence". We say "Actually if we bring it is your case that you

suffered damage." So ultimately it is on the claimants to make the first move in terms of explaining why it is they suffered damage. We can't possibly adduce an expert report based on something as vague as "You would have had less demotions". So for those reasons the preferable course we say is just to adopt the normal course and the claimants go first.

MR JUSTICE ROTH: You say in 81B.1:

"Google will serve expert evidence in due course concerning the counterfactual."

Of course, everyone in competition cases tends to serve expert evidence, but you seem to plead that and they serve expert evidence to support the case they have pleaded, but here it rather suggests that you are going to be explaining what you say is the counterfactual in expert evidence.

MR PICKFORD: That is true, sir, but the question really is when and what the sequencing is for that. I think in my submission it would be to read too much into what was a slightly boiler plate paragraph, arguably subparagraph, that what that meant is that we therefore thought notwithstanding what had been pleaded by the claimants we should go first on this issue.

MR JUSTICE ROTH: Yes. Give me just one moment.

MR PICKFORD: If I could just make one further point, sir, but I am happy to wait.

MR JUSTICE ROTH: Wait just one minute. (Pause.) You see, I think what's slightly puzzling me on the first part it is not about arguing the case. Obviously you want to put forward a counterfactual complying with the judgment. If one looks at the General Court judgment, which we have in the first bundle at tab 12.

MR PICKFORD: Could you give me a page reference? I am sorry. I am using ...

MR JUSTICE ROTH: 446. This is the General Court, but I think this passage was upheld specifically by the Court of Justice. It is paragraph 374 and the second sentence where it says:

"The analysis of the effects of the practices at issue on competing comparison shopping services cannot be limited to the impact which the appearance of results from Google's comparison shopping service in Product Universals and Shopping Units may have had on them, that being only one of the two aspects of those practices, but must also take into account the impact of the application of adjustment algorithms for generic results."

Your 81B.2.1 seems to be only the first of those two. Now it may be that is your case and then but it may be that actually your case goes a bit further, because it seems to me in what you said before one of the critical questions, and Google saying it is a combination of abuse and therefore the algorithms are relevant, whereas 81B.2.1, doesn't seem to refer to that. It just says "would not have included any links" and doesn't address any algorithms at all.

MR PICKFORD: If I could respond on this because this anticipates what is going to be a big sub issue within the question that I said was the core one we are going to be dealing with in due course about the meaning of the decision.

What the General Court found, as upheld by the Court of Justice, is when it came to considering a counterfactual analysis in the context of potential effects, it was legitimate for the Commission to effectively look at a world where both elements of the combination were taken away. We say that wasn't legitimate and the court said well, in that context you can do that in essence.

The point we will be making is even if that is permissible as a matter of European Union law on the issue of how one approaches potential effects, what it does not do is determine the appropriate approach to counterfactual for a damages action where this court needs to employ ordinary “but for” causation principles to determine what damage has actually been caused, that they are distinct legal questions.

Often one can imagine there is not going to be much of a distinction between the two

because of the complication of this idea of the combination abuse doesn't normally arise, but in a case where it does arise there is a very knotty issue about how one approaches causation in the context of an English law follow-on claim. We say in that context we will be arguing that it was not incumbent on us in a counterfactual world to remove both elements that had contributed to the abuse. It was sufficient to just remove one. That is consistent with what we did in the remedy that the Commission has never objected to and it is consistent with the way that the Commission itself approaches the issue of what concerns it in the decision. I think this is getting ahead of matters to take you to the Decision now, but in March I will be taking you, sir, to passages in the Decision that show that the Commission had no problem inherently with demotions.

Its problem was that CSSs got demoted while Google got promoted. It was the combination of factors that was at the heart of the problem. Therefore, for that reason whatever was said by the General Court and the CJEU when dealing with a point that we had about potential effects, is not determinative of the question that this Tribunal is going to need to grapple with.

Sir, I think that explains at least partly why there might be some apparent discrepancy between the two.

MR JUSTICE ROTH: But if, as we know, the claimants are going to say "Both of those are relevant in the counterfactual world and therefore the correct approach is as follows", presumably you will in the alternative respond to that and say "Even if that is so, the correct approach is not the counterfactual as the claimants allege it is. There might be a difference ".

MR PICKFORD: Yes, that's true, but to be totally candid about it, sir, we would need to understand the basis on which that result had been arrived at by the Tribunal in order to address that, because at the moment we don't understand in real world

practical terms how it can be said that we should have operated our business without algorithms that were although they are called demotion algorithms, what they are doing is seeking to filter results to provide more relevant and helpful results to users. We were permitted by the Commission to continue to employ those algorithms. That has never been hidden from the Commission. It fully understands that. It is an incredibly different world, so profoundly different from the world that actually continued once we had implemented the Remedy and satisfied the Commission that we were taking account of the Decision that we really would need to understand how it is said that we should have operated our business to be able to properly deal with it, which comes back to the point I made half an hour ago, sir, about the profound implications of the PI trial and how it will no doubt influence the parties' cases on either side, depending on what the Tribunal finds at that point.

MR JUSTICE ROTH: There is no suggestion that the expert evidence, in whatever sequence it should come before the judgment in the PI trial that's going to be on both sides. I say both sides. One side is several parties. The suggestion is it is a significant time after judgment in the PI trial so you know where you stand. That will, as it were, clarify this question.

One possibility is as there will be a further CMC after the judgment in the PI trial, is to reserve this question until we have that judgment. The experts all know these issues are in play. If they want to start doing some work, they can clearly do it and start reading the material that has been disclosed. They are presumably in the confidentiality ring so they will have enough to work on, and that we actually determine the sequence where I think the claimants are suggesting that it is I think seven months after the preliminary issue judgment. So there will be if there is a CMC three or four weeks after the preliminary issue judgment, we will be able to determine the sequence of expert reports without any disruption at that point and to, as it were, put these two

alternatives on the table and see where we are.

MR PICKFORD: Sir, in my respectful submission that's very sensible. Obviously none of that needs to interfere with getting a date in the diary for the final trial, which is the core thing that the Tribunal is trying to achieve here to make sure that that happens and to make that most effective and efficient in our submission that is by far the best thing to do.

MR MOSER: Sir, that is indeed the third option. Can I just have a go at the first option and respond as briefly as I can to what my learned friend has said, because there is a danger that some progress that has been made in the last five minutes might be undone if we just put it off to the CMC after the next hearing.

We have in a sense learned more from my learned friend about their counterfactual in the last five minutes than we ever have from their pleadings. We had also noted that it seemed to us that they were really leaving it over to the expert evidence under 81B.1, 81B.2.1 and 81B.2.2 in my learned friend's, if I may say so, euphemistic description, have concisely expressed he says their counterfactual. They are, of course, exiguous in the extreme in reality and, for instance, none of the further expansion that was provided some moments ago about their insistence on the original counterfactual that did not attract the General Court order or the CJEU, none of that is in the pleadings.

Very interestingly that illustrates to us that what we say is cogent, because it is going to be that sort of detail that we need in order to have a view on what their counterfactual even is.

My learned friend has criticised our counterfactual in our pleadings but, with respect, I say that proves my point. If he thinks that that is vague, that's because at the moment we have not been able to plead it with greater particularity in response to what they said in their pleadings, in response to what we know so far and that's going to be the problem with the expert as well. They will also be criticised as being somehow vague

and wrong because then they will come in with their completely different view about what they say the counterfactual is.

One point of factual correction if I may. My learned friend at one point, no doubt inadvertently, said that the Commission, he may have used the word approved or similar of their current Remedy. We have written to the Commission, it is in the bundles and asked them. They said they have not commented on or approved the Remedy. We can look at it if becomes relevant. It is not one that they have sanctioned in the sense of, in the positive sense. So it is there. It is true to say that there isn't a further action from the Commission that we are aware of at this stage against their Remedy, but it doesn't go further than that.

What attracts us to your Lordship's original suggestion, which means that we go first and then they respond, is that it does give us optionality in particular in combination with what my learned friend said, which was that they would be willing to give an expansion, as he called it, on their current pleading. Obviously if they were able in the interim to plead their counterfactual with the particularity with which they were relying upon it at trial, that would enable us to make greater progress in relation to the first expert report and your solution, of course, allows us to do that. It just doesn't oblige us to set out our entire case on the counterfactual if that proves to be impossible or unhelpful.

So we are attracted to the original version, a fall back, as you say. My learned friend prefers that is that we have a further CMC, but that really just kicks the can down the road. What we want to know is what their counterfactual really is. I am not going to have that argument now but I can see what they are saying today about the algorithms. What is surprising is the courts in Luxembourg were not terribly attracted to the notion that algorithms that deliberately demote competitors are not considered to be a competition law compliant way of going about your business, but that's an argument

for another day.

MR JUSTICE ROTH: May I ask you, you have all I think, all claimants have just reamended your particulars of claim in the last week or so. They have now been served. Is it envisaged that Google will now amend or re-amend its defences?

MR MOSER: Yes.

MR PICKFORD: Yes.

MR JUSTICE ROTH: If I look at the new pleadings, one of, and this is in a separate bundle. I am looking, in fact, at the Foundem pleadings and I have not traced this through various other ones, and I don't know what form you have this, I have it at tab 1 starting presumably at page 1 of the supplementary bundle. These are 14th November pleadings, and if I go, parts of these documents are confidential, but this is not,

If I go to page 56, in the new pleading Foundem has pleaded rather more extensively to what it says is the counterfactual. I am looking in particular at paragraph 102B (b), (c), (d). Now whether, Mr Moser, your clients have pleaded similarly, but in any case you are broadly making common cause on this.

Google will now amend its defence. I think it is reasonable to indicate that I think Google should plead more fully to what it says is the counterfactual, especially as you now have a more articulated pleading on the other side, so that you will spell out and make clear, which wasn't clear to me and Mr Moser says wasn't clear to his clients, the point you make about counterfactuals under the judgments but different counterfactual for the purpose of damages claims and so on. So I think the matter should be properly pleaded and you now have the opportunity to do that. That will greatly assist all the claimants seeing what that case is. I do think then, Mr Moser, that will help you on the very point you are concerned about and will help your expert. With the benefit of that I do think it is then better to revisit the exact sequence at the

CMC after the preliminary issue judgment, because I think then we will all have a much clearer indication and your case for saying Google should go first might be much more powerful if you win on this argument and equally might be less so if you don't. That will depend on what the Tribunal holds the decision as determined conclusively. So I think we will deal with it in that way.

MR PICKFORD: Thank you, sir. Mr Moser referred to the Commission having made findings that the algorithm that deliberately demoted competitors that were imposed by Google, there is not such a finding of the Commission decision.

MR JUSTICE ROTH: Right. That's there on the record. On experts may I also say this. The Tribunal is minded, and I have discussed this with the other member currently appointed of the Tribunal, although he is not present today, to appoint its own expert in this case, not in economics but in data science, really to assist the Tribunal in understanding some of the digital algorithmic aspects of what was scrutinised, found and so on.

Competition Authorities dealing with these cases now have teams of data scientists that assist them. We don't have anyone and we think that would be of great assistance to the Tribunal in this case. We have power to appoint an expert under our rules. We would like the parties to seek to agree on the identity of a data scientist whom we could appoint, and if they can't agree, to come up with three names that's three names by all the claimants together, not 12 names and three names from Google so that we can then suitably select, approach, instruct. We would ask you to do that by 31st January. The costs of that expert will be costs in the case.

Now there are then the timetabling and we are parking that yes, Mr Pickford?

MR PICKFORD: Sorry. I have just had a request from those instructing me to clarify are there any particular aspects of data science that the Tribunal is particularly interested in? My understanding, limited, is that there could be a number of different

potential experts depending on what areas are of most interest to the Tribunal.

MR JUSTICE ROTH: Well, I suppose it is the areas that were the subject of the findings of the infringement and how algorithmic penalties and algorithmic discrimination, selection works can be adjusted. The Remedy, which I haven't looked at. I am not sure it is in the bundles I have got, but no doubt it will feature prominently in the first trial. There might be some need to understand how the Remedy works. So that's the best advice I can give you on that.

I think in light of that the one bit of timetabling that it would be worth including at this point is factual witnesses and looking at what has been proposed, I think Google has said three months after judgment in the preliminary issues and then five months for response. The claimants have said 1st August and 30th September for response. As I said before, I do not envisage particularly with the preliminary issue trial having been fixed at the first possible date there is in practice going to be any substantive difference between the proposals.

In the light of that I would suggest, Mr Moser, that we go with the Google proposal, subject to any application to vary if it turns out that those dates should expire in the middle of August, which I imagine nobody would wish for.

MR PICKFORD: Yes. We had paragraph 11 in our draft order, which said that for the purpose of determining the dates we would exclude the month of August. So if it's

MR JUSTICE ROTH: So your five months if the three months is 31st July, then your five months is not 30th September is what you are saying?

MR PICKFORD: That is correct. There would be an extra month. So given the difficulty (inaudible) we were not then under serious pressure during September.

MR JUSTICE ROTH: Then there is a slight difference between the two. That is the only material difference. I think given the amount of material, Mr Moser, that's involved and the fact that one is dealing with potentially witnesses abroad, that might be

sensible to exclude August.

MR MOSER: Is your point that you expect the judgment to be at about the same time as the commencement of the timetable, so by the end of July? It is right to say that the selfdenying ordinance around August then adds to the delay. Can I just take instructions on the suggestion that we follow the Google timetable?

MR JUSTICE ROTH: Yes. It might bring the three months earlier.

MR MOSER: That is what I was thinking.

MR JUSTICE ROTH: Then 31st July, because if the trial is concluded by whatever it is, 19th March.

MR MOSER: March, yes.

MR JUSTICE ROTH: And that then gives a further that's one reason for my choosing the earlier period is that there is another week in which the Tribunal can start working on the judgment.

MR MOSER: Exactly.

MR JUSTICE ROTH: So why don't you take instructions, but it is still a question of leaving, as it were, August out in the two month period. In fact, what I will do, Mr Moser it is time to take a break, as you know we always do. I will take that break and some back at noon and you can tell me what you have found.

(Short Break)

MR JUSTICE ROTH: Yes, Mr Moser.

MR MOSER: I am afraid, sir, we don't bring a prebaked, oven ready solution. The Google timetable was superficially attractive, but renders it impossible to do the other thing you indicated the Tribunal was going to do, which is to fix in the allocated slot in 2026 and then work backwards, because the number of months between delivery of a judgment even in June and July of 2026 is not as great as Google's timetable demands. There is, in fact, something although we are all keen to keep

August sacrosanct, there is something of an August trap in this, because the way it pans out you fall not once into the August gap. You fall twice into the August gap and you end up somewhere in October 2026. The difficulty we have with that timetable is it doesn't meet the Tribunal's aim of bringing this on as soon as possible in the summer of 2026 unless it is possible to find a more express way of getting through the various steps and shaving off three months.

MR JUSTICE ROTH: Yes. Well, what I am inclined to do is to split the difference and to say we will exclude no time will expire in August and we will exclude two weeks of August from the calculations if the time span covers August and then have the three months and the five months with that caveat. We won't fix the rest, but the question really is the one thing I do want to fix is the CMC, which I would have thought should be I think we should say it should be the first available date from three weeks after the PI judgment.

MR MOSER: Yes. Sir, to be clear, you are planning to fix the date of the trial and of the CMC and the three months and the five months and leave the rest.

MR JUSTICE ROTH: Correct.

MR MOSER: Yes.

MR JUSTICE ROTH: So CMC to be on the first available date three weeks after the preliminary issues judgment. Factual witness statement three months after the judgment. Reply to factual evidence five months after but those dates to be extended by two weeks if they span if they embrace the whole of the month of August.

Then the question is whether one can have a trial in June/July 2026 or only I don't think there is any reason for it to be late October, but October, early November 2026, and if the factual witnesses come in September, early October, I would have thought that it should be possible then to have a trial in the second half of 2026, Mr Pickford.

MR PICKFORD: Well, in my submission that would be respectfully unwise for us to

timetable on that basis because at the moment we are contemplating, at least on the claimants' case not the claimants' case the Tribunal's abbreviated approach to the six stage claimants' approach we have four stages potentially on expert evidence. We should also have an expert meeting, which the claimants didn't provide for, and time for there to be a joint expert report and there needs to be sufficient time to take all of that together and prepare for a six week trial. That will involve taking the product in particular of the expert meeting from the point of view of then developing expert crossexamination and skeleton arguments and oral submissions, etc, all of which will take quite a lot of time for a substantial hearing.

We have set out in our draft proposal steps that are far from generous and the two weeks in relation to August will make no difference to where we ultimately end up, and where we end up on our timetable is a trial in October. We would suggest that the claimants really need to be careful what they wish for if they are seeking to have a trial in July, because it is not just it is not us trying to postpone things. It is the fact that everyone is going to be very seriously up against a very difficult timetable if we are aiming at a Trinity term trial with realistically expert evidence still being addressed in the beginning of 2026 and there being potentially a number of rounds of that. In addition, if I might add?

MR JUSTICE ROTH: Yes.

MR PICKFORD: All of this is predicated on the pleaded cases subject to the points that have been made about counterfactuals and us pleading further to that remaining broadly as they are. The claimants have all said "By the way, we may want to amend our case depending on disclosure". We can't seek to programme for that now, but they have not allowed any particular time in which they say they are going to be amending their cases and we don't know what sort of amendments they are going to be proposing and how substantial they are, but in my submission it would be far more

sensible to allow a little bit of breathing space in this timetable, which is all we have allowed, in order to get to October than have something that if we then have an amendment from the claimants at some inconvenient moment, which we will no doubt have to respond to, we are all going to be under intense difficulties and pressure in terms of adhering to the dates. You know, we are talking here about a couple of months, which in the scheme of this litigation is not particularly large.

MR JUSTICE ROTH: Yes, I understand that. Mr Moser?

MR MOSER: Well, I repeat what I said about the desirability of it coming on. I share the suggested view, which is that if you have the initial exchange of evidence by about October 2025, then it feels like something that surely you must be able to get on by the second half of Trinity term 2026. That's just how things work.

There is a suggestion that somehow pleadings might interfere with that. We have all said that the pleadings would develop following disclosure. That's rather going to be the premise of part of what I am going to say I imagine now this afternoon about disclosure, but that's not going to affect in any material way the preliminary issue trial. So that needn't concern us.

Really it seems to us that when it comes to the arrangements for the expert evidence, joint expert evidence, Tribunal expert evidence and responses, it ought to be possible to fit that in such a way that there are still many weeks left before any trial at the end of June and throughout July in 2026 and there's the obvious desirability of getting this thing on. It has been very long running, as my learned friend says, and we strongly favour July.

MR JUSTICE ROTH: It would have to be mid-June because of six weeks.

MR MOSER: Mid-June for the trial.

MR JUSTICE ROTH: Mr Pickford is right that there should be an expert's meeting and a joint experts' statement.

MR MOSER: Yes.

MR JUSTICE ROTH: So that would have to come in any event in March/April.

MR MOSER: So that would come in March/April. There would still be two and a half months to trial.

MR JUSTICE ROTH: Yes. Does anyone else I think you are all making common cause on this.

MR BOLSTER: We adopt Mr Moser's submissions and we agree in some other cases we can see there is still 18 months from the proposed trial window and there are other cases where even in a first CMC to trial we see this kind of window. So we think it is entirely achievable to set this timetable with a trial in the summer of 2026.

MR JUSTICE ROTH: I think if we are looking at six weeks, if it were to be in the summer, it would be starting on 23rd June. That gives one almost six weeks short of a day. It does seem to me that if the factual evidence is in by early or mid-October, even with whatever sequence of expert evidence and expert meetings and expert statement, there should be no real difficulty in getting that all achieved by late May, a clear month before trial at the very latest. And I think it should therefore be possible to have a trial starting on 23rd June. I think we will do it on the basis that the reading days which we haven't had when we have allowed six weeks, I have taken that to be six court weeks or Tribunal weeks, with reading days for prereading on top. So the prereading can be the previous week for however many days are needed, probably three days I suspect for a trial like this, three to four days, so that the actual hearing it seems to me can start on 23rd June and I think that can be made to work without any unfairness.

It is the experts who are working through that period but they are both from consultancies where they have large teams and certainly the factual evidence is well in time for that trial now.

So I think I am persuaded, although I take Mr Pickford's point that the delays in this hearing have been so great that you can say "Well, what's another couple of months?" but that slightly cuts both ways. In my view the delays have been so great through no fault of any of the parties, because it was a considerable time until the Commission produced its Decision following Foundem launching its case in 2012 and that's not Foundem's fault. It is not Google's fault. Then, of course, we were in the hands of the European courts which, as we know and we discussed at the last CMC, we were waiting for the judgment. So all those delays built up and I think, therefore, there is a real imperative to proceed with as much reasonable expedition as possible if it doesn't create unfairness and I don't think listing this trial for 23rd June will create unfairness. That's when the trial will be, to the end of July, well, for, as we said, five weeks plus the extra days.

I think, but you will correct me if I am wrong, that deals with the matters prior to disclosure or are there other matters apart from disclosure?

MR MOSER: It deals with matters prior to disclosure save that there was in our draft order for trial, which is at tab 8, pages 56 and following of the first bundle, a section on expert led disclosure. That's, of course, relevant to disclosure indirectly, but it is part of the directions for the trial. The parties are, I believe, agreed that there should be expert led disclosure.

Our suggestion for how that's to work, and, of course, the windows will now have to be adjusted in a way that I am probably not going to be able to do on my feet, are at paragraphs 2 to 6 of our draft.

MR JUSTICE ROTH: Well, I think when one says expert led disclosure, it has become a bit of a buzz word, but there are certain aspects of the disclosure that are for the Tribunal to determine which doesn't need expert assistance and there are other aspects of disclosure where it is sensible for the experts to meet and seek to agree on

what the appropriate scope of disclosure should be.

So I think rather than making it a general direction like that, when we work through the disclosure categories there may be some where the appropriate resolution is to say "Well, this one, we will, as it were, refer to the experts, ask them to meet and then set a timetable and see if they can agree. This next one we will decide here and now and you either get it or you don't and we will determine the date". I think that's the way we should deal with it.

MR MOSER: Sir, yes.

MR JUSTICE ROTH: Right. We go to the I think the sensible way of doing it is to deal with the Kelkoo disclosure application first and then to deal with the Connexity application, which I think you are not concerned with, Mr Moser, and then as regards Foundem, I think you are not concerned with any of them. Is that right?

MR BOLSTER: We have not made any application and nothing is made against us.

MR JUSTICE ROTH: So you can be released at this point from the hearing. You are welcome to stay if you want to, but not required to stay.

MR BOLSTER: I am obliged.

MR JUSTICE ROTH: Yes.

MR MOSER: So there is a draft disclosure order and helpfully

MR JUSTICE ROTH: Just one moment. Let me put some of this away.

MR MOSER: There is an update to the draft disclosure order. May I hand it up and then we will have it separately. There is a separate order that I am going to call the Ciao consent order. I do not have three copies, but I am being handed more. So this is two more of the Ciao. I will get you the other two shortly.

So the revised draft disclosure order is not very different to the draft order that was in the bundle. I hope you have the same version I have which has tracked changes hopefully. We see on the first proper page, number 2, 1 has been crossed out.

MR JUSTICE ROTH: Yes.

MR MOSER: 1 has been crossed out because the parties have agreed in relation to disclosure of documents in the Ciao proceedings and that agreement is in the separate draft consent order that I have also handed up, which I understand is agreed amongst all the parties.

MR JUSTICE ROTH: That's made in the Kelkoo and the Ciao proceedings.

MR MOSER: Yes.

MR JUSTICE ROTH: So I will make that order.

MR MOSER: Starting on a positive note.

MR JUSTICE ROTH: Yes.

MR MOSER: There is a great deal, however, that is not agreed and I want to come to it. I want to spend just a couple of minutes by way of some introductory remarks in relation to the disclosure application, because there is an almost religious difference between the parties in relation to what has and hasn't been pleaded so far, which we say is a barren argument between Kelkoo and Google and ought not to detain us.

The learned pleaders at the time of the Kelkoo particulars of claim pleaded, I submit appropriately, that abuse commenced at least on certain dates, at least in 2006, at least in 2008. The at least date is broadly based in the case of 2008 on the dates on which the Commission was content to find infringements. Now the learned pleaders, rightly in my view, considered that the appropriate approach in a competition law pleaded case with an asymmetry of knowledge inherent in this kind of case is rather than plead that which cannot be safely said and signed with a statement of truth at this stage, at least not in every particular, approach it by pleading it conservatively with a small c and amend following disclosure.

Google has two counters to this. The first is that Google is determined to read at least as though it said "On or after". So the first response to quite a lot of our requests has

been "Not entitled because you have not pleaded anything before, say, 2008". Then if we say "We have taken the asymmetrical approach and we are going to plead after disclosure", we are told "Ah! Then that must be fishing". So we are said to be scuppered both ways.

Now I respectfully submit that's not a workable approach in a competition law claim and I submit the court should approach this on a case by case and point by point basis, and as we go through disclosure I am not going to repeat the point every time matters have been pleaded at least. I will explain rather why it is in each case that we are seeking dates earlier than, for instance, 1st January 2008.

By the way, although welcome, of course, to be fair to Google they have, in fact, agreed in some instances to earlier searches, to 1st January 2006 or to June 2006 and we are grateful for that as far as it goes. One doesn't want to abuse concessions, but what that shows is that even Google realises there is not a complete block based on the pleading of at least from 2008. That's not a sustainable position.

We do say, however, we need more and we are entitled to more on the current pleading. That's because of the nature of the case, sir. The nature of this case can be very simply stated and is well known, of course. It is set out in the judgments in Google Shopping. Google offers general or horizontal search services in which it is we say clearly dominant. It does also offer vertical search service by way of a comparison shopping service.

This case is obviously about the comparison shopping market or markets across the EEA and the Commission and the court have already found an abuse. The abuse they found is the violation of the principle of equal treatment and the prohibition of anticompetitive leveraging in the favouring conduct, that is favouring Google's own comparison site as well as the demotion of competitor shopping sites. We say all outside the scope of competition on the merits.

Now this action as a follow on action in the national court will have to determine liability, so whether it caused loss and in due course how much it's caused, and the conduct that we are looking at was essentially twofold, and it is the conduct on which these disclosure applications are based.

The first is there is an exclusive box at the top of the page. Google reserved a box at the top of its general search results for its own Google shopping service and historically refused to offer comparison shopping websites access to that box with the result that rival downstream comparison shopping sites were less visible than Google's own. This box was initially called OneBox and eventually was called Product Universal. I think it may now be called Shopping Unit.

MR JUSTICE ROTH: That box, as I understand it, from what I have seen was introduced in the UK and Europe in about July 2005.

MR MOSER: It was first introduced in 2003 and in the UK about 2005.

MR JUSTICE ROTH: Yes.

MR MOSER: You will have seen –

MR JUSTICE ROTH: We are not concerned with the US market here, are we?

MR MOSER: No. So that's in about 2005.

MR JUSTICE ROTH: Well, July 2005.

MR MOSER: Yes. About the middle of 2005.

MR JUSTICE ROTH: Yes.

MR MOSER: I don't know. You have probably seen in Mr Hennah's fifth witness statement, which is at tab 58 at page 1080. So that's at paragraphs 45 and following just in case it helps.

MR JUSTICE ROTH: Yes. Well, I have read that.

MR MOSER: There are two pictures there of what the –

MR JUSTICE ROTH: I have seen all that.

MR MOSER: Over the page is the Product Universal on page 1081. It is very helpful.

MR JUSTICE ROTH: Yes.

MR MOSER: So that was or is the abusive promotion.

MR JUSTICE ROTH: Yes.

MR MOSER: The second aspect, as is well known and has been discussed this morning, is demotion. So Google's search algorithm or algorithms demoted comparison shopping websites whereas Google's service remained untouched and accessible through the box.

The main algorithm we know about is called in this case it's been called Algorithm A. It had another secret name.

MR JUSTICE ROTH: Yes.

MR MOSER: And there is another algorithm called Panda.

MR JUSTICE ROTH: Yes.

MR MOSER: They demoted competing comparison shopping sites down the order so they would be at the bottom of the page or another page effectively unseen. That started in June 2004 and we have pointed out that there may be other algorithms that may have been doing the same thing. So the important dates are June 2004 for the algorithm, July 2005 for the box.

We have, of course, pleaded this. I don't know whether you want me to take you to the pleading.

MR JUSTICE ROTH: No.

MR MOSER: You have seen all that in the skeleton arguments. That's why I say the pleadings point is entirely barren. If we had repleaded, say, last Thursday, which is not what that repleading was about that was about the CJEU judgment but if we had repleaded last Thursday, say, from on or about 1st January 2004 or similar, we would simply face a variation of the same argument against us. There's no magic in that.

So that's what I am going to be repeating where relevant in each case.

Why the period, for instance, in relation to 2006 matters where we seek disclosure, but in many cases even where Google are saying "You can have what you need back to 1st January 2006," the period before back to January 2004 matters, not least because even if we had pleaded it from 2006, the preparatory work at Google would have been going on, of course, before January 2006, but even if the pleading were as they say it is.

There is one other document which perhaps you haven't seen. In order to be able to show you this I am afraid I am going to have to go into the supplementary bundle. There is a bit of housekeeping here where I wanted to ask you what version of the supplementary bundle you have, because –

MR JUSTICE ROTH: I have two things that are called supplementary bundle. One is I think just the Connexity claim form.

MR MOSER: That's not it.

MR JUSTICE ROTH: Because it is confidential. Then I have the new pleadings from 14th November.

MR MOSER: Yes.

MR JUSTICE ROTH: And 13th yes, 14th November. I have no idea what version it is. It has something called "Draft Index" but it has the Re-Re-Re-Amended Particulars of Claim of Foundem, the Re-Amended claim of your clients, Kelkoo, the Amended version, but there is another version, as I have just said, of Ciao, and the Re-Amended Particulars of Claim of Connexity.

MR MOSER: If I may, how many tabs does that bundle have in your –

MR JUSTICE ROTH: 30. It ends with the Ciao RFI order, which is I think about particulars in the matter that has been agreed. I think there was an order made last week about Google's application.

MR MOSER: I am sorry to say there is an extended version of this supplementary bundle floating around and probably on the electronic version.

MR JUSTICE ROTH: Right. Well, I can go to it electronically I should think if that's material for present purposes and I can look at it someone can , we can update it over the lunch adjournment?

MR MOSER: That would be helpful.

MR JUSTICE ROTH: If I make sure I have the right supplement it says updated, yes.

MR MOSER: There is a hard copy in court if that were preferable. I am in your Lordship's hands.

MR JUSTICE ROTH: We can substitute my copy, if you want. I don't think I have marked it.

MR MOSER: We can perhaps substitute something other than the first (inaudible).

MR JUSTICE ROTH: I am being given three bundles. Which tab is this?

MR MOSER: 64.

MR JUSTICE ROTH: It is headed "Annex C11".

MR MOSER: That is correct.

MR JUSTICE ROTH: It looks like a Google document, is it?

MR MOSER: Yes, this is a document prepared by Google in the General Court.

PRESIDENT: Pause a moment. Is this a confidential document?

MR MOSER: It says "Confidential" at the front.

MR JUSTICE ROTH: That's why I am asking.

MR MOSER: I am not sure whether it is properly confidential for our purposes. I hope somebody will tell me.

MR JUSTICE ROTH: Perhaps we can check that. I can look at it while you are ...

MR MOSER: Can I just explain what it is?

MR JUSTICE ROTH: Maybe it is not a Google document. Is it a –

MR MOSER: No, it is I am told confidential. It makes it difficult to comment on. What I particularly –

MR JUSTICE ROTH: Is it actually a Google document?

MR MOSER: It is a Google document.

MR JUSTICE ROTH: Because it says:

"The defence conflicts with the decision ..."

But this is a Google document prepared by Google?

MR MOSER: Site by site comparisons are I understand sourced from Google.

MR JUSTICE ROTH: Those are confidential. What is in annex 2?

MR MOSER: There is only one page I wanted to show you.

MR JUSTICE ROTH: Yes. Just a minute. I want to understand what I am looking at. It is said to be an enclosure. It is a letter from Linklaters, your solicitors.

MR MOSER: Yes.

MR JUSTICE ROTH: Of 13th November, and that letter is at tab 25 I think.

MR MOSER: Yes, it is, but the letter does little more for present purposes than disclose, refer to it and enclose it. So I wasn't going to go to it. That's the letter it was attached to.

MR JUSTICE ROTH: Right. I see.

MR MOSER: Sir, I could speak to it but only I am afraid if we briefly go into private session or I can show you what it is that we are particularly looking at.

MR JUSTICE ROTH: Yes, why don't you just do that.

MR MOSER: It may be immediately obvious why we do. The internal pagination is looking at the landscape in the top righthand corner and at page 78 is a table or graph. We have a larger version of that graph if it assists, but it may be large enough.

MR JUSTICE ROTH: It is all right.

MR MOSER: You will see what it is. It is a comparison and something happens to

Kelkoo and it happens earlier than 2008. It happens it seems at the beginning of 2006. When we come to look at causation and effect, it does seem to us that the earlier period is likely to be at the heart of the inquiry. I don't propose to address you in detail on quite why this effect happened, because we don't know at present.

MR JUSTICE ROTH: I thought the real area of dispute over the scope of disclosure concerns the years 2004 and 2005.

MR MOSER: Yes.

MR JUSTICE ROTH: Because I think Google has agreed to give disclosure I haven't checked for each category but January 2006 and you are asking for 2004 and 2005. So I am just trying to see how these graphs well, the graph on the left on page 76 is not relevant to that.

MR MOSER: It is not relevant.

MR JUSTICE ROTH: It is the one on the right.

MR MOSER: Something rather happens it happens already at the end of 2005 and draws a vertical line there and it happens at the latest at the beginning of 2006. So we are looking for the reason for that necessarily in a period earlier than the end of 2005. So again we are not fishing.

MR JUSTICE ROTH: I don't get much out of this I have to say at this point. I mean, clearly things are happening from early 2006, but I mean, it may or may not be helpful. I don't know.

MR MOSER: Things are happening in 2006 and something must have happened before that in order to bring it about is what we say.

Google will say that the timing doesn't show whatever it is our case says and I can't go into the details as I say, for confidentiality reasons in open court, but, I mean, it is not a graph that probably merits the difficulty in getting to it via the bundles, but there it is. It is an important part of the mosaic as to why we say the earlier period is in issue.

So that's all I wanted to say about that and really all I wanted to say for the moment about the case and why we ask what we are asking for.

That may be the time to turn to the Redfern schedule, which I hope you have in its most recent version.

MR PICKFORD: Sir, I hesitate to interrupt my learned friend. Just before we are moving on from this new supplementary bundle before, sir, you potentially consider it during your lunch adjournment, this morning, indeed actually just before Mr Moser rose, someone gave me the same things that have just been given to you, sir, namely three new bundles and I believe in an electronic form these were provided late last night. None of the materials in here have been flagged with us in advance in terms of what their relevance is in Mr Moser's skeleton arguments.

There is an absolutely colossal amount of material here and it is really in my submission quite unacceptable to data dump three large volumes of material and then select bits from it that I have never seen before and have not been flagged to us. I can't possibly address the Tribunal on those points fairly.

MR JUSTICE ROTH: I can tell you I didn't get anything out of that graph. So I don't see that it takes matters further. If something else is referred to, we will see what relevance it has.

MR PICKFORD: I am grateful.

MR JUSTICE ROTH: There seems to be quite a lot of exchanges already on the categories that have been sought and disputed and I would have thought we can resolve as far as disclosure is concerned on the basis of what has been said without looking at anything new.

MR PICKFORD: It is a little surprising we say to receive three volumes like that.

MR JUSTICE ROTH: I understand that and I don't think it is helpful to look at a lot of new documents.

MR MOSER: I confess, my Lord, I shared some of my learned friend's dismay when I saw the bundles this morning or last night. In my case I had seen about ten more tabs on Friday, which I believed had been more generally distributed but it seems only made it round everyone last night. Most of the tabs in those supplementary bundles are simply the GOOG-SHOP reference files that are referred to here and there in the consolidated Redfern schedule and I don't propose to go to them.

There are perhaps a handful of further documents, say five or so, that may become relevant. They are largely correspondence, recent correspondence which are in the supplementary bundle, and then one item of disclosure which I can give my learned friend.

MR JUSTICE ROTH: Can I say this? If they are recent intersolicitor correspondence, that's fine. No problem about that. In there is one contemporary document that you say is relevant, then please would you tell Mr Pickford what it is at 1 o'clock so he can consider that with those instructing him and we will see what we do about it when we get to it. You don't have to tell me now.

MR MOSER: It is going to fall into the same category. It is probably more trouble to get to it than you are going to derive from it. It is going to be at tab 61, Penalty Server Data which we are going to reach very much towards the end of the disclosure and it is entirely confidential. So it may well be that's something for which we need to go into closed session.

MR JUSTICE ROTH: Tab 61. Shall we make a start?

MR MOSER: Yes.

MR JUSTICE ROTH: I have it blown up like this.

MR MOSER: So have I.

MR JUSTICE ROTH: That's the Redfern schedule. I think there is no alternative to just working through the categories.

MR MOSER: I am afraid there isn't. I have tried to work out how one might

MR JUSTICE ROTH: I think that's generally the only way to do it. Start largely at the beginning and keep going.

MR MOSER: There are, however, certain shortcuts because of what I have already said. So when we look at S1 and S2, Google have agreed to give S1 from 1st January 2006. So what we are arguing about is 2004 to 2006. It concerns for this period Google's share of the comparison shopping market and any discussions of the competitive threat posed by CSSs to those shares, including us.

MR JUSTICE ROTH: Google's share of the shopping market, why do you want the USA, which is really quite a different market, not at play in this case, different competitors?

MR MOSER: In fact, as I understand it the detailed documents we are asking for, although they are not limited to the UK, are concerning the EEA.

MR JUSTICE ROTH: I am looking at your definition in the first column.

MR MOSER: Yes, that's true.

MR JUSTICE ROTH: Can we delete the USA for starters?

MR MOSER: Yes, we can.

MR JUSTICE ROTH: It is unhelpful, I mean framing these requests over broadly in a way that are immediately reduced on a simple question from the Tribunal is not helpful, Mr Moser. When these requests are framed, the asking party really needs to consider what is proportionate and reasonable.

MR MOSER: You are absolutely right. I had rather read over it, because I know from the subsequent exchanges that we have been concentrating on the UK and EEA.

MR JUSTICE ROTH: Yes. It doesn't mean you are going to get what's left, but that's a general comment.

MR MOSER: So we seek disclosure here in relation to both the box or the algorithm

or both and we do it from the earlier period for the reasons explained.

The other side say "Oh, we don't want to repeat the searches carried out for Foundem", but as we have sought to set out on the next page, page 2, we are not asking them to repeat the searches for documents carried out to comply with the Foundem order. We think that documents that are not caught and are relevant to our claim are those - we can take away the US - from 1st January rather than from 2006 when Algorithm A was implemented and that's relevant to whether Google was engaging in an exclusionary strategy and because it is not limited to the UK, also EEA documents, and those are not reflected in the Foundem order.

We have pleaded our exclusionary category claim from at least 2006. I have explained the architecture of the pleading and exclusive promotion from at least 2008 , and we haven't yet had disclosure back to the earlier period. We are not being promised it.

As I have already said, even if we were to limit this to an infringement beginning in 2006, which we don't at this stage, that wouldn't mean that we wouldn't be entitled to any earlier documents at all, because they're clearly preparatory stages that would have been gone through.

There are aspects of the disclosure so far that have frankly made us concerned. That is if one looks at page 4, for instance, the search terms. One of the aspects of this is that the search terms so far have been limited by a reference to "market" or "market share". Now it is clear to us that that is deliberately searching for a term that is very likely not to be there, because we have seen some email exchanges and they are set out on page 4 in the central column between individuals of Google saying that there was a policy of not referring to "Market share" and there is a reference to that. We don't need to go to the underlying documents.

So it is in a sense a forbidden term and they say, "Oh, that doesn't matter, because

we did find some documents, so you can't be right". It may just be that (a) nobody is perfect, even in relation to the term "market share", or perhaps they were not critical documents, but we say that this search has to be carried out without this filter and it has to be carried out also in relation to what we say are relevant terms and in particular the relevant term "verticals". We have set that out in the bottom paragraph of page 4. We have written to them about it in a recent letter where we have explained that "verticals" is what this was called at the relevant time. Our kind of service certainly at the beginning would not have been referred to as CSSs at all, because, as we understand, the term CSS was coined in the course of the Commission proceedings. We see a series of emails and internal documents at Google where these were referred to as "verticals", sometimes "arbitrageurs" or simply "shopping sites". So any search that hasn't, for instance, searched for "verticals" would have been likely to have missed relevant documents. So that's all the more an important part of what we say is –

MR JUSTICE ROTH: So two points, you see. One is going back to January 2004 and the second is what's discussed on page 4: Google has agreed to include the terms "shopping site" and "product site", but you are asking for the terms "verticals" or "vertical sites". Is that right?

MR MOSER: Yes, and to remove the limitation that it has to include "market share", which we say is searching for something that's probably excluding relevant documents if there is it is suggested a policy to not referring to “market share” in communications. Those are our two central points without reading it all out again in relation to S1, sir. These are documents that are central, as explained, to our case.

Google says "We don't have a case about OneBox at all". I have explained from what we can tell OneBox, as the forerunner to the Universal Product, appears to us to have done very much the same sort of thing, and it does seem to us that you can't properly

look at certainly the standalone claim without looking at the Product OneBox. They say the CJEU, the Commission, they were content to say that Google's infringement started only with the launch of the Product Universal in those Member States in which it was launched. That is true, but that doesn't take account of the fact we also have a standalone claim and there was a product that preceded Product Universal that was as far as we can tell broadly the same thing, and we would like, please, to see the relevant documents.

MR JUSTICE ROTH: That would take you back to 2005, not to 2004, wouldn't it?

MR MOSER: That would take us back for its launch to the middle of 2005, yes.

MR JUSTICE ROTH: Well, therefore you can say a couple of months earlier, but it doesn't cover 2004.

MR MOSER: Not in the case of the box. 2004 in the case of the algorithm. You may well say there is a difference in dates and I can take instructions as to whether it is sensible to search for one from a few months before July 2005 and the other from 1st January 2004.

Would you excuse me for a moment?

MR JUSTICE ROTH: Yes.

MR MOSER: The only wrinkle in this is that I am reminded that later on we will come also to Froogle, which was Google's comparison shopping service, when we come to S3 and that would have been earlier than the box itself. They may have been thinking about something in relation to that.

MR JUSTICE ROTH: That's a different thing from the box.

MR MOSER: Yes. We do see in the confidential bit on page 1 one relevant reference to something. It is an example of the sorts of internal discussions that might have been going on. Froogle might be in S13, but to some extent these cut across the S categories.

MR JUSTICE ROTH: Can I ask you, you referred to the fact that Algorithm A was introduced in January 2004. If we look at S9, which is on page 18 in my version of this schedule, that's "Documents concerning the development, testing, launch, evaluation and implementation of Algorithm A".

MR MOSER: Yes.

MR JUSTICE ROTH: That I think Google has agreed to provide.

MR MOSER: Yes, it has.

MR JUSTICE ROTH: So that would obviously deal with the 2004 introduction, development, testing, launch. So you are going to get your S9 documents going back to 2003, conceivably even earlier, concerning the launch of Algorithm A and its design.

MR MOSER: As far as we can see it either the documents that we are seeking under S1 will already have been disclosed as part of S9, in which case there ought to be no difficulty in Google telling us that or, alternatively, they have not yet been disclosed.

MR JUSTICE ROTH: It might not look at the market share as such always.

MR MOSER: We are seeking slightly different things in relation to S2 and S9. That's why we say we are still insisting on S1. I was going to say that.

MR JUSTICE ROTH: I mean, if Algorithm A was not in the way it is designed, developed, intended to boost Google's position in shopping comparison websites, then 2004 documents, just looking at its market share, seem to me irrelevant.

MR MOSER: We will not know from S9 what the intention was, because what S9 concerns is the technical aspects of Algorithm A, the development, the testing, the launch, the evaluation and implementation of Algorithm A. We understand it, they are not offering us the strategy documents under S9. If they said they are, that would be fine.

MR JUSTICE ROTH: Well, you say documents your explanation of the relevance is documents concerning development, testing are relevant to the contested issue of

intention, because it will show what they were seeking to do.

MR MOSER: I am not sure that's Google's understanding of what they have agreed to give us under S9, although if they share your understanding, sir, then obviously I would be delighted.

Similarly if we go to S2, we are talking about a strategy for competing in the comparison shopping market. A slightly different point, but again it is a strategy point. It is important and not as far as I can see addressed in my learned friend's skeleton at all.

MR JUSTICE ROTH: Yes.

MR MOSER: Google do make a similar sort of point in response to some of this. They say, "We have given extensive disclosure in the form of, for instance, the Shopping File", but they don't provide what we are looking for, which is what was Google's strategy? What were key stakeholders saying to one another about the launch of the exclusionary strategy and the launch of the demotion algorithms?

We would be content, I am instructed, for instance, with six months before the launch of the box in the UK as the start date for the box.

MR JUSTICE ROTH: So that's effectively something like 1st January 2005.

MR MOSER: Effectively, yes.

MR JUSTICE ROTH: Yes. Well

MR MOSER: I am sorry. I didn't notice the time.

MR JUSTICE ROTH: I think what I will do is I will hear Mr Pickford's response to that and then we will rise and adjourn.

MR PICKFORD: Sir, I do wish to make some preliminary submissions as well.

MR JUSTICE ROTH: Well, would it be sensible then to come back?

MR PICKFORD: I think it would.

MR JUSTICE ROTH: Come back at 2.05.

MR PICKFORD: Thank you.

(1.05 pm)

(Lunch break)

(2.05 pm)

MR JUSTICE ROTH: Yes.

MR MOSER: I rise briefly with my learned friend's agreement just to clarify something I said in response to your absolutely justified comment about the USA. There is some concern about whether I have thrown the baby out with the bath water in what I have said and gone too far in what I said about the USA.

You drew my attention to page 1 of the schedule, which starts before of period from 1st January 2004 to 2018:

"Documents concerning Google's share of the comparison shopping market insofar as it includes the UK, EEA and the USA."

You pointed out surely the USA is not relevant to that and I agreed. That is right. However, there is now a concern that it may be thought by Google that they don't have to disclose anything on any of the other aspects insofar as it touches on the US and that, of course, can't be right. All of the stakeholders are in California. The factual witnesses famously are going to be in the US. We heard about that this morning. It is right that we are not seeking these documents S1 in relation to the US market share.

MR JUSTICE ROTH: Yes.

MR MOSER: However, when one comes to the second part of S1 which is:

"Discussions of the competitive threat posed by competing comparison shopping sites."

Then the global strategy of course will have been made in the US.

MR JUSTICE ROTH: Mr Moser, I interrupt you. Insofar as it includes the EEA, yes. It might be if it is general including the EEA, yes, but if it is purely about the US

market because there might be strategies for the US market where you have other competitors which are well established shopping sites which are not in Europe at all. So that's the only point.

MR MOSER: Our concern is that the global strategy would first be made in the US. They roll that out in the US and test it and then it comes to the UK usually, because it is another English (inaudible).

So any global strategy, for instance, around the threat of shopping verticals, any strategy may have been developed first.

MR JUSTICE ROTH: Well, on that basis we go back to 2002 and we are not going to do that. We have to draw a line.

MR MOSER: We certainly don't limit it when it comes to strategy generally in relation to S2 save, as you point out, by a date, so 1st January 2004 (inaudible) the strategy for competing

MR JUSTICE ROTH: That's a bit different. This is about market share, isn't it, and particularly competitors, which is a rather different thing, and I do think we should exclude the US, because it is a different market with different characteristics and there will be different competitors. It is indeed striking that your client, who is active in quite a number of national markets, but they are not in the US, are they?

MR MOSER: No. I wanted to put down a marker that (overtalking).

MR JUSTICE ROTH: Obviously the witnesses and many of the documents are in the US and witnesses come from the US, but we are looking specifically at this category. Right. So let me hear from Mr Pickford.

MR PICKFORD: Thank you, sir. So we say that before I get drawn into the weeds of the Redfern it is important to see the wood for the trees in relation to these applications and to establish some general principles.

Google has already made very substantial disclosure in the UK shopping proceedings.

That includes both the contents of the European Commission's investigative file, which is obviously very large, and substantial additional disclosure and the details of that have been set out in the evidence that, sir, you will have seen in these proceedings, both originally Ms Lawrance's ninth statement and more recently Mr Wisking's fifth statement.

Now you, sir, have previously made clear that any further disclosure requests need to be coordinated and targeted to address gaps in the disclosure to date. What is not permitted is a roving enquiry into Google's conduct. Always the question this Tribunal needs to ask itself is "Is the further disclosure necessary and proportionate for the pleaded claims to be fairly and efficiently brought to trial?" That's the essential question that we need to ask ourselves.

Now against that background we have to say that regrettably the claimants have not approached the applications that they are currently putting before the Tribunal at all on that basis. As we will come to see when we go through the details of the Redfern, they are often overly broad. The USA example is just one of many. They are not anchored in the pleadings. They have not been coordinated between the claimants and in many cases they amount to precisely the roving enquiry that the Tribunal has already deprecated.

A second point and I am not going to labour it, but a difficulty that we have had is that these applications were only generally put before us just before the deadline for the applications for this CMC. In some cases they refer back to they are variants on applications that were made previously. In Kelkoo's case it refers to the July application but they are not in identical terms.

Basically in both cases the claimants have dropped the ball until just before this application and that hasn't been helpful when you're dealing with a Redfern that is as big as this in terms of trying to seek to get agreement. So those are some preliminary

points.

The final preliminary point before addressing the Redfern is Mr Moser made some general submissions about the approach to dates and he said that they should be entitled to different dates to the ones that we are prepared to offer. He was illustrating that by reference to S1 and S2, but he is right that it is an issue that arises in relation to a number of the points in the Redfern schedule.

Now we have adopted a case by case approach to the appropriate dates by which to make disclosure by reference to the relevant issues. So as, sir, you rightly noted, in relation to Algorithm A, because there are issues about the development of Algorithm A, we are going back to the beginning of the development of Algorithm A, which is around 2004, but what one cannot do is point to, having gone back to 2004 in relation to Algorithm A, as Mr Moser seeks to do and say "Therefore, generally look, here is an early date for this item, so we can have an earlier date for these other items".

In particular in relation to OneBox and Froogle there is no pleaded case and that is important, because whilst Mr Hennah has produced a witness statement where he says "We think that there is a harm potentially extended to OneBox and Froogle", they have not pleaded that, and if they were to plead it there would be a limitation issue that immediately arises, because we are many, many years on from when they could have pleaded those claims.

What is totally unacceptable is to effectively seek to by stealth amend the issues that we are going to be arguing about via disclosure rather than amending your claim or seeking permission to amend your claim and then by framing disclosure by reference to the pleaded claim. Step one is, is it the pleaded claim? If they want to amend, they can apply to amend and we can have the debate about whether they are permitted to amend. If they are not permitted to amend then we take the claims as pleaded. At the moment they don't include OneBox and they don't include Froogle. So it's not

adequate in my submission for Mr Moser to seek to frame a case by reference to points that have not been pleaded.

In any event they do have 1,500 documents going to OneBox or Froogle that have arisen through disclosure on other issues and from having the Commission's file. So it is not like they do not have some documents that they can look to, but effectively what they are seeking to do in my submission via reference to saying "We just need to start a bit earlier" is effectively it is a preaction disclosure application in all but name without actually properly justifying that preaction disclosure application. If they have a claim, then they should plead it and if they can plead it, they can have disclosure by reference to it, but not the other way round.

MR JUSTICE ROTH: Well, they don't know exactly how you planned the introduction of either Algorithm A, which goes back to June 2004, or indeed Product Universal and what the thinking was and how the prior experience affected it. To say they have to plead first and then you would say "Well, where are the particulars?" They would say "We can't, because we are not sure about this". So yes, there is an element in all these cases where you have got that asymmetry of information where they are seeking to understand what went on. Yes, we tie it to the pleadings but it doesn't mean therefore because the actual event happened in, was it 2008, therefore nothing before 2008 is relevant, or the experience with the predecessor to Product Universal was part of the thinking of how to introduce a new product.

So one cannot draw these sharp lines it seems to me in this sort of case.

MR PICKFORD: Sir, I have not sought to draw quite such sharp lines. To be clear I gave the example of Algorithm A where because the issue there is about how that algorithm was developed, notwithstanding when their claim actually starts, we have said "Fine. We will disclose back to the beginning of when Algorithm A was introduced and you can have the disclosure that goes with that and that's around 2004".

So, with respect, I am not adopting an artificially restrictive approach, but one does have to look at these matters on an issue by issue basis.

MR JUSTICE ROTH: Yes.

MR PICKFORD: When we go through the Redfern schedule and say "Okay. In relation to this particular issue, how is this to be justified?" Some might be justified at earlier dates, for instance, Algorithm A, and some when we get there in my submission are not, and that's points that effectively say well, we think the case here is really against the OneBox or against Froogle. If that is the basis of the case it needs to be pleaded.

MR JUSTICE ROTH: Yes.

MR PICKFORD: Sir, with those introductory comments can I turn to issues, if I take S1 and S2 as well because I think Mr Moser was doing that as well as I understand it.

MR JUSTICE ROTH: Yes.

MR PICKFORD: A sensible place to start is what we have actually agreed to provide, and one finds that in the main bundle at tab 142 and it is page 2379 that I would like to go to, please.

MR JUSTICE ROTH: Tab 179?

MR PICKFORD: 2379 is the page and it is tab 142.

MR JUSTICE ROTH: Yes. A letter from Bristows.

MR PICKFORD: That's right. It is a letter of 7th November and in particular I would like to look at paragraph 10.

MR JUSTICE ROTH: Yes.

MR PICKFORD: So the first point to make is that on the time period, we are not sticking in 2008, which is when one of the abuses is alleged to start. We have gone back to the earliest date that anything is pleaded against us in terms of there being an abuse, which is 2006. So we are giving disclosure from 2006 on the time period.

We are not going back to 2004, because 2004 is an Algorithm A issue, but it is not pertinent to the –

MR JUSTICE ROTH: But you are on some things.

MR PICKFORD: Yes, because on Algorithm A what they want to know about is how Algorithm A was developed. So we can't sensibly tell them about that without going back to the introduction of Algorithm A, because we accept that that is sufficiently in issue in the pleaded cases. What we don't accept is in issue in the pleaded cases is Froogle and OneBox. There is no claim in relation to Froogle and OneBox.

So when Mr Moser seeks to justify his claim by reference to his claim for disclosure by reference to Froogle and OneBox, we say that that is where we do ultimately draw the line, because what you can't rely on is a pleading which says "At least a date" and then go back to wherever you want. That immediately is the sort of roving enquiry which is a fishing expedition. If they think they can plead that claim, let them plead it and we can see whether it is even a legitimate claim to plead, given limitation issues. If they can't, then they could potentially make an application for preaction disclosure in effect, to which we would say "Well, if you are not going to be able to plead that for a limitation point, then you should…"

MR JUSTICE ROTH: What they have pleaded is at least from 2006, haven't they?

MR PICKFORD: Yes.

MR JUSTICE ROTH: So they have not said it started in 2006. They say that is the latest date at which it started, the abuse.

MR PICKFORD: Yes, but my point is one cannot rely on the words "At least" as a sufficient anchor for a claim in relation to different products that are not pleaded as abusive. These things are obviously looked at by the European Commission. There is also a very large file on other products that were in play. As I referred to, there are 1,500 documents going to those other products.

The Commission decided that there was nothing to see here in relation to its decision, and whilst I am not saying that that rules out the possibility that Kelkoo can seek to make such a case, they either need to have pleaded it or they need to have a justification for preaction disclosure, and we don't have either. They are just suggesting that they have sort of pleaded it because of the words "At least". In my submission that's not sufficient on the issue of time period. I obviously have other points to make on this point too.

MR JUSTICE ROTH: What they are looking at in S1 is about how Google looked at performance of its comparison shopping site compared to others and that that therefore would have fed into the way in which they might have been appearing in search results. Hence, if one looks at the quotation which is confidential in the second column of this entry in the schedule, it is about looking you know, what are web results doing to Google's, their shopping comparison site compared to others. Therefore that can feed into the question of how the algorithm is working and so on.

MR PICKFORD: And had they not received that already, they would have got that document through what we are proposing to disclose, because we are going back to the beginning of 2006.

MR JUSTICE ROTH: Under?

MR PICKFORD: Under this head for S1 and S2. So all that demonstrates is precisely the kind of document that they if they had not already received it from the Commission File, they would still be getting from what we are proposing.

MR JUSTICE ROTH: Yes, and if there was such a document from 2005, they won't.

MR PICKFORD: That's right, because there was a different product in place then.

MR JUSTICE ROTH: Why is it different from the product referred to in this quotation?

MR PICKFORD: Because it was OneBox and Froogle that were prior to the Commission's decision, which begins in 2008.

MR JUSTICE ROTH: But this quotation is not dealing with Product Universal, is it, because that didn't exist at the time of this quotation?

MR PICKFORD: This goes obviously to the issue of Froogle.

MR JUSTICE ROTH: You are saying this doesn't seem to be working well and therefore that's a precursor for saying we need to do something rather different. That's why it seems to me of some relevance.

MR PICKFORD: Sir, I think what you might be getting at is issues that go to precursors immediately prior to the period when the alleged abuse starts, if there is something that's on the horizon at that moment, then it would be relevant to consider that if it is just before then the allegation of abuse takes place, because it is a background to it.

MR JUSTICE ROTH: Yes.

MR PICKFORD: But that would be a different, that is not the justification that Mr Moser was giving when he started talking about Froogle and OneBox, and that doesn't in my submission allow one to go back a further two years.

MR JUSTICE ROTH: I can tell you where I am at the moment, Mr Pickford, on this. I think 2004 is too much, but I think to go back one year to 2005 is reasonable and I note that you have agreed you say in the spirit of compromise nonetheless under S7, you have agreed to go back to January 2004, which is also about the difference between looking at other commercial sites and how Google looked at what people were saying about commercial shopping sites.

It seems to me to go back to one year beyond the period that you suggested seems to me reasonable. That will cover, therefore, the period prior to the introduction of the OneBox, but I don't see a basis for going back any earlier because they are already getting that under the other agreed disclosure period that I looked at with Mr Moser the preparation of Algorithm A. So you don't have to worry about 2004, but I do think

that an enquiry of this nature with a significant disadvantage that the claimants are under to go back to January 2005 seems to me reasonable.

Secondly, I think as regards search terms

MR PICKFORD: Sir, I will come on to address you on that.

MR JUSTICE ROTH: Well, that's as far as the period is concerned. So that's both S1 and S2.

MR PICKFORD: Thank you, sir. Can I turn in that case to the question of search terms?

MR JUSTICE ROTH: I mean I say that notwithstanding that on page 5 of this there is reference through the FTC investigation to a 2004 document, but I think in the interests of proportionality one should start in January 2005.

MR PICKFORD: Thank you, sir. If I may turn to the search terms issues?

MR JUSTICE ROTH: Yes.

MR PICKFORD: There are two of those effectively. One concerns the issue of verticals and one concerns the issue of strategy.

So on the question of verticals at the last CMC in this matter, sir, you commented and we respectfully agree that "vertical" was far too broad a term by which to search because it encompasses vast swathes of what will be irrelevant material, because any specialist search, including all of Google's specialist searches, are referred to as verticals. So if that is of itself a key word and it isn't sufficiently qualified, then it is going to produce an absolutely huge amount of material for us to search through and that's obviously disproportionate.

Then what seems to be said by Kelkoo is "We could maybe discuss words by which we qualify it", but if one thinks about the words by which they would qualify it, they are the words that they are getting anyway and therefore it is not going to help them to have "verticals" introduced as a further word as long as it is qualified by the other

sensible sort of words one might have.

So if you go back to the letter from Bristows in paragraph 10. Sir, do you still have that?

MR JUSTICE ROTH: Yes.

MR PICKFORD: What we are offering are “aggregator” with “market share”, “aggregator” with “threat”, “CSS” and “threat”, “comparison shopping” and “threat”, “shopping site” and “market share”, “shopping site” and “threat”, “product site” and “market share”, “product site” and “threat”. So we say that those words will be ample in terms of producing sensibly targeted disclosure, always taking

MR JUSTICE ROTH: I thought there are some internal documents from Google where Mr or Professor Varian is advising them not to use the word "market share" in their internal documents. That's page 4 of the schedule. I don't know when that took effect.

MR PICKFORD: We can come on to deal with the Varian point. In my submission

MR JUSTICE ROTH: It means that if that is right and, of course, the original Varian memo is much earlier, I think from 2003, wasn't it, the one that's in S26 where he said: "We should be careful about what we say in both public and private avoiding certain phrases." So that means one has to be a little broader in the use of words than one might be, because Google was obviously alert to the poss… Google knows quite a lot about searching, doesn't it? It was quite alert to what might be picked up on searches and how to avoid things being picked up.

MR PICKFORD: Sir, when he said all the searches he was proposing to do are conditioned by the word "Market share". They are not. In B –

MR JUSTICE ROTH: Well, in B half of them are. It is aggregate, so it is only “threat” is all we have got. It is always the words that are proposed are always in conjunction with either market share and query one can forget about that because it is not going

to produce anything except by accident if someone was not following the Google internal policy, or the word "threat", and I do wonder whether using the word I mean we have the word I think “shopping site” and why one cannot have “shopping site” and “verticals”, not “verticals” on its own for the reason you mentioned, but “shopping site” and “verticals”.

MR PICKFORD: I can just take instructions.

MR JUSTICE PICKFORD: Or probably “shopping” and “verticals”.

MR PICKFORD: I think, sir, with respect, I think the issue really here is not so much with the word "market share". It is potentially with the word "strategy" because verticals is, as I said, extremely broad.

MR JUSTICE ROTH: Yes.

MR PICKFORD: What we are trying to do with the word "verticals", just as we are trying to do with the words like “aggregator” and “comparison shopping” and “shopping site”, etc, is to target a certain business segment, as it were.

MR JUSTICE ROTH: Yes.

MR PICKFORD: Then on the other hand what we are trying to do is match that with documents that will yield matters that are of interest to the claimants in terms of points about threats or threats to market share or market share or strategy, which is the other point they seek under S2.

In my respectful submission “market share” is a word that falls into part B of that equation and therefore if one has a concern about the word the phrase "market share", you don't correct for that by broadening out part A of that, which is the business units, into “verticals”, because that's not going to help really even address that point.

The way to address it is to look at the other side of the equation, which is words like “threat” and whether we need to expand the word “threat” into, for instance, including “strategy”. In my submission that's a more logical way of approaching the problem

that has been identified than broadening out the business area because the business area is already sufficiently covered in my submission.

MR JUSTICE ROTH: Can you help me, in your further comments, as I understand it, it says "Whilst Kelkoo's criticisms are unfounded", etc this is on page 4 "Google further offers to search for the term "threat" to identify documents where Google discusses any potential competitive threat."

So are you offering there to just look for the word "threat" on its own, is that what's being said? I would have thought that's even broader than “verticals”.

MR PICKFORD: No, that's not what's intended.

MR JUSTICE ROTH: So what is intended?

MR PICKFORD: What is intended is what's set out in the letter I showed you sir, “threat” together with.. so it is “threat” in the context of the sites that would be relevant to a discussion of threat.

MR JUSTICE ROTH: Because it seems that the word "verticals" was used a lot within Google to refer to comparison sites.

MR PICKFORD: Sir, my point is not that verticals is not a potentially relevant word. It is that it is a vastly too relevant word, because it embraces a huge amount of the rest of Google's business.

MR JUSTICE ROTH: Yes. That's why if one had “verticals” and “shopping site”, that would considerably narrow it, wouldn't it?

MR PICKFORD: If it is in conjunction either, sorry, to be clear, is vertical and shopping site a search in its own right?

MR JUSTICE ROTH: Yes.

MR PICKFORD: Could I just seek instructions on what the likely implications of that would be?

MR JUSTICE ROTH: Yes.

MR PICKFORD: I think the difficulty, sir, with that approach comes back to the point that I was making earlier, which is that then we have two words that are only focused on one half of the equation, because if it's verticals plus product site or shopping or whatever it is, what that's going to provide is a vast array of documents that are just simply about product sites quite irrespective of whether it is anything to do with market share or anything to do with strategy or anything to do with the issues that are really likely to be relevant.

I do come back, sir, to my earlier point that the better if we are to flex on something here, the better way of doing it that will actually yield more relevant documents and therefore is going to ultimately assist the claimant more is to bring in the word "strategy" suitably qualified, which I think is one of the suggestions that had been made by the solicitors for Kelkoo in any event, and to it doesn't have to be the word "strategy" alone. We can seek to find means of qualifying strategy so that in conjunction with the relevant business unit or the relevant website, focuses on documents that are to do with strategy in connection with shopping sites.

MR JUSTICE ROTH: Well, it is difficult to sort of micro-manage this in the course of a Tribunal hearing and one does not want to keep repeating searches, but may I suggest this: “verticals” and “shopping site” and either “strategy” or “threat” or “market share”? So you have verticals and shopping site together and then with any of “strategy” or “threat” or “market share”. That seems to me pretty narrow and not a great expansion on what's in paragraph 10(b).

MR PICKFORD: Sir, thank you. We will approach it on that basis. If I could just say one thing, which is if it turns out that that yields a very, very large pool, we might have to come back and

MR JUSTICE ROTH: Yes. You can apply for all these things, because it is the only sensible way to deal with it. Generally with disclosure issues like this the sensible

thing is that you can have liberty to apply and that can be done with an online hearing lasting an hour.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Which can be, if necessary, heard between 9.15 and 10.15 if counsel is in court and you want to do it quickly. So we can slot that in conveniently, because I think everyone appreciates to get to the bottom of the practical implications of some of these things, you just can't do it in a hearing like this.

So that's what we will do with S1 and 2.

MR PICKFORD: The final point is custodians. Mr Moser did not introduce this issue but there is a disagreement between the parties about custodians. So if I can explain what our position is on this.

MR JUSTICE ROTH: Yes.

MR PICKFORD: So there are two additional custodians that are sought to be included beyond, I think it is about the 30 that we already have. They are Ms Mayer and Professor Varian.

Now in relation to Ms Mayer, her documents have already been searched for the purposes of creating the Commission File. My understanding is that the Commission File goes back substantially before the Commission actually found an infringement. So I think it goes back prior to 2006. There are some quite early documents on there. So they already have access to Ms Mayer's documents through the Commission File. She doesn't need to be added as a further custodian to the 30 odd that are already included.

In relation to Professor Varian, he does not need to be added because he has never been a member of the Executive Management Group. There is no reason why he is going to have any particular special cache of documents that would be relevant here and insofar as there have ever been documents that have been exchanged with him,

they will be captured by the searches that have been done on the other documents, who are members of the Executive Management Group in any event. It is not like Professor Varian is going to be excluded. It is just he is not a custodian. Those are the custodians that we have previously (inaudible) previous disclosure on this and we say we should stick to that. There has not been a good reason to deviate that's been advanced by Kelkoo.

MR JUSTICE ROTH: Penny Chu is one of the custodians, is she?

MR PICKFORD: Can I ask where you are currently looking, sir?

MR JUSTICE ROTH: I am looking at page 4H.

MR PICKFORD: Page 4.

MR JUSTICE ROTH: On the schedule. An email between Hal Varian and Penny Chu.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Is she a custodian?

MR PICKFORD: I am just going to check.

MR JUSTICE ROTH: Someone will know.

MR PICKFORD: I think that's likely to have been provided because it was a document that was sent by Ms Mayer and her documents were provided as part of the –

MR JUSTICE ROTH: Can you answer the question, please? Is she a custodian?

MR PICKFORD: Ms Chu I don't think is a custodian.

MR JUSTICE ROTH: Right, because there is an email exchange between Mr Varian and Ms Chu discussing the policy of not referring to market share. The reason the claimants know about that is because it came out in the US proceedings.

MR PICKFORD: Can I just take instructions? I thought the reason they knew about it was because it came from Marissa Mayer's disclosure, but I am just going to ... I am sorry, sir. You are right. It is DoJ.

MR JUSTICE ROTH: Yes, and it wouldn't have come out otherwise.

Then, Mr Pickford, I think Professor Varian should come in, but not Ms Mayer.

While we are on Professor Varian, let's deal with S26, his memo.

MR PICKFORD: (Inaudible) I think we have agreed a consent position on this.

MR JUSTICE ROTH: That's agreed, is it?

MR PICKFORD: Yes, we have given certain assurances to the Preiskel Solicitors and they are content with those.

MR JUSTICE ROTH: Okay. Then we add Professor Varian, but not Ms Mayer, right? Then we go to 3.

MR PICKFORD: I think we are back to Mr Moser at that point.

MR JUSTICE ROTH: We are.

MR MOSER: Thank you, sir. May I say we are content with the dates and the other matters referred to.

One micro item and this may be a matter for the weeds and what you refer to, we would prefer if the qualifier for “verticals” and “threat” or “strategy”, as the case may be, would be “shopping” rather than “shopping sites” I am told, but that might be a matter for open exchange between the parties.

MR JUSTICE ROTH: Well, you discuss that between solicitors. S3.

MR MOSER: That is S3. S3 is Froogle. It is really to be read with S4 and S5 which I can perhaps take relatively swiftly, because it is explained in our skeleton argument. S4 is the Product OneBox point on which I have really already addressed you, sir, and S5 makes a similar point. These come down to what I would call the religious disagreement on pleading at least and so forth.

Really all the points that have featured in the exchange between you and Mr Pickford have already prefigured what I was going to say about disclosure in relation to OneBox.

The period in S4 is one year before OneBox was first introduced. Now we have had an exchange about that and I have heard what the Tribunal says.

"Including any documents on the decision to launch product OneBox in the UK and any other (inaudible) as explained."

We have already set out in our skeleton argument at paragraph 38A as to why we say this is relevant in our pleadings and I think it is well trodden ground this afternoon and Froogle is essentially a variation on it. We have already seen other emails that refer to Froogle which was Google's own CSS before Product Search and clearly again on S3 Froogle's performance from the time it was launched until Product Universal was launched in those markets is we say relevant to the question of the issue of whether Google benefited from being promoted, its Froogle programme being promoted through the OneBox and the issue of demotion of CSSs other than Froogle. So it can't be that the emails we have already seen about Froogle are the only isolated instances where this has been discussed. Yes, we have had documents in disclosure. They are mentioned on page 8.

In 2006 it was recognised that there were issues with Froogle. There is the confidential mention in the second bullet point in the middle of page 8 and further numerous issues about Froogle are set out in meeting minutes.

We have tried to identify the gaps as we were bidden to do but we submit –

MR JUSTICE ROTH: Isn't this covered effectively by S1 and S2 from January 2005? I mean, Froogle was Google's competitor in the comparison shopping market.

MR MOSER: It was.

MR JUSTICE ROTH: So that's what S1 and S2 are all about.

MR MOSER: I suppose if that is recognised between the parties, that would probably satisfy us

MR JUSTICE ROTH: Simply how Froogle is doing if it is not looking in a competitive

situation, is it making any money? Is it worthwhile? Is it attracting advertising? I don't see that's relevant. It is really Froogle compared to others and you have that in S1 and S2.

MR MOSER: I will take instructions. That may well be if that can be made clear either ...

MR JUSTICE ROTH: Because you have some documents about Froogle already, haven't you?

MR MOSER: If you will excuse me for a moment. I am told that's a very helpful point, sir. If everybody realises that is within the ambit of S1, then we are content.

MR JUSTICE ROTH: Yes, but it is not everything you are going to get under S1 about Froogle's performance. It is the comparative bit.

MR MOSER: Yes.

MR JUSTICE ROTH: So the answer is no to S3. S4, you want to go back to July 2004.

MR MOSER: Yes.

MR JUSTICE ROTH: Well, I have already said I think we should only go to January 2005.

MR MOSER: We are content with January 2005.

MR JUSTICE ROTH: But I am just trying to understand. Is this because you have brought a claim about Product Universal, which, of course, was the subject of the Commission Decision. Is this to consider whether you can claim about Product OneBox?

MR MOSER: Yes. If OneBox operated in the same way as Product Universal, has the same promotion, it would have been implemented through the Product OneBox. We don't know that.

MR JUSTICE ROTH: The difficulty about this is there are some other requests coming about some other algorithms and you can say "We don't know about how this algorithm

works, so we'd like to know about that, whether it is Diversity, whether it is Anchor++ or something". Yes, there are a whole lot of things that Google was doing which you don't know about, of course you don't have information about the internal operation of Google but that's where I do get concerned this becomes a sort of roving exploration to see what other things can we claim about.

We do start here with a very thorough, extremely drawn out Commission investigation looking into Google and concluding that these are the two areas of worthwhile significant abuse and not other matters. The Commission will clearly have looked at OneBox. They refer to it. They have described it and so on and they decided it is really Product Universal where the serious problem starts. To say you can just cast your net to see whether you might not be able to do better than the Commission, I think that is not really a proper part of this claim. You have quite enough and we all have quite enough looking at Algorithm A and then at Product Universal. So where it is a precursor and to explain the context for Product Universal, I am sympathetic, but where it is, as I think you say at the top of page 11:

"Kelkoo needs to understand how Product OneBox worked in order to assess if it operated in the same way as Product Universal and therefore whether the exclusive promotion began when the Product OneBox was first launched."

I mean, that really is a fishing investigation. We will come back to that when we look at some of the other algorithms. As I say, these are primarily follow on cases for the period of the Commission Decision. I appreciate you say the remedy is not sufficiently comprehensive, and I think we must and should we are not formally obliged to but that it is reasonable to take the position "Well, we can be guided as to what's proportionate by what the Commission has come up with after all those years of poring over what Google was doing".

MR MOSER: It is not unheard of, of course, for the Commission to take a policy

decision along the lines of something you have just outlined and said "We have enough on our plate with Product Universal and Algorithm A and Panda and we will concentrate on that and we will start in 2008 and work from there".

MR JUSTICE ROTH: But they will have got material clearly from before 2008 and they will have considered it and whether it is worth looking at. I can't remember now how long their investigation lasted, but I seem to recall it went on for a very considerable time.

MR MOSER: One may speculate on that. It is true that we say what we say at pages 10 and 11 and, with respect, your characterisation of what we are arguing is correct. There is unapologetically a point that we make where we say if this operated in the same way as far as exclusive promotion is concerned, then exclusive promotion will not have started when the Commission's Decision became (inaudible) it will have started earlier.

Then my learned friend has I think today for the first time raised a limitation point and so on, but there is no limitation because, of course, we don't know and for that same reason we say we should be entitled to ameliorate the asymmetry of information on this issue in the way that we suggest because it seems that's why I showed, sir, the passage in Mr Hennah's witness statement. It seems to us to all intents and purposes the box that was there that became Product Universal was doing very much the same thing that Product Universal was doing when it was launched and therefore if we are right and the latter was an abuse, then it would follow the former was as well, and we have pleaded it, as I have explained, which we say embraces that.

There is a gap we say in the disclosure.

MR JUSTICE ROTH: Well, the Commission investigation which started in something like 2012 it seems.

MR MOSER: 2010 I am told.

MR JUSTICE ROTH: 2010. Well, in any event you are absolutely right, November 2010 and received information from a number of international competition authorities, including the German and Italian, and a whole lot of comparison sites including, of course, Foundem and Ciao and was looking into those complaints and its initial preliminary assessment was expressed in general terms and in conducting its investigation saw that these are the main areas of abuse. I think that is a guide that we should follow in the interests of proportionality even if there are potentially other areas where there might conceivably have been some abusive conduct, but I think we have to keep these proceedings within manageable bounds and that's in your interests as well and costs.

MR MOSER: I will have one more go, if I may and then we will see where we go with this.

MR JUSTICE ROTH: Yes.

MR MOSER: So we have the whole picture. The Commission may not have been as interested in OneBox as we are, because whereas Universal was introduced across the EEA, OneBox was only introduced in the UK and in Germany. We are, of course, bringing a claim in the UK and so we are particularly interested in OneBox. It may well be that was part of the thinking. One can only speculate, sir.

MR JUSTICE ROTH: Well, the UK and Germany were two pretty important members of the EU.

MR PICKFORD: I am unsure whether you need to hear from me or not?

MR JUSTICE ROTH: I am not going to allow it. Mr Moser, the whole point about proportionality is that one doesn't necessarily cover everything and one has to form a judgment of where all the resources, expense, time have to be debated and I think we have large complex proceedings as it is. As I say, this is just a fishing attempt to see if there might be something else. So let's go on.

S5 really goes with it, doesn't it?

MR MOSER: S5 goes to the same point. I have not persuaded you on S4, so I am not going to persuade you on S5.

MR JUSTICE ROTH: No, you are not.

MR MOSER: S6 is dealt with at paragraph 39 of our skeleton argument, collective internal communications. It is relevant to the issue of whether the teams worked independently or towards a common goal, the exclusionary strategy claim and the exclusive promotion claim. We have narrowed the time period of this request from 1st January 2004 to the end of 2005. They say we have the pre-Decision Commission File. However, that includes very few documents in the relevant time period when we say the preparatory communications would have taken place.

We have also agreed to narrow the request as per further comments on page 13 to remove discussions about Product Universal, Panda (inaudible) and Product Search and Google Shopping. We do maintain there is a gap in relation to discussions between different teams around OneBox, Froogle and Algorithm A, in particular the period before 2006, because that's not addressed at all by the existing disclosure referred to by Google. That is the File.

MR JUSTICE ROTH: Yes. Well, Mr Pickford, I am not persuaded to go back to January 2004 for the same reason I have given earlier, but I am thinking about the year of 2005. This is communications between, as I understand it, the sort of people dealing with Froogle/OneBox on the one hand and the people dealing with Algorithm A on the other hand about those various matters, about how did they interrelate.

MR PICKFORD: Sir, my understanding is it is somewhat wider than how they interrelated because it is "or"s between them, so it is "internal teams for OneBox or the internal teams for Froogle or the internal teams for Algorithm A".

MR JUSTICE ROTH: No, it is "and", isn't it? If you look at S6, that's my understanding.

If you were right, I would have concerns, but, as I understand it, it is 1 or 2 and 3.

MR PICKFORD: Sorry. Yes. Sorry. I beg your pardon, sir. That's right.

MR JUSTICE ROTH: I think that is reasonable and it is for the year 2005. So preparatory to what then happened from 2006 onwards. That is pleaded, there was preparation going back it said going back earlier. There may have been very little interchange between them. So I think

MR PICKFORD: On the basis of dealing with S1 and S2 I am not going to ...

MR JUSTICE ROTH: That's S6. 7 is agreed I think.

MR MOSER: Yes.

MR JUSTICE ROTH: S8, Mr Moser, seems to me extremely broad.

MR MOSER: We have sought to narrow it by only requesting weekly search launch committee documents.

MR JUSTICE ROTH: Weekly?

MR MOSER: Weekly. We say since that was the mechanism through which Google considered changes to its algorithms, it is the most proportionate way to provide the requested information, but we are not seeking all emails, other documents and everything else. It seemed to us by concentrating on the weekly search committee weekly search launch committee it was the best we could make it insofar as reasonableness and proportionality are concerned. It is difficult again for us to know quite how they dealt with it, because this is all internal, but it goes to the issue of when adjusting algorithms did Google follow the (inaudible).

MR JUSTICE ROTH: The answer may be this. In their comments Google says this is the second response on page 17:

"Google has agreed to carry out reasonable and proportionate searches responsive to S9, S10 below, which will cover the development, testing, launch, evaluation and implementation of Algorithm A and its updates."

S10 is the updates. So

MR MOSER: (Inaudible). As you can see, the documents disclosed in relation to (inaudible) didn't seem to cover any weekly search launch committee in relation to any algorithm other than A and Panda. The purpose of this disclosure request is to test Google's case that it applied its search algorithms equally to all CSSs, to all websites equally, and that no search algorithm had a greater effect on CSSs on other websites. That's the problem.

MR JUSTICE ROTH: The algorithms you are concerned with are Algorithm A and Panda.

MR MOSER: Yes.

MR JUSTICE ROTH: You have the weekly committee meeting agendas for Panda I think.

MR MOSER: Yes, yes.

MR JUSTICE ROTH: It is really Algorithm A and you are getting a lot about Algorithm A under S9 and S10. I think the answer is at the moment it seems to me look at what you get under S9 and S10.

MR MOSER: Yes.

MR JUSTICE ROTH: And what you already have and if you say S9 and S10 are just technical documents and don't explain what the thinking is and what actually Google was seeking to do by these updates and for that we need the weekly search launch committee meeting documents, then come back.

MR MOSER: Yes, sir.

MR JUSTICE ROTH: And we will deal with it that way.

MR MOSER: There is then S9 and S10 which are agreed.

MR JUSTICE ROTH: Agreed.

MR MOSER: Then S11. With S11 we are squarely back within the central part of the

issues in dispute especially regarding Algorithm A. We are looking for documents from the launch of Algorithm A up to 1st August 2011. That's a narrowed search period. Internal documents concerning the impact of Algorithm A on CSSs and other commercial sites. There is a contested issue on that clearly. And one sees on page 19 examples of two internal documents that we do have and the sort of things that are being said. Obviously I can't read them out.

MR JUSTICE ROTH: What is the date of the first one?

MR MOSER: I will tell you in a moment, if I may. Again Google's case is

MR JUSTICE ROTH: Do you have that date?

MR MOSER: June 2006 or it may be the American dating, April 2006.

MR JUSTICE ROTH: Anyway 2006. The launch of Algorithm A was in June 2004. If we take this from 1st January 2005. Why is it the impact on other commercial sites?

MR MOSER: Because Google says Algorithm A did not apply at all in a different way to the CSSs, to other websites and they clearly want to make an issue of that. So it is an issue that we wish to test. There are other aspects to this. It is not the central point of why we say we are entitled to this, but in relation to the Penalty Server Data that we are going to come to at the end of this.

MR JUSTICE ROTH: Yes.

MR MOSER: That is not available for the period before November 2006 for Algorithm A, which is why we are particularly keen on S11 for that purpose.

MR JUSTICE ROTH: Yes.

MR PICKFORD: I do wish to push back on S11 hard.

MR JUSTICE ROTH: Yes. I am just redigesting all that has been said about it. Both the documents that you quote from and indeed your introduction to those quotes, there are several documents in the disclosure to date which show there were internal discussions at Google about the impact of Algorithm A on CSSs. I mean, you will see

from the nature of the decision of Algorithm A whether it is in some way different with other commercial sites, but it seems to get into documents that don't concern the impact on comparative shopping sites. It is not very relevant. If it discriminates in favour of Google Maps as against other mapping sites, so be it, but that has nothing to do with this case.

MR MOSER: It certainly tests Google's pleaded case. In a sense the fact that Google are pushing back against this hard is unsurprising and ought to put one on enquiry, because the narrative is important. We see what we are told in the yellow highlighted emails.

MR JUSTICE ROTH: Yes. Can you show me the bit in the Defence that you say in Google's Defence that you say relates to this?

MR MOSER: I might have to get the assistance of Mr Whelan. It is in the witness statement of Mr Wisking at paragraph 45. I will have to find out where it is pleaded. Forgive me.

MR JUSTICE ROTH: Well, the Defence is at tab 165.

MR MOSER: I don't know whether this is a good time for a transcriber break.

MR JUSTICE ROTH: We need to take a break, so it may be that that is the moment when you can have a look. You say it is in Mr Wisking's sixth witness statement?

MR MOSER: Tab 121, page 2182.

MR JUSTICE ROTH: Yes. What paragraph?

MR MOSER: I think that might be a dud reference actually. It doesn't get us there. Sorry. I think that just contradicts us generally. I will get you the reference.

MR JUSTICE ROTH: We will take ten minutes and I will come back at 3.35.

(Short break)

MR JUSTICE ROTH: Yes, Mr Moser.

MR MOSER: Thank you, sir. The pleading we were looking for is at tab 165.

MR JUSTICE ROTH: Yes.

MR MOSER: Amended Defence. That you probably knew, but it starts at page 2690 with paragraph 32C.

MR JUSTICE ROTH: Just one second. Yes. 32C.

MR MOSER: 32C, 2690 although nothing happens on 2690. The relevant bit is over the page right at the end where it says that:

"Algorithm A and Panda did not target CSSs; they applied to all websites."

That's then expanded on at 32E and that's all confidential.

MR JUSTICE ROTH: Let me just read it.

MR MOSER: Yes, please. (Pause).

MR JUSTICE ROTH: Yes, that's helpful, but what do you mean by I mean, all they are saying is it applied to everything. If you are then asking for all documents concerning the impact on everything, that is indeed vast. I mean, you have got the documents that you have quoted from. So you have certain documents that can indicate certain matters.

MR MOSER: We suspect there must be others like that.

MR JUSTICE ROTH: If it is on shopping sites, you get them and if it were limited to shopping sites, subject to the period, then I can see some force in that, but to start looking at everything in the universe that Algorithm A affected, which it would, because it is a general algorithm.

MR MOSER: It is extremely likely that a discussion of the effect of the algorithm generally won't be limited to just shopping sites and so there will be illuminating discussions in disclosure around the impact of Algorithm A on matters that won't necessarily be caught at all by the filters that we have agreed in relation to the other disclosure.

MR JUSTICE ROTH: If Algorithm A is a general algorithm used for ranking, there will

be lots of discussion about how it works in different settings and whether it needs improvement on this or correction on that. I mean, it's a vast range of documents even if the period were to be limited to January 2005, just over those five and a half years sorry six and a half years. It would be vast. I mean, if you want it limited to the impact on comparison shopping sites, which you probably get anyway but under another category, but insofar as you don't then that seems to me within the bounds of relevance subject to hearing from Mr Pickford, but that's looking at Google's comments in the schedule, that's their concern. It is all other commercial sites.

MR MOSER: For example, on page 20.

MR JUSTICE ROTH: Yes.

MR MOSER: Can I just take instructions on that point?

MR JUSTICE ROTH: Yes.

MR MOSER: A counterproposal that has come back from behind me is a fallback to CSSs and other marketplaces, so that's Amazon and so on.

MR JUSTICE ROTH: Well, they will all operate in different ways. No, I don't think so, Mr Moser.

MR MOSER: If that doesn't find favour, we would be content with internal documents concerning the impact of Algorithm A on CSSs.

MR JUSTICE ROTH: Well, Mr Pickford, if that were for a period from 1st January 2005 and its impact of Algorithm A on CSSs.

MR PICKFORD: Sir, in principle we don't have a problem with that, but the difficulty is it is actually not going to be very helpful to have two different items of disclosure going to the same issue, because we already have S9 and S10 where we have agreed to give:

"Documents containing the development, testing, launch, evaluation and implementation of Algorithm A."

So I don't see what additional documents we are going to be picking up with the impact, the word "impact" but if they would like a further search on the word "impact", then so be it.

MR JUSTICE ROTH: We don't know and so limited, I think you accept it is relevant. It may be unnecessary, and then it will not involve any extra work. So from 1st January 2005 to 1st August 2011 impact on CSSs.

Now S20, which is the webmaster guidelines, you have agreed, Mr Pickford, to go back to January 2006.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Can I ask you, Mr Pickford, to go back to January 2005, as we have?

MR PICKFORD: Yes.

MR JUSTICE ROTH: Thank you. S21, this is Anchor ++.

MR MOSER: Yes.

MR JUSTICE ROTH: Well

MR MOSER: I know, sir, from your remarks on Anchor++ and others that presently this is not a favoured one. Put it that way. I can see why. I will have a go at explaining why this is not just a stab in the dark but it appears to us to be a gap, in fact, a gap if we are right, in the Commission's, otherwise thorough investigations. It starts at page 22.

MR JUSTICE ROTH: Yes.

MR MOSER: The effect of Anchor++ on CSSs, commercial sites. So that's another algorithm. It may have been an algorithm which demoted CSSs. They know. We don't know. No, they don't plead they say that Anchor had the effect of demoting CSSs. Well, they wouldn't, would they, in the words of a famous witness, but if one looks at the confidential bit right in the middle of page 22, that is reference to

a document in the Commission's File that we have been given. It is the only document that we have. That's not necessarily against us. That indicates to us that there is very likely to be more. We don't know why the Commission did not take Anchor ++ further in its decisions.

As we explained, this is a proprietary matter. We can't look into what they have or haven't done. We have provided other examples of documents which suggest that Anchor ++ did demote and we have made reference to that in our table. It would be going too far to go through these documents in detail. It simply seems to us of all the evidence we have been able to evaluate this is the likeliest other candidate for an algorithm that was doing what we say Algorithm A and Panda were doing. It is always difficult when you simply don't accept the reason provided by the other side, but we don't. We would be happy to accept it if we are shown disclosure and we are wrong about this. I may be told that I am fishing. I am not entirely fishing because –

MR JUSTICE ROTH: We are told a bit about Anchor ++, aren't we?

MR MOSER: We are.

MR JUSTICE ROTH: And what it was seeking to do. And yes, it would demote, because of the way it operated and the way it applies. You have been told that a year ago and you have not sought to say we think therefore you have a case on Anchor ++ based on what it was designed to do.

MR MOSER: It all arises out of requests that were initially made back in July. If pleaded that their general search algorithms were proprietary their precise mechanics not known to us and the timeline is as it is, but I say that in the context of this case it is not as though this is coming extraordinarily late in the order of things. We are still talking about disclosure. They say we are talking about predisclosure. It is always difficult to strike the balance. If one takes the line of amending one's pleadings in an ambulatory way, one is told "You shouldn't really be amending your pleadings every

time something moves on" and if it competes conservatively, of course then it is met with the argument "You have not pleaded that specifically". Google says "You haven't put an application to amend your pleadings". It would be rather premature to amend our pleadings in respect of Anchor ++. What we are asking for is disclosure.

MR JUSTICE ROTH: Yes. Yes. Mr Pickford, the one thing I am not clear about is did Anchor ++ apply also in the way it operated to the Google comparative shopping site?

MR PICKFORD: I think I know the answer to that but I am going to turn around and make sure the answer I am about to give is the correct one.

MR JUSTICE ROTH: Yes.

MR PICKFORD: Sir, indeed the answer thankfully is the correct one. It didn't apply, because Google was not ranked at all. Google in the results they are talking about here, the general search results, as opposed to the Box, Google effectively implied an infinite demotion to Google. It just obliterated it from appearing in those sites at all.

MR JUSTICE ROTH: Yes.

MR PICKFORD: So it was subject to a far more so having subjected its own results within general search results to being removed from general search results, obviously there was nothing else you need to do to it.

MR JUSTICE ROTH: Google was in the box?

MR PICKFORD: In the box which used a different algorithm. Exactly.

MR JUSTICE ROTH: So this applied to the others.

MR PICKFORD: Sir, my submission on it is, as you will anticipate, because it is anticipated in the Redfern, that there isn't a pleaded case here. There was every opportunity if Kelkoo wanted to to seek to plead. Obviously we are not encouraging ambulatory amendments on a monthly basis. They have just repleaded. If they wanted to replead something else they could have sought permission to do that as

well, but it is not part of their claim and we do have to draw the line and we say the right place to draw the line is in relation to the pleaded claim.

MR JUSTICE ROTH: Yes. Thank you. Well, Mr Moser, I mean, having been told how it works a year ago, you didn't then say "Right. It is affecting comparative shopping sites". It didn't apply to the Google version, whether it was Google or Froogle product search. Therefore, this is another form of discrimination and I don't see that getting these documents are going to help you, because you know that it doesn't apply to Google sites and you know that it does have the effect of demoting some commercial some comparative shopping sites. You were told that by Google in good time to digest it and decide what to do about it. So I don't see how approaching that further through disclosure is going to help.

MR MOSER: Sir, I can do nothing other than repeat the submission I have made. The line we follow is we say an appropriate one, which is that we haven't pleaded aspirationally or exaggerated our pleadings. We could have struck in something we didn't really know at an earlier stage. There has been no mystery about this because, of course, we have been writing to them and asking them about it.

MR JUSTICE ROTH: You have amended but what is it that you want to know and need to know beyond what you have been told about Anchor ++? If one looks at Google's response, quite reasonably you asked about it.

MR MOSER: Yes.

MR JUSTICE ROTH: And you get a response which is not evasive it seems to me. If one looks at the response referred to in the schedule of 27th October 2023 at page 1272, and there it is and yet if you wanted to say "Well, that is a form of abuse", you could have but you haven't and it is not that you lack the resources to consider this and evaluate it and you haven't done it and to then start asking now for disclosure. Yes, it obviously is going to demote some of the comparative sites.

MR MOSER: It is obviously going to do that but we don't know from what date it did it, the extent it did it.

MR JUSTICE ROTH: You have been told it certainly did it at the start of your period and you have been told it stopped doing it around about 2009. So that's a good enough period to claim for if you want to.

MR MOSER: I sense that I am not going to be able to persuade you.

MR JUSTICE ROTH: No.

MR MOSER: Now we are just going to argue on it.

MR JUSTICE ROTH: I think you have had your chance on it and I think we should move on. The answer is no.

S22.

MR MOSER: S22 is an interesting one, because I wonder if we have been talking past each other. It is limited to a document that expressly refers to Kelkoo, expressly refers to us.

MR JUSTICE ROTH: S22:

"The impact of algorithms ..."

I see, yes.

MR MOSER: It is plainly an issue. It is plainly a valid request. I don't know why it is said to be wholly untethered to the pleaded issues, because we are told that there were manual penalties that were applied to us and knowing about what the impact was in relation to algorithms affecting our ranking and any manual penalties affecting us, there does seem to be a clearly contested issue and one on which we are entitled to see any documents in so far as they have not already been disclosed in relation to all the disclosure requests above.

So we are slightly at a loss as to what more to say about it than we have before, but if, for instance, the general searches that they refer to haven't included us, Kelkoo as

a

MR JUSTICE ROTH: No, I understand.

Mr Pickford.

MR MOSER: You have the point.

MR JUSTICE ROTH: I have the point, yes.

MR JUSTICE ROTH: Mr Pickford, what do you say about S22? I think the second response that part 2 is not limited to Kelkoo I don't think is correct. I think both 1 and 2 are only concerning the impact on the claimants.

MR PICKFORD: Well, I mean, put it this way. Obviously the claimants are amongst the group who may be impacted and who will already be covered by the disclosure. Insofar as it is disclosure on Panda, we are giving that. Insofar as it is disclosure on Algorithm A, we have covered that. Insofar as it is disclosure on other algorithms, we have covered that and that's fishing at this point.

MR JUSTICE ROTH: Yes.

MR PICKFORD: Then in relation to manual penalties, there is the whole topic of the penalty server and what we have done to try to provide information on that and that's a topic in and of itself and that's the area that we are able to interrogate to try to provide disclosure on that. So we are not really sure what this is adding. If Mr Moser is saying it is literally just documents that mention the word "Kelkoo" in this context, then I can take instructions, although I am not sure I can see that's going to provide any other documents. Insofar as it is about Algorithm A and Panda. Insofar as it is about other algorithms, then the same points we have already canvassed apply. They are not entitled to disclosure on those unpleaded claims.

Could I just turn around and ask what the position is on Kelkoo?

MR JUSTICE ROTH: Yes.

MR PICKFORD: Sir, our position remains as I have just explained. We don't know

what we would actually have to do additionally to provide disclosure on these topics insofar as they are legitimate ones for disclosure, i.e. Algorithm A and Panda, because we are doing it already. So we need to understand what it is that S22 is really going to that's additional to that.

MR JUSTICE ROTH: Yes. Mr Moser, do you want to respond to that?

MR MOSER: It strikes me that we are saying similar things save that Mr Pickford asserts that he can't imagine what further documents would be met by including the key words "Kelkoo" or "Yahoo shopping". We say if they didn't include those, then they wouldn't have captured documents that expressly referred to us. It seems in my respectful submission obviously correct what we say. There is not a great deal I can add.

MR JUSTICE ROTH: Well, Mr Pickford, I think again going back to January 2005 what I think is sought is a search for documents that refer to expressly Kelkoo or “Yahoo shopping” and it may be that then it refers to them in the context of some other algorithm, but it does seem to me that that is in the context of this case a reasonable search to undertake. Whether it captures anything additional to what is already captured I don't know, but if Google is expressly referring to these sites, and for some reason that has not been captured elsewhere, that is potentially relevant and I think you should do that search going back to again 1st January 2005.

MR PICKFORD: That's understood.

MR JUSTICE ROTH: S23, Diversity, well, you know what I am going to say, Mr Moser.

MR MOSER: I do.

MR JUSTICE ROTH: Unlike Anchor++, which was implemented, this is something which was not implemented. To get documents telling you why it wasn't implemented really seems to me disproportionate. Yes, it might yield something, but I just think

that's disproportionate. They say expressly they didn't implement anything equivalent.

MR MOSER: I hear that, sir. I am going to make one attempt to explain why it is not quite as black and white as that, because what has been pleaded in the pleadings is they say that the algorithm was not implemented and we say "Ah, but it may have had a direct or indirect effect". Out of that there has been spun a further pleading argument in relation to whether that is a further cause of action or similar being pleaded by way of a reply. That I suggest need not detain us.

The point is that we are saying it might have a direct or indirect effect, particularly indirect effect, even though it was not implemented in the EEA and that's something that we wish to test. The point is expanded on at paragraph 46 of our skeleton argument. I can't do much more to that.

MR JUSTICE ROTH: Yes. Let me remind myself what you said. 46?

MR MOSER: Paragraph 46.

MR JUSTICE ROTH: I have got it. (Pause.)

MR MOSER: We are content to discontinue. There are three requests that sit together, 23, 24 and 25. We are prepared to discontinue 24.

MR JUSTICE ROTH: I am not quite clear what the indirect effect you say it could have had.

MR MOSER: The answer to that is we don't know.

MR JUSTICE ROTH: Conceptually how would it have an indirect effect? I mean, it doesn't apply to searches. There will be a few people in Europe who have a US address but that's really de minimis. How would it have an effect if it wasn't implemented here? I just don't understand it and I don't think paragraph 46 explains it. I mean, if you want a bit more explanation

MR MOSER: Sir, I take the point I think, especially given the time.

MR JUSTICE ROTH: Well, I don't want to shut you out having something this is going

to be a big trial on important issues for your client. If I thought this was really relevant or might be, we should spend time on it and we have tomorrow, but we are clearly going to self-evidently run into tomorrow, but at the moment I just don't see how you say it has been indirect or may have an indirect effect, I just don't understand it.

MR MOSER: The thoughts are along the lines it was implemented in the United States. There will have been search results in the United States, people who were searching in the States or with access to state search engines will have been influenced by the ranking of Kelkoo in that way and it may also be that Google are aware of how searches in the US might have an indirect effect on searches in the EEA.

MR JUSTICE ROTH: Kelkoo wasn't in the US so it wouldn't have affected Kelkoo even in the US.

MR MOSER: It would have affected search results in the US.

MR JUSTICE ROTH: But I mean it is extremely farfetched. I mean, the whole point about proportionality is balancing cost and relevance, isn't it? It is not saying it has to be completely irrelevant. It is saying what is the degree of likely relevance to the effort and cost and volume of work involved. No, I don't think so. You had a good shot at it, Mr Moser.

MR MOSER: Sir, yes.

MR JUSTICE ROTH: S25, that's D iversity as well. S26 is agreed now. Is that right? The Varian memo.

MR MOSER: It is agreed in the sense that we received a letter I think over the weekend where we were told we had asked certain further questions whether it refers to this, that or the other. We were told it doesn't. On that basis we have abandoned the request.

MR JUSTICE ROTH: Yes. Very well.

MR MOSER: Now we are about to come on to compliance mechanism disclosure

requests. Before we do that I had a note I have had two notes passed up to me. May I just take instructions for a moment?

MR JUSTICE ROTH: Yes, of course.

MR MOSER: The first suggestion is whether we have skipped over S20.

MR JUSTICE ROTH: If we have, that's probably my mistake no, we did address it.

MR MOSER: No mistake happily.

The other point, and I am sorry to revisit something, and this is my mistake, is in the flush of victory over the disclosure in relation to S2 and in particular Professor Varian as

MR JUSTICE ROTH: A custodian.

MR MOSER: Yes. Forgive me. That is at page 5. Professor Varian as a custodian. I didn't revisit the finding that Ms Mayer should not be a custodian. I have been asked to have a second go and go back to that. You are probably aware, sir, of Ms Mayer's role. She was the Vice President for search and consumer web and there's mention in the evidence of an FTC deposition in 2012 where she explained her role as being central to all of this. So she sits very centrally in relation to the strategic themes on search and consumer matters.

My learned friend's point was you are going to get everything in relation to Marissa Mayer, because we have provided extensive disclosure in the form of the Shopping File. The thing about the Shopping File is it was not responsive to the search terms that we have now discussed, be verticals or shopping together with threat and so on. So for a figure of such centrality I am asked with some emphasis to press again upon you our proposal that Marissa Mayer is a custodian and there are in the supplementary bundle some documents where quite obviously she is dealing with this. I don't think I need to show you this.

MR JUSTICE ROTH: Mr Pichai, is he a custodian?

MR MOSER: I am getting the answer, sir.

MR JUSTICE ROTH: I am told there are about 30. So there must be a list.

MR MOSER: There is about 30. There is the reference in S1 to him confirming he would work with Ms Mayer.

MR JUSTICE ROTH: Yes.

MR MOSER: Yes, possibly. It is difficult to know who the anchor point is.

MR JUSTICE ROTH: No, but what's the answer? Is he or isn't he?

MR MOSER: We think so. We are just checking. He is. My submission is it would be odd even if he is, given that Mr Pichai, Ms Mayer and Professor Varian are working on these matters together, that two of them should be a custodian and the third were not. I know the contrary argument is if two are, then it will capture what she does, but we just don't know.

MR PICKFORD: There is another contrary argument, sir, which is that her documents have already been provided as part of the EC Commission disclosure and every exercise we have to do requires extra resources to perform it, to review it, to do all the deduplication. In our view what we are going to find is that all those documents or materially all those documents are duplicated, but it takes time and cost to do it.

MR JUSTICE ROTH: I understand. No, I think, Mr Moser, I was persuaded by Professor Varian, because I think he had a slightly different role and there were some indications that he said things that may be very relevant, but Ms Mayer was part of the general train of communication and I think it will be captured by the large number of custodians you have got. So the answer is no.

If you get documents and you can see, because they start building up a picture of what was going on, that it seems Ms Mayer was then being asked to do something but you haven't got what she did and so on, I think you can then make specific disclosure requests regarding her, but as a general trawl I think one has to draw a line in

an organisation as large as this, and I think you have got quite a lot. One can always in my experience find other important people and say "Well, what about them?" particularly with such very large organisations. So I think, in fact, sometimes the people higher up produce rather less on their own, because whereas they produce a lot of documentation about a whole lot of other things that have no relevance. So I think we will keep it where it is with Professor Varian coming in.

So that takes us to compliance mechanism. Is the compliance mechanism - is there a document which is the compliance mechanism, as it were, the thing that Google put to the Commission which the Commission evaluated? I am just wondering how is it going to obviously we are going to look at it in the trial or the Tribunal is going to look at it. Mr Pickford, how does it manifest itself in terms of documents?

MR PICKFORD: May I take instructions, sir?

MR JUSTICE ROTH: Yes.

MR PICKFORD: Sir, on that issue probably the core document, which we are very happy to provide, which I believe is part of disclosure anyway, the Tribunal, there is a letter from Google's solicitors who are dealing with this aspect of matters, which is Cleary Gottlieb, which sets out over nine pages the remedy and how Google was proposing to comply with the requirements of the decision, and insofar as there is a single document which basically encapsulates the essence of the remedy, that's it.

MR JUSTICE ROTH: That is from 2017 I suppose?

MR PICKFORD: Yes.

MR JUSTICE ROTH: And did that trigger further correspondence with the Commission then?

MR PICKFORD: Yes. There is a monitoring process. There are people who were put in place to monitor the remedy and there was continuing correspondence between Google and those responsible for ensuring that the remedy was properly implemented.

MR JUSTICE ROTH: Is there a monitoring trustee as such?

MR PICKFORD: Yes. I don't know whether they are called a trustee, but there are certainly "experts" I believe they are called, but in any event the Commission had people that were required, their job was to ensure that the Remedy was properly followed, I believe at Google's expense.

MR JUSTICE ROTH: Given the time, it seems to me it is sensible to move into part B tomorrow and then we have if you could just those instructing you could supply the Tribunal with that letter after we rise so I could read it before we resume, I think that may help me understand the process, which isn't covered anywhere I think in the material I have got probably.

Can I ask, Mr Moser, in your skeleton you talk at paragraph 59 onwards about the Penalty Server Data request.

MR MOSER: Yes.

MR JUSTICE ROTH: That's not in the Redfern schedule, is it?

MR MOSER: It is not in the schedule, but it is a request for information.

MR JUSTICE ROTH: I see. It is not a documentary disclosure request?

MR MOSER: No.

MR JUSTICE ROTH: I see. That's helpful.

MR MOSER: Can I give you some short references? I know there is a lot to read and look at, but there is a letter about the Penalty Server Data dated 13th November 2024. That's at tab 25 of the supplementary bundle. That had attached to it an example of the Penalty Server Data. Absolutely no point in reading it all. That example is at tab 61 of the supplementary bundle.

MR JUSTICE ROTH: That's Linklaters' letter of 13th November.

MR MOSER: That is correct, yes. That will give you more information about the penalty server argument.

MR JUSTICE ROTH: You said the attachment is at?

MR MOSER: The attachment is at

MR JUSTICE ROTH: Tab?

MR MOSER: Tab 61 of the supplementary bundle.

MR JUSTICE ROTH: Yes.

MR MOSER: The attachment is just to show what it looks like. There is not very much more one can do about that, and the penalty server, of course, falls into quite a confidential part of this. It may be that it is easiest discussed in private. I can test that with my learned friend over the adjournment.

MR JUSTICE ROTH: Is the attachment the attachment to the letter of 15th October or is it an attachment to this letter?

MR MOSER: That's a good question.

MR JUSTICE ROTH: Because this letter doesn't seem to refer to anything being attached.

MR MOSER: I am sure you are right, in which case it is the letter at tab 98 of 15th October and this is a reference to it.

MR JUSTICE ROTH: That's at tab 98, is it? Okay. Well, I will look at that before tomorrow.

MR MOSER: If you are looking at the Commission letter that we are promised, you may also wish to look at and this won't be surprising for Google, because I am sure they have seen it before and I think it is again an attachment to something that made its way into the supplementary bundle at tab 62 of the supplementary bundle is an email to us from Monsieur Allibert, the Head of Unit Comp, at the Commission. It is really only paragraph 1 of his email at the bottom of page 1 that makes good what I said earlier about what the Commission did or didn't say.

MR JUSTICE ROTH: Yes. Very well. So we have that to deal with. Then we will

move to Connexity. Then I think the Google request for information is resolved. So we should not have any problem finishing tomorrow I think. So we will say 10.30 tomorrow.

(4.29 pm)

(Hearing adjourned until 10.30 am on Tuesday, 19th November 2024)