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

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

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10 Salisbury Square House
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13 Tuesday 19th November 2024

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15 Before:

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17 The Honourable Mr Justice Roth
18
19 (Sitting as a Tribunal in England and Wales)

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21
22 **BETWEEN:**

23
24 KELKOO.COM (UK) LTD AND OTHERS
25 INFEDERATION LTD
26 WHITEWATER CAPITAL LTD
27 CONNEXITY UK LTD AND OTHERS

28
29 **Claimants**

30 v

31
32 GOOGLE UK LTD AND OTHERS

33
34 **Defendants**

35
36 **A P P E A R A N C E S**

37
38
39 **Philip Moser KC & Hugh Whelan (Instructed by Linklaters LLP)**
40 **on behalf of Kelkoo and Ciao**

41
42 **Aidan Robertson KC & Matthew O'Regan (Instructed by Preiskel & Co LLP)**
43 **on behalf of Connexity**

44
45 **Meredith Pickford KC & Luke Kelly (Instructed by Herbert Smith Freehills LLP)**
46 **on behalf of Google**

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Tuesday, 19th November 2024

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(10.30 am)

MR JUSTICE ROTH: Mr Moser, good morning. I have received an order by consent in the Kelkoo and Ciao proceedings providing for disclosure, the one to be treated as disclosed in the other, so I am happy to make that order.

MR MOSER: I am grateful.

MR JUSTICE ROTH: I have also received, as requested yesterday, from Google's solicitors copies of the letters from their Brussels lawyers to the Commission setting out the remedy, and then a qualification to the remedy. I assume you have those as well. I imagine they were already disclosed, were they?

MR MOSER: They were in disclosure, yes. So that's a letter of 29 August and then one later, 28 September.

Unless, sir, you have anything else for me I think we were just starting on the compliance mechanism disclosure requests.

MR JUSTICE ROTH: Yes.

MR MOSER: My learned friend, Mr Pickford, had indeed made his point that there had been a couple of solicitors' letters that talked about it.

Now, to give a little bit of context, we are, of course, aware of the compliance mechanism, as it were, from the outside. We know firsthand that it exists and we have been taking part in it.

The point is not so much that we are unaware of, shall we say, Google's external presentation of the compliance mechanism; it is more that we don't know and we have no visibility at all of how it was put in place, what the discussions were, and also how it has changed, because over time we have seen certain things, such as the introduction of a product sites tab, and one infers changes will have been driven at least in part due to the sort of considerations that Google must have been applying its

1 mind to, and a leopard not changing its spots entirely, of course they are a commercial
2 company, they will have been keen to optimise their own competitiveness.

3 We allege that from the traffic performance that we can see it doesn't seem to us to
4 have significantly improved matters, so we allege in our amended particulars of claim
5 that the abuse appears to be ongoing.

6 Can I just show you the pleadings on this, please. The amended particulars of claim
7 are behind tab 164. I am sticking to the same version that my learned friend,
8 Mr Pickford, is using.

9 **MR JUSTICE ROTH:** Are these the 14 November pleadings, new ones?

10 **MR MOSER:** I am happy to use 14 November pleadings. They are in the
11 supplemental bundle

12 **MR JUSTICE ROTH:** Yes.

13 **MR MOSER:** at 2. If I can ask you, please, to turn to paragraph 95, D and E.

14 **MR JUSTICE ROTH:** Yes. It is on page 117.

15 **MR MOSER:** It is. You will have seen this. It is where we say breaches are continuing
16 after the Shopping decision, but changes subsequently introduced to bring an end to
17 the infringement failed, we say, in reality to do so.

18 At (b) in particular we say:

19 "Since June 2017 until the date of these... Particulars... (and ongoing) ..."

20 You see what we say there:

21 "... abuse that dominant position ... continuing the ... conduct ...",

22 and so on:

23 ... and therefore "breach of Article 102 ..."

24 At 95E we say:

25 "Further and in any event ... failed to repair the damage ..."

26 So we say both of those things. That is therefore squarely in issue in our particulars

1 of claim; it is further in issue because in the defence Google positively relies on their
2 solution.

3 **MR JUSTICE ROTH:** Yes. Well, I appreciate it is in issue. There are, I think,
4 regular or were at the time regular meetings between Google's representatives and
5 the Commission about the operation of the remedy; is that not right?

6 **MR MOSER:** That's what we were told yesterday, yes.

7 **MR JUSTICE ROTH:** Have you received any documents about that in the disclosure
8 you have had?

9 **MR MOSER:** We have received some disclosure. I don't know whether we have
10 received them about the meetings, but some of them (inaudible). We have very limited
11 information. This is the problem. We can see, as it were, the shadows on the walls
12 of the cave, but we can't see what's behind them. You have seen what we have said
13 set out in the schedule much, that's essentially what we have.

14 **MR JUSTICE ROTH:** It seems to me the starting point would be for you to have the -
15 maybe that's what you are seeking in R6 and R8 - details of the meeting with the
16 Commission and the team in DG Comp regarding the operation of the remedy.

17 **MR MOSER:** Yes.

18 **MR JUSTICE ROTH:** That won't be burdensome on Google because no doubt it will
19 be carefully kept in the same place. Once you have had that, it seems to me you will
20 be able to target further requests if necessary; if you haven't had that, it seems to me
21 a sensible starting point to hear from Mr Pickford, and that it might be appropriate
22 I digest that and then see really how things are going, but let me hear what Mr Pickford
23 has to say. He is obviously getting agitated.

24 **MR PICKFORD:** Thank you, sir. The reason I have leapt to my feet is because I am
25 again puzzled by Mr Moser's submission to you.

26 If we could go, please, to the bundle, page 2184, which is Mr Wisking's sixth witness

1 statement I think they are in there and we are at paragraph 54. It is in tab 121.

2 **MR JUSTICE ROTH:** Yes. Well, I have seen it. Page and paragraph? Sorry.

3 **MR PICKFORD:** The bundle page is 2184 and what Mr Wisking sets out there and
4 this is why I am slightly puzzled by Mr Moser's submissions:

5 "To date, Google has disclosed a large number of documents to Kelkoo relating to the
6 design, implementation, performance and monitoring of the Remedy. Pursuant to the
7 Order of Mr Justin Turner KC... Google disclosed the Post-Decision Commission File
8 Documents, comprising Google's communications to and from the Commission,
9 including: Commission RFIs and questions regarding technical features ..."

10 **MR JUSTICE ROTH:** This is marked as "confidential", I don't know why it is. It doesn't
11 look confidential.

12 **MR PICKFORD:** No I have checked that and I think because what lies under this is
13 confidential, someone slightly overzealously marked this as "confidential" in this
14 paragraph. Obviously what it is referring to is confidential; what I am about to read out
15 is not, but why don't I just let you, sir, read it to yourself.

16 **MR JUSTICE ROTH:** Yes. (Pause.)

17 I have read 55 as well.

18 **MR PICKFORD:** In relation to meetings specifically, I am instructed that the
19 documents that have been provided already would include Google's presentation
20 notes. The Commission itself does not provide minutes, agreed minutes, so we don't
21 control any such document, and any other document that we would have in relation to
22 those meetings would be a privileged document created by Google's lawyers.

23 So insofar as there are documents relating to all of these aspects of the design and
24 operation of the remedy, they have been disclosed, so I don't really follow Mr Moser's
25 opening submission, I am afraid, on this point.

26 **MR JUSTICE ROTH:** Yes.

1 **MR MOSER:** Perhaps I could help, sir. None of those documents give us any
2 indication as to Google's internal thoughts about this.

3 **MR JUSTICE ROTH:** That, of course, is correct, but I am looking at what you are
4 asking for in R8, for example, presentations for EC followup meetings.

5 **MR MOSER:** Documents prepared for the EC followup meetings.

6 **MR JUSTICE ROTH:** Including presentations.

7 **MR MOSER:** Yes.

8 **MR JUSTICE ROTH:** But you will have had the presentations.

9 **MR MOSER:** We dispute those are presentations.

10 **MR JUSTICE ROTH:** Well, if you've had everything that was produced at the meeting,
11 those are presentations at the meetings, aren't they? Have you been through what's
12 described here as the remedy disclosure?

13 **MR MOSER:** Absolutely. You can take it we have reviewed all of the disclosure.

14 **MR JUSTICE ROTH:** Is there anything in what you have seen that suggests there is
15 a presentation that is not included?

16 **MR MOSER:** In principle everything that we have put into schedule R are what we
17 consider to be the gaps in disclosure, so the disclosure requests address those gaps.
18 Specifically, whether we believe there are presentations, I will have to take
19 instructions. Obviously R8 is not our only ask. What we are asking –

20 **MR JUSTICE ROTH:** Yes, I am trying to get a sense of what you are actually seeking
21 here.

22 **MR MOSER:** We are seeking the documents prepared for these meetings so we can
23 see the internal thinking of Google in preparation for the Commission meetings. What
24 we are seeking is the correspondence to and from the Commission. That is again, as
25 it were, external in this case, external to Google, to the submission.

26 What we haven't seen is any of the internal documentation. It plainly exists. It is

1 mentioned in Braendle 1 at paragraph 35. We say we are entitled to it. That's going
2 to be the gist of it. It is unlikely - I put that as carefully as I can - Google would be
3 revealing those internal thoughts to the Commission. So the documents you see at
4 paragraph 54 of the statement my learned friend has gone to, it is specious at first
5 sight, it looks like we have given them 4,500 files or whatever it is.

6 **MR JUSTICE ROTH:** What you have is what was received by or sent by the
7 Commission, the exchanges and any documents prepared for meetings; what
8 I appreciate you haven't got is the internal preparation and thinking behind Google's
9 strategy. Where do I find the Braendle witness statement?

10 **MR MOSER:** That's at tab 64. (Pause.)

11 Page 1259. It's 35. It looks like quite a short period, not disproportionate. What R8
12 is about is the Google documents about these meetings. I don't know if every
13 presentation has been given to us or not, but that's not really what we are after. We
14 are after the documents prepared for all of these things by Google.

15 **MR JUSTICE ROTH:** Yes.

16 **MR MOSER:** It is the internal thinking. That's where they are going to say, you
17 know, if there is nothing to see there, then so be it. They may have nothing to hide.
18 We are barking up the wrong tree, but at present we simply haven't seen any of the
19 internal documents, and that's why R5, R7 all we stress is it is internal documents that
20 we are after, not the things passing between Google and the Commission.

21 **MR JUSTICE ROTH:** Yes. So, Mr Pickford, that clarifies what is being sought?

22 **MR PICKFORD:** Yes, sir. So in our submission Kelkoo have not made out a sufficient
23 basis (inaudible). Mr Moser took you to their particulars of claim. You'll have seen
24 those are incredibly broadly framed. Then basically say the remedy (inaudible)
25 infringing. One gets more detail if you go to their reply.

26 **MR JUSTICE ROTH:** But I mean the basic point is pretty clear, isn't it? You say the

1 remedy has solved the problem and they say, no, it hasn't; that's what it comes to, isn't
2 it?

3 **MR PICKFORD:** Yes, sir, and then they say in their reply why they say it hasn't solved
4 the problem, and their justification for saying that is that there is not equal treatment,
5 that the remedy does not treat them in the same way as Google. There are aspects
6 of that we don't understand.

7 Let's just put that to one side and just take at face value the unequal treatment plea.

8 In order to make that good, they already have the information they need, which is how
9 the remedy, in fact, operated and whether they were treated equally with Google or
10 whether they weren't treated equally with Google. They can interrogate that on the
11 basis of the documents they have.

12 What Mr Moser has now emphasised from an already very large selection of
13 documents they already have is: we need the internal thinking.

14 The first point to make on the internal thinking is there is no pleaded issue on which
15 Google's thinking on the design of the remedy goes, because the case against us is
16 they were not treated equally and they can determine that from what they have.

17 **MR JUSTICE ROTH:** That's true right the way through; it is true for algorithm A - that
18 they were not treated equally.

19 **MR PICKFORD:** Yes.

20 **MR JUSTICE ROTH:** But they are entitled to look at what was your intent and the
21 way you saw algorithm A operating on comparative sites, and on them in particular,
22 because that is quite or could be, depending on what it says, quite informative of how
23 things operate, and similarly, seeing your internal thinking on the remedy can be quite
24 informative as to how it operates otherwise we wouldn't get any internal documents
25 from Google, other than simply the algorithm A and Panda, and then people can see
26 does it work equally or not, and that would be it, but we are having these documents

1 because the corporate thinking of Google is relevant. As you know, intent, although
2 not necessary, is not irrelevant.

3 **MR PICKFORD:** Sir, it is not irrelevant, but the starting point in my submission is what
4 is the pleaded case and then one has to ask oneself just as we were talking about
5 yesterday, one says, "Okay, well, what is therefore proportionate, given the pleaded
6 issues?"

7 **MR JUSTICE ROTH:** Yes.

8 **MR PICKFORD:** Now, my submission to you is not that documents going to intention
9 can never be relevant and therefore there is some sort of legal bar on their being
10 provided. That's not my submission. My submission begins with looking at their
11 pleaded case.

12 The second part of it is to say: in that context is it proportionate, given what they
13 already have, what they are ultimately seeking to prove, to get drawn into the design
14 of a remedy which, as Mr Braendle explains was developed with both internal and
15 external legal teams, to satisfy the Commission and to ensure that the Commission
16 were satisfied that Google had addressed the issues that were set out in the decision?
17 In our submission virtually all of that is likely to be privileged, because this is not a 'run
18 of the mill' business decision prior to an infringement finding, where there might well
19 be documents going to what Google was attempting to achieve, and we have never
20 stood in the way of disclosing those documents, as, sir, you pointed out. We have
21 documents all about how algorithm A was developed, et cetera, and they have been
22 and/or are being disclosed, but here we are talking about a specific legal remedy put
23 in place, developed by Google together with its lawyers, to address a specific legal
24 concern that had been articulated in a European Commission decision.

25 **MR JUSTICE ROTH:** If you are saying they are privileged, why isn't that point that's
26 the ground for resisting it, it's not taken in the comments on the schedule, is it?

1 **MR PICKFORD:** It is taken, sir.

2 **MR JUSTICE ROTH:** I am looking at Google on R1:

3 "Disproportionate and not relevant and should be pleaded."

4 R2:

5 "Not relevant. Duplicative."

6 **MR PICKFORD:** It has definitely been taken. I will find you the exact reference or the
7 references to it.

8 **MR JUSTICE ROTH:** That's not the objection in the schedule. The whole point of
9 these comments is the Tribunal can see in a convenient way the position of the two
10 sides.

11 **MR PICKFORD:** Sir, if I can explain, I have somewhere where I think it is, and indeed
12 my learned junior is going to yes, it is paragraph 63 of Mr Wisking's sixth statement.
13 I think what has happened here in the production of the schedule is that we have here
14 12, I think it is 12, specific requests, and in respect of the individual issues that arise
15 in those requests, someone has gone through and taken those parts of Mr Wisking's
16 statement that relate to them individually and put them into the table.

17 What that hasn't done is transposed his general comment about all of this being
18 privileged, which applies to all of it, and Kelkoo are well aware of and we
19 emphasised, we set it out in our skeleton argument, we told Kelkoo about this in
20 correspondence and we have put it in our witness statement. I apologise that it hasn't
21 been repeated throughout this table.

22 **MR JUSTICE ROTH:** He says a significant proportion, but it is not ...

23 **MR PICKFORD:** I am not sure until we have done the exercise what we can't say is
24 each document is necessarily privileged because we'd need to go through and assess
25 each one for privilege. That's one of the reasons we are concerned about this
26 exercise, because it is going to be extremely onerous simply to do the privilege sift in

1 order to comply, and we say: for what ultimate purpose, given the nature of the claim
2 that is ultimately being brought? Which is why I began, sir, with the point about the
3 pleaded claim.

4 **MR JUSTICE ROTH:** Well, if we look at R2, if you did work internally, testing the
5 impact of the mechanism being proposed, that would be clearly relevant. I find it hard
6 to think it is privileged we need a full argument on privilege but the question is: does
7 it solve the problem? If you have done internal testing to assess whether it solves the
8 problem, the results of those tests are obviously relevant. It goes to the very issue the
9 court is asked to determine. If you have done work assessing that internally, of course
10 that's relevant. It is hard to ...

11 **MR PICKFORD:** Sir, whether that particular document, if it exists, which is currently
12 speculative, attracts privilege or not would need to be assessed on the basis of
13 an examination of it.

14 Again, going back to comments that were made yesterday, it isn't my case that there
15 is no conceivable document that falls within the scope of what's being sought by
16 Kelkoo that could be relevant to the issues in dispute.

17 My submission is, given the enormous breadth of what is being sought across these
18 12 items, given what they already have and given the onerous nature of the exercise,
19 which is going to involve a lot of questions about privilege, one has to ask where is it
20 ultimately all going in the context of a plea, which is that they didn't receive equal
21 treatment? They can see whether or not they received equal treatment on the face of
22 the documents they already have.

23 Sir, that's the best that I can put our point.

24 **MR JUSTICE ROTH:** Well, I am not satisfied with that, but equally I don't know, nor
25 obviously does Kelkoo, what is the breadth of this because this was a concentrated
26 period. You get the decision of the Commission in June, or thereabouts that the

1 Commission decision came, you then produce your first proposal in August.

2 **MR PICKFORD:** Yes. August.

3 **MR JUSTICE ROTH:** Then there are some amendments revisions in September, so
4 there is an intense what was the date of the decision? Is it June? Is my memory right
5 or was it some other date? Yes, it was late June, I think, 27 June. So we are looking
6 at a period two of months; yes? So we are two months, a couple of core teams
7 working on this. So this is not sort of a multiyear, broadranging search. It seems to
8 me there would be documents that one would be very surprised if they are privileged,
9 but one would need to assess that, and Mr Wisking, to be fair to him, says that many
10 of them will be, but he doesn't say they all will be, and it will be on the nature of what
11 was being done, then I don't know to what extent there are later amendments,
12 although that is something Kelkoo will know.

13 I have not read Mr Braendle's witness statement before. It wasn't one of the
14 documents I was asked to read, I think. That explains a bit how things were done.

15 **MR PICKFORD:** It explains in particular the institutional structure within Google, and
16 the way in which the remedy was developed and how it was put together. So it sets
17 out, effectively, who was in charge of what, when, in terms of developing the remedy,
18 and then, of course, in terms of the remedy itself there is the disclosure that I referred
19 to previously.

20 Now, in relation to R2 if we are just focusing in on a very short period of time, I take
21 the point, sir, you make that's that a much more limited exercise. That's not the scope
22 of what was being sought under this heading generally, and our allergic reaction to it
23 in particular stems from the idea that there should be disclosure over what would,
24 effectively, be at least a five year period, because that was the period during which the
25 remedy was monitored in relation to every minute detail of Google's internal thinking
26 every time it changed.

1 **MR JUSTICE ROTH:** I understand. I think we should take it in stages. The first stage
2 is to go from June 2017 to the end of September 2017 and I think it would be sensible
3 in this instance for Google to consider what documents it can usefully disclose that will
4 show the strategy to design the remedy.

5 It looks like it is really the "Core Remedy Team", which is a grouping of individuals,
6 about ten people, who were working on the basic strategy of what they were seeking
7 to do, and then there was the more technical aspect of actually putting it into place,
8 which is I think less relevant.

9 I think, rather than going through the details of this at the moment, I think it would be
10 better if Google in the first instance went away and looked at what the Core Remedy
11 Team produced in those or three months, probably starting at the beginning of June,
12 because you may have had some, I don't know if you had some forewarning before
13 the actual public decision was issued, of what would be the best way of resolving the
14 issue which the Commission was identifying as being prohibited and see what exists,
15 what can be produced, provide that to Kelkoo and then Kelkoo can consider (a) what
16 it wants to make of that going forward, and (b) you can consider the scope of
17 a privilege argument and Kelkoo can address the privilege argument, and we may
18 need to look at authority on privilege and we are not in a position to do that clearly
19 today.

20 **MR PICKFORD:** Yes.

21 **MR JUSTICE ROTH:** Although, Mr Moser, that's not far short of what you are seeking,
22 and I appreciate that I mean, at the moment we started with a completely different
23 position that Google was saying you are only going to get the external documents that
24 went to the Commission and which they got from the Commission, and nothing else,
25 and you are saying basically, "We want everything else", subject presumably to
26 privilege, and you don't know what there is, because other than the description of how

1 | it was organised by Mr Braendle, you don't really know.

2 | I think that will get us started and, I think, if necessary, you can come back I suppose
3 | it will be early in the New Year and say, "We also want this, this and this and we think
4 | they are not privileged for these reasons", and Google can make out its case for
5 | privilege. I think that seems to me, unless there are ...

6 | **MR MOSER:** It does seem a sensible start, sir. There is no point in my arguing over
7 | the point in relation to privilege. I think your Lordship has the point. Mr Pickford does
8 | not know, of course, what documents exist. He hazards there may be documents and,
9 | if so, they might be privileged, but the Core Remedy Team of about ten people at any
10 | one time is certainly a good start.

11 | May I also urge on you there was also in place a leadership team of seven people
12 | under, it seems, the chairmanship of Matt Brittin. That is mentioned at page 25 of
13 | Mr Braendle. It would, of course, be illuminating, specifically in light of what we are
14 | seeking, which is what Google's internal management thinking was, to see not only
15 | what the engineering and Core Remedy Team were doing, but also what the people
16 | who are the product leads for shopping and sales, who were in the leadership team,
17 | were saying to each other.

18 | **MR JUSTICE ROTH:** Except for this, well, the engineering team I think we can leave
19 | out because they were the people who did - not belittling it for a moment - that sort of
20 | implementation work on instructions from the Core Remedy Team. The leadership
21 | team are no doubt important, but they were being told by the Core Remedy Team and
22 | then telling the Core Remedy Team giving them guidance. So I think by looking at
23 | what the Core Remedy Team has you will get their interaction with the leadership
24 | team.

25 | So I think a reasonable and proportionate focus is the Core Remedy Team and then
26 | certain support for that is in the name. I think that is a proportionate starting point, and

1 similarly that period of those few months is also a useful starting point, from the
2 beginning of June to the end of September. You can then look at the documents you
3 have got of the followup meetings, and just see from that how and to what extent the
4 remedy really developed, changed, and you will be able to just explain, also to the
5 Tribunal, what actually happened with the remedy, what it was, how it developed, what
6 the concerns are, in a way that we haven't got at the moment.

7 **MR MOSER:** No. Sir, I take that point. It is a good start. You have put down that
8 marker, which is taken. I will have only one more go at something, and that is you did
9 mention R2, and R2 is important, which is the data testing. It obviously exists. It
10 should be easy and proportionate to disclose and it will be extremely informative.

11 **MR JUSTICE ROTH:** Yes.

12 **MR MOSER:** It is only from the date it was first considered. So if it was only two
13 months, it won't be such a long period as a year.

14 **MR JUSTICE ROTH:** Yes. Can you point again, it would be helpful if you looked at
15 what was supplied to the Commission, which was presumably certain results of
16 testing, and saying, "We see this, this and this and we want to see the data behind
17 this or behind that", because some material was supplied to the Commission, saying,
18 "This is a good step because it has these results". So we get more traditional specific
19 disclosure, and so from these documents we can say that this was done.

20 So I think rather than I am not going to make a general order. Mr Pickford and those
21 behind him, I have given them the clear understanding I do think these documents are
22 relevant. I am well aware about proportionality. I take the point there may be to some
23 extent issues of privilege, but I think Google will go away and look –

24 **MR MOSER:** If it is privileged, it is privileged. That's normal.

25 **MR JUSTICE ROTH:** Yes, but there may be arguments about privilege. I don't know.
26 I would hope that you are then supplied with additional documents and you can then

1 see what more is needed, and Google also can then really inform the Tribunal what
2 scope of documents, if we focus on the Core Remedy Team and those months,
3 actually exists.

4 **MR MOSER:** Then we could come back with specific disclosure in the first instance
5 on those two points.

6 **MR JUSTICE ROTH:** Mr Pickford, that's how I am going to deal with it, and I think you
7 understand the point.

8 **MR MOSER:** We are seeing the light at the end of the tunnel. For my part of the
9 schedule, and I appreciate there is then Connexity to follow, there is only one item left
10 and then there is still the penalty server point, which is a nonschedule point.

11 The last item is part C in relation to Kelkoo 's traffic data disclosure requests. This is
12 a slightly different point, I venture to say, unless I am going to be contradicted, in that
13 I believe relevance is not in dispute in this case. What is in dispute is whether this
14 should come now or whether it should be left for what has been called the "expert-led
15 process".

16 I can probably abbreviate my submissions by reminding you of the letter you may
17 already have seen at supplementary bundle 12, which was written by my instructing
18 solicitors about this. It is a short letter.

19 **MR JUSTICE ROTH:** No, I have not seen it.

20 **MR MOSER:** It is quite short. May I invite you to read it, please?

21 **MR JUSTICE ROTH:** Yes. (Pause.) Yes.

22 **MR MOSER:** A couple of takeaways from that letter. The first is, on this occasion,
23 these aren't categories counsel and solicitors have just thought up, these are
24 categories that have been designed by the experts.

25 The second one is they, meaning Google, have had our traffic data for about a year
26 now. So their expert, Mr Noble, is presumably enjoying himself with Kelkoo's traffic

1 data. We haven't been able to start yet.

2 Behind tab 12, at tab 13, is a letter from Alix Partners from our recently appointed

3 expert, Mr Hunt. I don't know whether you have seen this one either.

4 **MR JUSTICE ROTH:** No. Shall I read that?

5 **MR MOSER:** If I can ask you to just cast your eye.

6 **MR JUSTICE ROTH:** Yes. (Pause.)

7 Is there a response to the Linklaters' letter of 30 November?

8 **MR MOSER:** Maybe so. Forgive me. Is that one of the footnotes?

9 **MR JUSTICE ROTH:** Sorry?

10 **MR MOSER:** Which one? Forgive me.

11 **MR JUSTICE ROTH:** The letter from Linklaters of the one at tab 12.

12 **MR MOSER:** Yes.

13 **MR JUSTICE ROTH:** Is there a response to it?

14 **MR MOSER:** I am told there is.

15 **MR JUSTICE ROTH:** You know what I am going to ask you, which is, where is it?

16 **MR PICKFORD:** 1627 of the supplementary bundle, sir.

17 **MR JUSTICE ROTH:** 162, you say?

18 **MR PICKFORD:** 1627 in the Bates pagination. Unfortunately that's not the electronic.

19 It is 1634 in the electronic. Tab 71. (Pause.)

20 **MR JUSTICE ROTH:** Yes. Mr Pickford, why is it that paragraph 10 of that letter says:

21 Google can "provide... a statement of what traffic data it holds" only by 17th January.

22 I just find that extraordinary. We were asked for this on 3 October initially; why can't

23 that be done before Christmas?

24 **MR PICKFORD:** My understanding is because it is a substantial exercise, but I will

25 take instructions on the specifics of why that is so –

26 **MR JUSTICE ROTH:** (Overtalking) know what sort of traffic data it holds.

1 **MR PICKFORD:** The specifics.

2 **MR JUSTICE ROTH:** Yes.

3 **MR PICKFORD:** The reasons for that are as follows. Firstly, what is being sought is
4 20 years' worth of data which will not be held in the same places, it will potentially be
5 in a large number of different places. It is going to be a substantial exercise to even
6 work out precisely who can tell us about what and then they will have to try to work
7 out what they can tell us going back some 20 years - 20 years is a long time, sir. We
8 have the added complication of it shortly being Thanksgiving in the US and it is then
9 obviously going to be Christmas.

10 **MR JUSTICE ROTH:** We all know about Thanksgiving, it takes up two days. You
11 know, people –

12 **MR PICKFORD:** I understand it is also disaggregated by a device, whether it is
13 a mobile device or a PC, etc, what they are asking for.

14 **MR JUSTICE ROTH:** You are not being asked to produce it, you are just being asked
15 to explain what is the nature of the data you have. That's what you are saying what
16 it's got, what traffic data you have no doubt–

17 **MR PICKFORD:** How helpful we can be in relation to that will depend on how much
18 time we get to investigate it. Obviously we can do our best and provide what we can
19 find out in a given period of time, but there is –

20 **MR JUSTICE ROTH:** I am sure you can do it. Google is a large sophisticated
21 organisation. You can devise and put a remedy to the Commission on a finding of
22 abuses in two months. This is a very simple question. I appreciate the answer may
23 be more complicated to provide, but it seems to me - and you have been put on notice
24 about this - and clearly your expert will also want to look at some traffic data, I have
25 no doubt since the beginning of October when this was first raised, so it seems to me
26 you can be required to do it by Christmas. I don't think that is at all unreasonable.

1 What I am concerned to achieve is that Mr Hunt can meet Mr Noble early in the New
2 Year, and then, on the basis they both then know what Google has, and discuss
3 together what's an appropriate and proportionate degree of disclosure of what it
4 seems to me is going to be relevant data.

5 That is essentially the exercise Mr Wisking suggests should take place, but I think it
6 needs that information to be constructive and productive and we need to get on with
7 it.

8 We know what, and Mr Noble will see what, the claimants have in mind. Mr Hunt may
9 now wish to refine that, because he has come on board since the requests were
10 formulated. Then, it is for the experts to consider whether they need data for the whole
11 period, or for sample periods, whether they need all of this data, or some of it or
12 possibly some other data, but I think the starting point is for you to explain exactly what
13 you have, and you indeed may be able to say, "Well, data for these years is readily
14 available, data for those years is much more complicated because ...", etc, but that
15 exercise has to be progressed quickly.

16 So, Mr Moser, what I will order is that Google produces a statement of what traffic data
17 it holds by reference to the nature of the data sought in your part C requests, and for
18 what periods, by 22 December and that—

19 **MR MOSER:** I am told the 22nd is a Sunday; can that be right?

20 **MR JUSTICE ROTH:** Yes, you are quite right, because I am in the wrong year.
21 I mean then well, we will say then 20 December.

22 **MR MOSER:** I am grateful.

23 **MR JUSTICE ROTH:** 20 December, and that in January the parties' experts should
24 meet to discuss to consider and discuss what will be appropriate disclosure for the
25 purposes of the proceedings with an effort to reach agreement. Insofar as they cannot
26 agree, then their alternative positions can be presented to the Tribunal.

1 **MR MOSER:** Thank you. I think that also takes care of what was paragraphed at the
2 beginning of yesterday, which was loosely called "expert-led disclosure".

3 **MR JUSTICE ROTH:** Yes.

4 **MR MOSER:** That brings us to the last point, sir. The last point is the penalty server
5 data. This is a request for information. It is addressed in our skeleton at
6 paragraphs 59 to 61. You will have seen it there.

7 The penalty server file is a server within Google that an engineer can query and it will
8 tell you what specific ranking algorithms or manual demotions apply to a specific
9 website or page at the time of that query. It is central to the proceedings for obvious
10 reasons, because it relates to the penalties in dispute.

11 A useful way into this is to look at our letter of 13 November, which is in the
12 supplementary bundle at tab 25.

13 **MR JUSTICE ROTH:** Yes. That I think you asked me to read yesterday and I have
14 looked at –

15 **MR MOSER:** I am grateful.

16 **MR JUSTICE ROTH:** and you then set out you refer back to your letter of 15 October.

17 **MR MOSER:** That's right, the original request.

18 **MR JUSTICE ROTH:** Which has a series of questions, as it were.

19 **MR MOSER:** That's right. We try at 8 on the page to put it into context by giving
20 an example, which I think I also regrettably had to ask you to look at yesterday,
21 an example of just one of the files of more than 22,000 included in the data, which is
22 about 4,000 lines. That's at tab 61 of the bundle.

23 **MR JUSTICE ROTH:** Yes.

24 **MR MOSER:** If you just go to tab 61, you will see the nature of the penalty server
25 data. It is a lot of lines. It is confidential, so I won't speak to it too directly. We have
26 22,000 of these. The point is we can't make head nor tail of them without being told -

1 it should be very easy to tell us - how this works. You see there are lines that feature
2 website names and numbers, and what we want to know is - how do they work
3 together. That's in that letter at tab 98, the letter of 15 October that you have already
4 seen.

5 **MR JUSTICE ROTH:** Yes.

6 **MR MOSER:** We suggest really a very proportionate thing, which is just looking at 26
7 lines.

8 **MR JUSTICE ROTH:** Is this annex A?

9 **MR MOSER:** Annexes A and B. It starts at page 56 –

10 **MR JUSTICE ROTH:** questions.

11 **MR MOSER:** There are questions. We understand it contains all the files for the
12 relevant websites.

13 **MR JUSTICE ROTH:** No, I understand. You have had this data disclosed to you and
14 you are trying to understand it.

15 **MR MOSER:** We have, exactly. They keep saying a variety of things, including, "Oh,
16 that's not why we disclosed it to you", but, with respect, the disclosure was not so
17 limited. It is, frankly, unsatisfactory to say the least that there is no proactive provision
18 of an adequate explanation, as there would be with any ordinary disclosure. Just to
19 dump this on us and say, "We, Google, only want to use it for one particular purpose,
20 you are not allowed to look at it and try to work out what it means", seems to us just
21 extraordinary.

22 It should be easy to answer. We would then understand what the penalties mean
23 because the exercise that's going to be at the heart of all of this is: look at the penalties,
24 look at the effect that had on traffic and then work out what that did, as it were, to our
25 business, to our bottom line. That's the key behind all of this.

26 **MR JUSTICE ROTH:** Yes.

1 **MR MOSER:** Here it is. We just want to know how it works.

2 **MR JUSTICE ROTH:** Really what you are asking for is annex A and annex B of that
3 letter.

4 **MR MOSER:** It is. We are not asking to have them decode for us 22,000 times
5 400 pages or 22,000 times 4,000 lines, we just want know: if you look amount example
6 A, the first and second bit, how do they interact? What does the number mean? What
7 do the letters mean?

8 **MR JUSTICE ROTH:** Mr Pickford, what do you say about that?

9 **MR PICKFORD:** There is a narrow question here and there's a broader question. The
10 narrow question is about explaining in particular what data of the type at tab 61 actually
11 means, and then there is a broader question, which it is important not to lose sight of
12 which is: where is any of this going?

13 I want to deal first with the narrow question, but I want to make clear I am going to
14 come back to what we say is the bigger issue.

15 So on the narrow question, we have explained how to interpret penalty server data of
16 the type - that was highlighted by Mr Moser.

17 If you could go, please, to tab 83 of the main bundle at page 1450–

18 **MR JUSTICE ROTH:** Yes.

19 **MR PICKFORD:** that's an appendix. It is confidential, so I need to be careful.

20 **MR JUSTICE ROTH:** It is 1450.

21 **MR PICKFORD:** This is an appendix to a letter which I am going to come back to. It
22 is a letter from Herbert Smith.

23 **MR JUSTICE ROTH:** Yes. I see.

24 **MR PICKFORD:** Dated 10 July, I think.

25 **MR JUSTICE ROTH:** Yes.

26 **MR PICKFORD:** It explains what those various items are, how to basically decode

1 | what the information is in, for instance, tab 61 of the supplementary bundle.

2 | On the narrow point, the starting position is: we have not simply done a data dump
3 | and not explained what those lines of code actually mean, but in my submission, sir,
4 | it is very important to –

5 | **MR JUSTICE ROTH:** Yes, you will appreciate this is detailed and technical and I can't
6 | take it in on the hoof. All I know is that the letter of 15 October is written taking into
7 | account your letter, that you have just referred me to, of 10 July. Certainly, those
8 | advising the claimants - and they are not lacking sophistication - still are struggling
9 | evidently, and they have had regard to what you said on 10 July, but they say, "It still
10 | needs us to raise these questions".

11 | There should be no – certainly, if we take the annex A/annex B questions - if your
12 | response to any of them is, "See paragraph 10(b) of our letter of 10 July", and that's
13 | the answer, you can say so, but it is clear there are certain specific questions that are
14 | raised.

15 | If one looks at annex A on page 1556, question (d) about the hash tag, that's a very
16 | specific question. Presumably, it is not answered in the letter of 10 July. Who knows
17 | what the answer is, but it is something that your people can simply answer. Having
18 | provided this data to the claimant, it seems to me right that those in Google, who fully
19 | understand it, should explain to the claimants how it is to be understood.

20 | **MR PICKFORD:** Sir, I do not want to lose sight of my broader points, but I am just
21 | taking instructions on this narrow issue.

22 | **MR JUSTICE ROTH:** I picked that as an example, then one can work through these
23 | in great detail, but it is just the sort of thing that I can see one would reasonably ask.
24 | Then if they have two files (inaudible), can you just clarify what is the difference?

25 | **MR PICKFORD:** Sir, our position is we are very happy in relation to discrete issues
26 | to write Linklaters a letter, which says, "Please see what our explanation of this is

1 already". The difficulty is going to come when we get to the aspect of the questions
2 that seek to broaden out into what we say is a much wider, ultimately, fishing
3 expedition.

4 **MR JUSTICE ROTH:** Which of the questions in annex A or annex B is just seeking
5 a - just a decoding of a data entry. That is all it's asking. Which of the annex A
6 questions do you say are fishing?

7 I have to say, Mr Pickford, as I read them, they are just asking for clarifications to
8 enable the recipient of these documents just to understand them and how they are
9 organised.

10 **MR PICKFORD:** Thank you, sir, I apologise for the short delay. If we could look,
11 please, at page 1553 of the main bundle –

12 **MR JUSTICE ROTH:** Yes.

13 **MR PICKFORD:** these are illustrative.

14 **MR JUSTICE ROTH:** But I am not looking at those questions, I am looking at annex
15 A on 1556. Those are the questions I am asking you about. I have read them and
16 they do seem to me to be quite neutral questions for someone who sees a lot of data
17 from Google, someone outside the Google organisation, just trying to understand what
18 the data is.

19 Indeed, question A is saying, "We think we have understood it, but can you just confirm
20 that our understanding is correct?"

21 I mean, there's no difficulty in Google answering that, and it seems to me quite
22 a reasonable question.

23 **MR PICKFORD:** I think it is possible, sir, that the problem that arises here is that
24 what's now being suggested is not what we understood we were meeting. We didn't
25 understand that there was - I am not sure there was a refusal ever to address annex
26 A. I think the direction that has been sought, as far as I understand, wasn't about

1 answering annex A, it was about answering other questions.

2 **MR JUSTICE ROTH:** Let's start with so annex A you are happy to provide - willing to
3 provide - you may not be happy.

4 **MR PICKFORD:** I think so. The difficulty we are having is this has somewhat shifted
5 since –

6 **MR JUSTICE ROTH:** Mr Moser, is that right, we are looking at annex A and B ...

7 **MR MOSER:** We are. I am happy to take any further questions away for specific
8 disclosure later once we have understood what the penalty server data actually
9 means, rather than guessing at it now. They say, "We have told you the stuff", plainly
10 we still don't get it.

11 **MR JUSTICE ROTH:** It is easy to repeat it.

12 **MR MOSER:** They can repeat it, of course. Next time it will have to be so we
13 understand what the penalty means.

14 **MR JUSTICE ROTH:** Just a moment.

15 Well, Mr Pickford, unless you say anything more, I am going to order that Google
16 provide this information by 20 December, the information requested in annex A and B
17 to Linklaters' letter of 15 October.

18 **MR PICKFORD:** Sir, insofar as we can annex A was not sought. In the letter that's
19 in the enclosure at supplementary bundle at 457, what was being sought was annex
20 B and paragraphs in the letter. I have explained why, I am happy to explain why, we
21 were not prepared to provide those.

22 **MR MOSER:** Just so there is no misunderstanding, sir, it is my contention that annex
23 B is the examples that go with annex A, so it is the annex as a whole.

24 **MR JUSTICE ROTH:** That's my understanding as well, annex B, and they are asking
25 how to interpret each example, and there are 13. No doubt explaining a few will help.
26 Then the explanation of the later ones may be simple, but the request, as I understood

1 | it from the skeleton, is to deal with this letter of 15 October. I appreciate there is more
2 | in the letter than annex A and annex B, but those are the ones I am going to order by
3 | 15 October. If Google is unable to understand these matters, well, it will say so. That
4 | would be surprising.

5 | Does that conclude the Kelkoo applications?

6 | **MR MOSER:** Yes.

7 | **MR JUSTICE ROTH:** Then we were going to have a CMC - but not before
8 | I think unless there is a renewed the parties cannot agree on any of the further
9 | matters, such as traffic data - the next CMC will be after the preliminary issues
10 | judgment, I think.

11 | **MR MOSER:** That's right, yes.

12 | **MR JUSTICE ROTH:** In that case that's an appropriate moment to take a break and
13 | you and your team are excused, because I think we then turn to Connexity.

14 | **MR MOSER:** I will enquire as to the desire to stick around or not.

15 | **MR JUSTICE ROTH:** That's a matter for you. You are welcome to stay, or watch it
16 | remotely or whatever. I will come back at noon.

17 | **(11.46 am)**

18 | **(Short break)**

19 | **(12.00 pm)**

20 | **MR JUSTICE ROTH:** Just before, Mr Robertson, you start, one thing I didn't say but
21 | was that there probably should be costs in the case for your application.

22 | **MR MOSER:** Yes.

23 | **MR JUSTICE ROTH:** Yes. Mr Robertson, can I just raise one preliminary matter on
24 | your claim? It was transferred from the High Court to the Tribunal and I see that you
25 | have what's in a sense a parallel claim in unlawful means. That, as I read Master
26 | Kaye's order, was not transferred, because this Tribunal has no jurisdiction on that.

1 **MR ROBERTSON:** That's our understanding, yes.

2 **MR JUSTICE ROTH:** But I don't think any order has been made about it.

3 **MR ROBERTSON:** It's been treated by the parties as stayed in effect, although it's
4 not been formally stayed.

5 **MR JUSTICE ROTH:** Yes. Well, I was wondering whether it's not appropriate formally
6 to stay it, and if you would submit a consent order to me, wearing my other hat as a
7 High Court judge in the High Court proceedings, I can do that and I'm sure Google it
8 will suit them as well. I think formally the position should be recognised.

9 **MR ROBERTSON:** We'll do that.

10 **MR JUSTICE ROTH:** Yes.

11 **MR ROBERTSON:** So far as the Tribunal's agenda is concerned, we've only got
12 disclosure left as regards Connexity.

13 **MR JUSTICE ROTH:** Yes.

14 **MR ROBERTSON:** The other agenda item has been dealt with entirely to our
15 satisfaction and therefore we just want to address disclosure.

16 The way we're going to divide submissions is I'm just going to make three general
17 introductory points and then I'm going to hand over to Mr O'Regan to go through our
18 specific requests for disclosure.

19 **MR JUSTICE ROTH:** Yes.

20 **MR ROBERTSON:** Our three

21 **MR JUSTICE ROTH:** Just before that, can I just be clear? You've got, unlike some
22 of the other claimants, it's a pure follow-on claim up to the date of the Decision and
23 then you're claiming thereafter again on the basis of remedy. So your claim period
24 starts on 1st January 2008. Is that right?

25 **MR ROBERTSON:** That's correct.

26 **MR JUSTICE ROTH:** The other thing I want to know is the disclosure that's been

1 | given to Foundem and Kelkoo, the common disclosure, you've received that?

2 | **MR ROBERTSON:** We have –

3 | **MR JUSTICE ROTH:** Yes.

4 | **MR ROBERTSON:** and that's the basis on which we're going to proceed going
5 | forwards as well in accordance with paragraph 4 of your order at the March CMC this
6 | year.

7 | So the first thing I wanted to do just by way of introduction was tee it up by paragraph
8 | 8 of Google's skeleton, who noted we've not to date made any disclosure. So there's
9 | been no disclosure from Connexity. That's correct. That's because there's a consent
10 | order in place made by yourself on 30th October this year which sets a deadline for
11 | Connexity's disclosure of 7th February 2025, and that's the deadline that we're working
12 | towards, having rolled up our sleeves and got on with it, as I promised you at the March
13 | CMC we would do.

14 | The second point I wanted to say by way of introduction was really to respond to Mr
15 | Pickford, whom I took to be criticising Connexity for not coordinating disclosure with
16 | Kelkoo. Without waiving any privilege, of course, I can confirm there has been
17 | a substantial degree of coordination between those instructing us and Mr Moser's
18 | instructing solicitors, and also on a counsel-to-counsel basis, including as between
19 | junior counsel, and I am very grateful to Mr Whelan late last night burning the midnight
20 | oil with Mr O'Regan. I just want to place on record our gratitude to Kelkoo and their
21 | instructing solicitors for cooperating so effectively with us.

22 | There just simply isn't anything in that point. We have attempted to make sure that
23 | our disclosure requests that Mr O'Regan is shortly going to take you to, are dovetailed
24 | in with those that Kelkoo has made to you and which have now been dealt with, and
25 | then we will be proceeding on the jointly case managed basis, and therefore we don't
26 | anticipate there being any degree of significant overlap. This is essentially

1 supplementary and specific to our case.

2 The third introductory point I wanted to make is just to touch upon the claim for
3 exemplary damages in this Tribunal. Now, that's a point that will be heard, thanks to
4 your order yesterday, on 21 March next year.

5 Just to place on record now, we respectfully disagree with Google as to the availability
6 of exemplary damages as a remedy before the Tribunal. In our view the claim is
7 pleadable, which is why we pleaded it, and is a matter of mixed fact and law for full
8 trial. Google have presented this as if the Demolition Nutrition decision of Mr Justice
9 Lewison

10 **MR JUSTICE ROTH:** I don't want to take you out of your flow, but I really don't think
11 we need a sort of foretaste of what will be argued on 21st March. If you start doing
12 that, then Mr Pickford will want to summarise Google's submissions and I think we are
13 going to get all that. At the moment it is there on the pleading and we will see what
14 happens.

15 **MR ROBERTSON:** Okay. In that case, I do want to emphasise that our requests for
16 disclosure Google identifies four requests for disclosure. They say they are only there
17 in support of the exemplary damages claim. They are not; they are applicable to our
18 claim generally, and Mr O'Regan will deal with them specifically on that basis. That's
19 not an objection to them being granted. I think therefore on that basis

20 **MR JUSTICE ROTH:** I think some of them are described in your schedule. Is that
21 right?

22 **MR ROBERTSON:** The summary in the schedule the ones we are dealing with are
23 R6, R13, R14 and R24. They may have been described as that in the schedule, but
24 Mr O'Regan will explain why they arise.

25 **MR JUSTICE ROTH:** Yes, very well.

26 **MR ROBERTSON:** Then I hand over to Mr O'Regan.

1 **MR PICKFORD:** Would it be sensible, sir, for me to respond to general points before
2 we canvass through the Redfern, because I equally have general points to make?

3 **MR JUSTICE ROTH:** Yes

4 **MR PICKFORD:** I have to respond to the general points raised by Mr Robertson at
5 the very start.

6 **MR JUSTICE ROTH:** Well, I don't need to hear why you say they can't claim
7 exemplary damages from you any more than I did from Mr Robertson as to why they
8 can, otherwise the question of disclosure by Connexity is not before me, is it?

9 **MR PICKFORD:** There is no point being taken to that.

10 **MR JUSTICE ROTH:** That was Mr Robertson's first point. The third point was
11 exemplary damages; I don't need to hear from you on that. Then there is just the
12 question of what degree of coordination there was. I mean, that will emerge when we
13 go through the particular requests.

14 **MR PICKFORD:** My general points are not purely responsive to –

15 **MR JUSTICE ROTH:** Well, in that case I think you make them when you reply de
16 novo, but I think it is for me to hear the application at the moment.

17 Yes. So Mr O'Regan.

18 **MR O'REGAN:** So as to the Redfern schedule, I am working off the hard copy of
19 which the first page is numbered 41, if you have the consolidated version of the
20 Redfern schedule, and that's annex 3 or schedule 1 at the top on page number 2.

21 **MR JUSTICE ROTH:** I have got that.

22 **MR O'REGAN:** I am grateful. I propose in dealing with our specific requests in part
23 because of the common threads, or at least some of them, to do with whether they are
24 for exemplary damages only or for exemplaries and for general pleaded claims, to
25 group some of them together in initial observations, and then we can go through the
26 schedule in detail, if you consider that appropriate, sir.

1 **MR JUSTICE ROTH:** Yes.

2 **MR O'REGAN:** There is also a draft order in the supplementary bundle at page 77
3 tab 77, but I don't need to go to that at the moment.

4 It may help from a clarificatory point to explain what we mean by Connexity, because
5 it's being used as somewhat of a portemanteau term in these proceedings for all three
6 of the claimants, although because of a corporate history, the organisation that is now
7 the third claimant has been through a number of name changes and has acquired
8 various other entities along the way.

9 That's set out in section 1 of our Re-Amended Particulars of Claim which is in the
10 supplementary bundle at tab 4. In simple terms the company was known as Bizrate
11 from 1996.

12 **MR JUSTICE ROTH:** (Pause.) Yes. Thank you.

13 So you were telling me that Connexity has gone through sort of a reorganisation?

14 **MR O'REGAN:** Yes, sir, that's in the supplementary bundle at tab 4, and it's section
15 1. I was just going to summarise those for you, sir, rather than take you through them
16 in great detail.

17 **MR JUSTICE ROTH:** Yes, do I need to know that for the purposes of disclosure?

18 **MR O'REGAN:** Simply because, as you will see in Annex 1 of our Re-Amended
19 pleadings, which is at page 297 of the supplementary bundle, where I list what we call
20 the "Connexity EU Domains", and there is about 45 of them, because of the corporate
21 history and also because some of them are geographic domains, so .de, or .uk, or
22 whatever they are.

23 So in some of the requests relating to, for example, traffic to Connexity, it will be in
24 relation to each of those domains, which we accept are a lot, but that is simply where
25 the claimants are. There are a lot of domain names. So that is simply to explain what
26 we mean by Connexity and Connexity domains, that the structures have changed over

1 time through acquisitions, which is why there's a lot of them. You will see references
2 to Bizrate or to Shopzilla, or to Tada I think it is, and there are various others. That is
3 simply what we mean by Connexity in these proceedings.

4 It has been suggested, and my learned friend will make submissions on this as
5 well, that we have taken an inappropriately broad approach to disclosure requests.
6 Simply that is not the case. We have borne in mind very much the observations and
7 guidance given by you at the last CMC in March, and also in your ruling in that CMC
8 on Foundem's application.

9 We want to progress these cases as rapidly as possible. We have coordinated
10 disclosure where that has been possible. As my learned friend Mr Robertson has said,
11 we are endeavouring to catch up on disclosure and have been rolling up our sleeves
12 to do so.

13 It is important to understand we had not received any disclosure from Google in March,
14 the stay having been removed, and in reality it wasn't I think until June that we even
15 got a copy of the confidential version of the Commission Decision.

16 So we have worked extremely hard in a relatively short period of time. We are
17 conscious that disclosure must be necessary, reasonable and proportionate, and
18 indeed related to the pleaded matters that are in dispute, and that is the approach that
19 we have taken in this case.

20 Overnight, we have again borne in mind, sir, the guidance you provided yesterday on
21 proportionality, the absence of fishing requests and the need to balance the
22 information that is sought and its relevance to the costs and effort of doing so. That's
23 the approach we are taking.

24 **MR JUSTICE ROTH:** You have made the point that you have come later to the party
25 and that you only got the disclosure most of it, I think in July; have those instructing
26 you finished reviewing that?

1 **MR O'REGAN:** Can I take instructions, sir.

2 I think most of it has been reviewed at least once. Those instructing me say the more
3 you look at it, the more you be likely to find, but we have certainly been through as
4 much of it as possible with a reasonably large team of junior solicitors and paralegals.
5 There is a lot of material to get through from a standing start. That in part explains the
6 timing of our application, because we were still working on it almost constantly up until
7 then, and indeed until now.

8 **MR JUSTICE ROTH:** Yes.

9 **MR O'REGAN:** The second general point, sir, is the context in which our applications
10 are made. They have been made in relation to our repleaded Particulars of Claim,
11 which obviously were only filed and served last week, but we obviously knew what
12 they were going to contain and on the original directions we would have filed and
13 served those in, I think it is 10 October.

14 So to some extent my learned friends are responding to a request that was made in
15 relation to the previous pleadings. So there is unavoidably a slight mismatch between
16 the two.

17 We accept that the defendants in this case have not had an opportunity to fully
18 consider those pleadings at that stage.

19 Now, they accept a significant repleading. The pleadings have not been amended
20 since early 2018, due to the existence of the stay, and of course at the time those
21 instructing me, and at the time Mr Robertson had only seen a nonconfidential version
22 or the public version, indeed it was only placed on the Commission website I think
23 about a month before we actually filed and served our original particulars of claim in
24 the High Court.

25 Since then, of course, we have the full Decision, we have had the judgment of the
26 General Court and now the judgment of the Court of Justice. So our amended

1 pleadings reflect all of that, but we have not introduced any new claims. As my learned
2 friend, Mr Robertson, has said, it is a follow-on claim through until the date of the
3 Commission Decision, then a standalone claim thereafter, but in relation to the same
4 conduct.

5 It is not a new conduct. We say the existing conduct has not been ameliorated by the
6 remedy.

7 So January 2008 was nearly 17 years ago. As my learned friend has explained to you
8 earlier, we are going back the best part of 20 years now in terms of data.

9 So the important matter there, of course, is due to the passage of time since Google
10 first conceived and then implemented the strategy the Commission has condemned
11 as being abusive, contemporaneous documents are going to be key at every stage of
12 the Connexity proceedings, both the follow on claim and the standalone claim.

13 The reality is that most predominantly all of those documents are ones that are going
14 to be held by Google, and therefore ones of which we seek disclosure.

15 Now, we also say that Google's conduct was intentional, was intended to harm
16 competitors, including Connexity and its forerunners, and that decisions on this
17 abusive unlawful strategy would have been taken at the very highest corporate level
18 within Google at California, and that the conduct that took place over such a long
19 period was no frolic of junior employees in some far flung part of the Google empire.

20 Therefore we would expect to see that relevant documents would be held by senior
21 employees and executives, but little, I am instructed, has turned up so far from such
22 senior individuals.

23 It is not sufficient in terms of custodians and the scope of disclosure to focus on the
24 lower level employees who would have implemented that strategy.

25 There is also, sir, as you adverted yesterday, a significant information asymmetry in
26 this case. Google has all the information and we do not, and therefore we are at

1 a significant disadvantage.

2 So those are my general observations in relation to our application. I don't know if my
3 learned friend wants to respond now or in reply.

4 **MR JUSTICE ROTH:** Let us just look at where it takes us. What I have to decide are
5 the particular applications and categories you are seeking. I don't have to decide any
6 more general questions, such as who was involved in decisionmaking and so on, it is
7 really a question of what disclosure should be ordered.

8 So shall we go to the schedule ...

9 **MR O'REGAN:** I would like to make one more general point as to the disclosure we
10 have had to date, which is why we are asking for the further disclosure.

11 The disclosure to date is predominantly materials either from the Commission file or
12 materials that have been designated as common disclosure in these proceedings, so
13 in the Kelkoo or the Foundem proceedings.

14 They are not ones we have had any input into, and indeed some documents have not
15 been disclosed on the basis that they are, to quote, "excluded documents". We have
16 not seen everything that's in those other proceedings, some of which we say is
17 relevant and therefore been the scope of those applications.

18 **MR JUSTICE ROTH:** Your claim is no broader than the Kelkoo and Foundem claim,
19 is it? It affects possibly some other countries, but it is not –

20 **MR O'REGAN:** Markets may be slightly different.

21 **MR JUSTICE ROTH:** Yes, but the allegations of abuse are in some way narrower
22 because you are foursquare within the decision, and they also make the allegations in
23 the decision. So it is not that you have additional allegations.

24 **MR O'REGAN:** Well, no additional allegations.

25 **MR JUSTICE ROTH:** So when you say, "We had no input in that disclosure but there
26 were sophisticated teams of lawyers", getting that disclosure, dealing with the same

1 | allegations that you are making.

2 | **MR O'REGAN:** Indeed, sir, but they were not our applications. That's the only point
3 | I wanted to make, and not to belabour on that.

4 | Now, we say the Commission file in itself is insufficient. The decision obviously dated
5 | from June 17, but the statement of objections had been served in April 2015 and
6 | the supplementary SO in July

7 | **MR JUSTICE ROTH:** The common disclosure does go beyond the Commission file,
8 | doesn't it?

9 | **MR O'REGAN:** Yes. It has been put to us at that substantially everything is in the
10 | Commission file or substantially is in the Commission file. In our submission that's
11 | simply not the case, partly because of the timing. So dates of the statement of
12 | objections and the SSO would suggest the last substantive evidence gathering steps
13 | by the Commission would have been some time before the Decision was adopted,
14 | given the processes the Commission needs to go through.

15 | It is the nature of the Commission's investigative decisions that it took in how it was
16 | going to investigate, what information it was going to ask for that will determine what
17 | information is on the Commission file, which is not necessarily the relevant documents
18 | that we say are relevant and for which we seek disclosure.

19 | Of course, the Commission asks, but it is the recipients of the RFIs, whether that be
20 | Google or third parties, who have to determine what they consider is relevant and
21 | responsive to those requests. So, the Commission file, in our submission, simply will
22 | not be comprehensive and complete.

23 | If one looks in the decision –

24 | **MR JUSTICE ROTH:** Well, that's why I stopped you. I appreciate that, but I think
25 | that's common ground.

26 | **MR O'REGAN:** Yes, sir.

1 **MR JUSTICE ROTH:** There is disclosure beyond the file, so you don't need to labour
2 that point.

3 **MR O'REGAN:** I am grateful. It means there are unavoidably a number of gaps and
4 the withholding of excluded documents is a second one.

5 **MR JUSTICE ROTH:** Well, it is not necessarily a gap because there may be
6 documents that are not relevant to your claim. So that's what the excluded documents
7 are intended to address.

8 **MR O'REGAN:** We have been criticised in correspondence for not identifying the
9 gaps.

10 **MR JUSTICE ROTH:** Yes. Well, shall we get into the schedule.

11 **MR O'REGAN:** Yes, sir. If you have the Redfern schedule, it is at page 41 –

12 **MR JUSTICE ROTH:** Yes, I have it.

13 **MR O'REGAN:** of the Hard copy. I wanted, if I may, sir, to address you collectively
14 on five requests, because they are the ones that are said to relate to the claim for
15 exemplary damages. There is a common thread as to why we say they are relevant
16 to the entirety of our pleaded case, and not some pleaded claim for exemplaries. They
17 are request 1A, which is the first one, on page 41. That's Google's investments.

18 **MR JUSTICE ROTH:** I am just looking at Google's comments. I don't know it relates
19 to exemplary damages.

20 **MR O'REGAN:** No, that one doesn't, sir, but it is in the same category.

21 **MR JUSTICE ROTH:** I am not sure it is, because the objection to this is nothing to do
22 with exemplary damages.

23 **MR O'REGAN:** Very well, sir, so I will address you first on that one then, and then
24 there is R6, R13, R14 and R24 that are said to be

25 **MR JUSTICE ROTH:** Shall we do R1(a), then.

26 **MR O'REGAN:** Yes, sir. Now, R1(a) is a request for documents related to Google's

1 investments in its comparison shopping offering, that's both in the investment and
2 development of the underlying technology. We are seeking disclosure of that, and
3 also the effects of that technology on Connexity and its traffic and revenues.

4 **MR JUSTICE ROTH:** Why is that relevant?

5 **MR O'REGAN:** Sir, Google's abusive conduct would have required substantial and
6 ongoing investment. It is not something that just happened, and we see in disclosure

7 –

8 **MR JUSTICE ROTH:** When you say "conduct", what do you mean by "conduct"?

9 **MR O'REGAN:** Well, it's the demotion of rival shopping services, is the one half of the
10 conduct, and the second half is the preferential display and positioning of Google's
11 own shopping services in the search pages.

12 **MR JUSTICE ROTH:** Yes, but neither of those, they are to do with the technology of
13 Google's own shopping comparison site, they are to do with the technology of the
14 Google general search. Of course Google invested in improving the quality and
15 operation of its own comparison shopping site. There is no complaint about that.
16 That's competition on the merits.

17 **MR O'REGAN:** It would have been, sir, but for the that technology is clearly relevant
18 whether it be algorithms or –

19 **MR JUSTICE ROTH:** I don't understand that. The algorithm is in general search, the
20 operation of the Google general search engine, and the ranking of shopping sites in
21 general search. It is not about Google's own shopping comparison site. Google wants
22 to make its own shopping comparison site as good as it can, but that's irrelevant.

23 **MR O'REGAN:** Well, that's the downstream service on the downstream market that
24 has benefited from conduct of (inaudible) and that would require technology. It was
25 not something –

26 **MR JUSTICE ROTH:** Of course it has technology. I don't see why that

1 technology how the Google Shopping comparison site operates in itself is of any
2 relevance to the abuse. The abuse is the way Google created certain aspects of its
3 general search where it was dominant.

4 **MR O'REGAN:** We are not seeking disclosure of that, sir –

5 **MR JUSTICE ROTH:** You are getting it because you are getting it in the common
6 disclosure, but this is not that's what 1(a) is seeking.

7 **MR O'REGAN:** 1(a) isn't seeking that, 1(a) is seeking the investment that was made
8 in the Google Shopping service –

9 **MR JUSTICE ROTH:** I still don't understand why it is relevant.

10 **MR O'REGAN:** Because Google would only have made that investment if they
11 considered it would have been profitable for it to have done so. We say that that's one
12 of the many verticals, to use the jargon, that Google took a decision that it wanted to
13 invest in and to promote on its website. That would have required significant financial,
14 human and technological investment, and that was part of Google's overall strategy
15 and shopping is only one of those verticals. That led to significant changes in how the
16 search results were displayed and the look and feel of Google's search page.

17 So it's relevant to understand why Google took those decisions and look at the
18 investments they made and the returns they expected to make on those investments
19 in its shopping vertical. That is the documents that we are seeking.

20 **MR JUSTICE ROTH:** At the moment to a certain extent Google's strategy on comp
21 eting on other sites is relevant. That's what is now going to be disclosed within limits
22 pursuant to the Kelkoo requests and I think you get that disclosure under common
23 disclosure, the S1, S2 is slightly narrowed down, but to go beyond and see how Google
24 was developing the technology of its own comparative shopping site seems to me
25 beyond the scope of this case, or if it has some slight relevance to the scope of this
26 case, wholly disproportionate, Mr O'Regan. I really don't see how that takes this

1 matter appreciably further.

2 **MR O'REGAN:** I think, sir, (inaudible) this morning in relation to Kelkoo's application,
3 the intent of a company is relevant Google's intent and its strategic intent is something
4 we are entitled to look at, and those documents will be informative as to the
5 commercial decisions at Google took in its shopping, moving through from Froogle to
6 Product Universal, to the Shopping Unit, to Google Shopping web page.

7 That business is the beneficiary of conduct condemned by the European Commission.
8 That conduct would only have been entered into if Google were behaving in a rational
9 profitmaking manner, if it was intended to be profitable by taking market share and
10 revenue from competitors. That's all we are saying.

11 **MR JUSTICE ROTH:** That's why we have S1 in the Kelkoo request, dealing with
12 competitive threats and how that.. but investment and development of the underlying
13 technology of Google's own product in the downstream market seems to me way
14 beyond that, and of most tangential relevance and quite disproportionate.

15 **MR O'REGAN:** Yes, sir, I can see you are not with me on this, sir.

16 **MR JUSTICE ROTH:** I am O'Regan, Mr O'Regan, I am quite against you on that.

17 **MR O'REGAN:** Moving on, sir, to R6, R13, R14 and R24, it may be there are individual
18 points one would need to look at, but there are some overall general points

19 **MR JUSTICE ROTH:** Sorry, one moment for my notes, R6, R13, R14 and R?

20 **MR O'REGAN:** 24.

21 So R6 is quarterly board reports; R13 is reports from Google's Product Search team
22 to its Executive Management Group; R14 is strategy review documents of that Product
23 Search team; and R24 are annual strategic questions from the CEO to Google's
24 executive management.

25 Now, Google has indicated it considers these are purely and squarely addressed at
26 our exemplary damages claim, in our submission, that isn't the case.

1 **MR JUSTICE ROTH:** I think when you say Google considers that, if I look at R24 on
2 page 30, and the fifth column, "Reasons for relevance":

3 "These reports inform the organisation's state of mind relevant to Connexity's claim for
4 exemplary damages."

5 So that I think is taken from your application. So it was Connexity saying, "This is
6 relevant to exemplary damages" so when you say Google say that, you said that.

7 **MR O'REGAN:** If I can address you why, in my submission, they are actually broader
8 than that.

9 **MR JUSTICE ROTH:** Yes.

10 **MR O'REGAN:** R6 is board documents. Internal page 10 has the larger number page
11 49. These are quarterly reports. We accept we can't go back to 2002, but we submit
12 2006 onwards would be relevant, given that clearly the strategy in relation to the
13 shopping services is not something that would have just happened overnight on 1
14 January 2008.

15 Clearly, there would have been a lot of documented work and documentation and
16 consideration of the shopping service, whether that be Froogle, or Google Product
17 Search or its successors. That work would have started well before 2008. We think
18 it is reasonable, in our submission, to go back to 2006 in relation to that.

19 Generally, in our submission, it is implausible that a strategy of this nature would not
20 have been considered and approved at the very highest levels within Google, either
21 by the senior management teams or other senior executives responsible for the search
22 and strategy and management of the group, right up to the executive management
23 group.

24 **MR JUSTICE ROTH:** Can I interrupt you? First of all, Google was providing the
25 quarterly board letters as agreed up to January 2008.

26 **MR O'REGAN:** Yes, sir, (inaudible) thereafter.

1 **MR JUSTICE ROTH:** So that you are getting.
2 You asked them of course by that stage both Algorithm A and Product Universal were
3 up and running in the UK and Germany.
4 **MR O'REGAN:** Yes. The algorithm had been up and running since 2004 and
5 Universal, as you say, sir, from January 2008.
6 **MR JUSTICE ROTH:** You are going to get those materials up to 2008. You say you
7 want it taken forward to for some years. One could say that Panda came in in I think
8 2011, but you are asking for more than quarterly board letters, you are asking for
9 a whole lot of other things (overtalking)
10 Just a moment. If they are relevant for your claim, they are also relevant for the other
11 claimants' claim, aren't they?
12 **MR O'REGAN:** They would be, sir, yes.
13 Just on quarterly reports, sir, we haven't received those because they have been
14 designated as excluded documents through until January 2008, on the basis our claim
15 period doesn't start until 2008.
16 **MR JUSTICE ROTH:** But it says in the column here:
17 "...in the interests of cooperation and in narrowing the issues requiring determination
18 by the Tribunal at [this] CMC, Google agrees to provide these documents to
19 Connexity."
20 So you will get them.
21 **MR O'REGAN:** I am grateful, sir.
22 **MR JUSTICE ROTH:** Maybe you have not actually received them yet, but that has
23 been agreed.
24 My other question was what you want beyond that, if it is relevant for your claim, it is
25 equally relevant for the other claims.
26 **MR O'REGAN:** Yes, sir, it will be.

1 **MR JUSTICE ROTH:** The only distinction between your claim and the other claims is
2 that you are seeking exemplary damages. If we put that aside, I think that's where the
3 point that's made about coordination is raised. One would expect this to be pursued,
4 if it is really relevant, by all the claimants, but it isn't.

5 You may say they are not sufficiently vigorous in pursuing their claims, but it does put
6 you a little bit on the back foot.

7 **MR O'REGAN:** We are also making a specific request for a specific document at the
8 same time. In Kelkoo's S1, in S2 of Kelkoo they have asked for, and been granted,
9 disclosure of strategy documents, we are making a very specific request for
10 a particular document.

11 **MR JUSTICE ROTH:** Well, it is not very specific because, as I read it, in the first
12 paragraph you want all quarterly board letters, reports and presentations to the
13 Google/Alphabet boards, Executive Management Group, Operating Committee, etc,
14 etc, about everything. I mean, if there's a discussion on the board as to whether
15 Google should operate in China, you are asking for it.

16 **MR O'REGAN:** It clearly needs to be limited

17 **MR JUSTICE ROTH:** Well, it is not, in your request.

18 **MR O'REGAN:** It should be limited to the matters in this case. We are not seeking
19 disclosure of something that's completely unrelated.

20 **MR JUSTICE ROTH:** Yes. Well, I mean, I would expect you and those assisting you
21 to formulate the request in a limited way. I need to know what the limit is. Is it
22 concerning Connexity; is it concerning other competing comparative shopping sites?

23 **MR O'REGAN:** Yes, the strategy for the development of Google's shopping vertical,
24 that is what this case is all about. It is not about ...

25 **MR JUSTICE ROTH:** So the strategy for the development of Google's
26 shopping I think we are using the term "CSS" in this case, which is the same thing.

1 **MR O'REGAN:** (inaudible) know what it means.

2 **MR JUSTICE ROTH:** Yes. You have accepted it should go back to January 2006
3 a moment ago, and not '02. I think I ordered yesterday that from January '05
4 documents concerning any discussions of the competitive threat to Google's CSS
5 posed by competing CSSs are to be disclosed and documents at every level, not
6 limited to any particular employee or category of employees.

7 If you look at S1, and similarly you look at –

8 **MR O'REGAN:** If these documents are within the scope of S1, then –

9 **MR JUSTICE ROTH:** Well, why wouldn't they be? I mean, they won't be if they are
10 purely concerning Google's development of its own CSS, but insofar as they relate to
11 competition with others, then they will be and similarly S2, Google's strategy for
12 competing.

13 Again, I think I said, if my memory is correct, it will start in January 2005, not
14 January 2004. So again, it will be that will include every level. So when you get those
15 documents I can't recall now what was said about dates of any of this disclosure,
16 I don't think we had got into the detail of dates just a moment, Mr Moser is that
17 covered by what we went through, what should be disclosed, but is it covered by the
18 form of order?

19 **MR MOSER:** No, not yet.

20 **MR JUSTICE ROTH:** We probably ought to deal with date, shouldn't we?

21 **MR MOSER:** We can look at that.

22 **MR JUSTICE ROTH:** I think the first thing is, having defined the categories that will
23 be provided for you and Linklaters, to discuss with Herbert Smith Freehills what are
24 proposed dates that Google thinks it can do, and whether you accept that or not, but
25 rather than doing it in the hearing, but and if you can't, perhaps that should be done
26 then on the papers.

1 **MR MOSER:** Yes.

2 **MR JUSTICE ROTH:** Because obviously the requests have been refined and that will
3 affect it.

4 **MR MOSER:** We can perhaps agree a term in the order to that effect.

5 **MR JUSTICE ROTH:** Yes. You should seek to agree the date, and if you can't agree,
6 then refer, but, thank you. I interrupted you, Mr O'Regan, because you will get those
7 documents.

8 **MR O'REGAN:** I am grateful.

9 **MR JUSTICE ROTH:** When you see them, you can say it appears there is a gap or
10 there must be something that happened that is not covered, but at the moment
11 narrowed, as you have accepted it must be, to the strategy for development of
12 Google's CSS, and it seems to me it needs to be narrowed a little further, Google's
13 CSS, in competing with other CSSs –

14 **MR O'REGAN:** If it may assist.

15 **MR JUSTICE ROTH:** you should pursue that.

16 **MR O'REGAN:** That's a very helpful suggestion and ruling, sir, that we look at
17 Kelkoo's S2, and if these documents are a subset of Kelkoo's S2, as are the
18 documents sought in R13, R14 and R24, perhaps to short circuit all of this is to stand
19 over each of those applications and we see what materials are disclosed in response
20 to Kelkoo's S2, on the basis that Connexity will also get those documents, and they
21 won't be marked as excluded documents that are not relevant to Connexity's claim.
22 We can then see where we are, and if we are not satisfied with that disclosure, either
23 make an application for specific disclosure of these or other document, and then, sir,
24 we can withdraw R6, R13, R14 and R24 at this point.
25 That also then, at least for today, deals with the issue as to whether or not these
26 requests relate solely to exemplary damages or to the claim more broadly, and that

1 | may be an appropriate way to move forward in relation to those applications.

2 | **MR JUSTICE ROTH:** Yes, I think that seems to me very sensible.

3 | **MR O'REGAN:** I am grateful.

4 | **MR JUSTICE ROTH:** You can then also refine them if you do wish to restore them,

5 | in the way that they have been refined in the course of discussion in the last half hour.

6 | **MR O'REGAN:** Then, sir, there is the question of dates for those periods. In R13

7 | Google is –

8 | **MR JUSTICE ROTH:** Sorry. Let me look. What page is that in R13 in the large

9 | format?

10 | **MR O'REGAN:** It is simply having common dates as to what this disclosure is. I don't

11 | know where we are forgive me, sir what you ruled in relation to Kelkoo's S2.

12 | **MR JUSTICE ROTH:** I think it was 1 January 2005.

13 | **MR O'REGAN:** But the end date, sir, not the start date.

14 | **MR JUSTICE ROTH:** Sorry?

15 | **MR O'REGAN:** The date to which disclosure needs to be given.

16 | **MR JUSTICE ROTH:** The end date?

17 | **MR O'REGAN:** The end date, yes, before we move on.

18 | **MR JUSTICE ROTH:** Well, one of them was December 2018 and yes, 31

19 | December 2018.

20 | **MR O'REGAN:** Our pleaded case, sir, is that the infringement is continuing to date.

21 | **MR JUSTICE ROTH:** Yes.

22 | **MR O'REGAN:** Mr Robertson has just informed me that's also the case for Kelkoo,

23 | so perhaps we just go to 2018 and then we can come back in future if necessary –

24 | **MR JUSTICE ROTH:** whether anything has particularly changed.

25 | **MR O'REGAN:** We can go through the next ones slightly more quickly, sir. R2 is to

26 | do with the penalty server data.

1 **MR JUSTICE ROTH:** R2 ...

2 **MR O'REGAN:** You dealt with Kelkoo this morning with my learned friend, Mr Moser.
3 Kelkoo's application obviously only related, first of all, to penalty server data relating
4 to Kelkoo's websites and domains, and Kelkoo, having had that disclosed, simply seek
5 clarification and an explanation of that.

6 Our application is in relation to disclosure of the penalty server data in relation to the
7 Connexity domains, and obviously to the extent necessary an explanation of that
8 would be sufficient to be provided at the same time.

9 That information, in our submission, is relevant because demotion of competing
10 websites is an essential feature of the abuse.

11 **MR JUSTICE ROTH:** But why do you want to go back to July 2005 when your claim
12 is from January 2008?

13 **MR O'REGAN:** Some period before 2008, sir, in our submission is relevant, because
14 the one needs to look partly at the period that went happened before the abuse
15 started. We know that the Algorithm A and penalties were being applied to Connexity's
16 domains well before January 2008 and that conduct continued thereafter.

17 **MR JUSTICE ROTH:** Well, in this case it won't be a clean period, but you are not
18 seeking to bring a case on it.

19 **MR O'REGAN:** We certainly want to determine the baseline of the conduct to know
20 what was happening before that period starts. It is something the economists will be
21 able to assist on further in due course.

22 **MR JUSTICE ROTH:** Then from January '08.

23 **MR O'REGAN:** We are now in the abuse period.

24 **MR JUSTICE ROTH:** Yes, I understand that.

25 Let me hear from Mr Pickford on R2, the penalty server data. It seems to me if there's
26 to be a clean period, one might be able to limit it in a certain way, but why should this

1 is penalty server files that mention Connexity or its other domains.

2 **MR PICKFORD:** When would you like to hear me on my general points, because

3 I have –

4 **MR JUSTICE ROTH:** Does your general point dispose of this point? Because this is
5 a Connexity specific application.

6 **MR PICKFORD:** Yes, they are general points relevant to ...

7 Let me start with R2

8 **MR JUSTICE ROTH:** But if you say it would help to hear your general point, but as
9 you know from yesterday, I find the most convenient way to deal with Redfern
10 schedules is point by point and to hear both sides on the point rather than hear one
11 side go through the lot and then go back to the beginning with the other.

12 **MR PICKFORD:** Absolutely, sir, and I am very happy to engage in that.

13 **MR JUSTICE ROTH:** Why don't you give me your general points and, if you like, we
14 can go to R2 after lunch.

15 **MR PICKFORD:** Thank you, sir. So the general points are these, and I think to a
16 large degree they have come out of at least some of them have come out of
17 exchanges between you, sir, and Mr O'Regan.

18 The first one is, there was a very telling response, in my submission, from Mr O'Regan
19 when he said that yes, of course there'd been disclosure given already in relation to
20 the Kelkoo claim and the Foundem claim, and yes, of course it was right that their
21 claim was no wider than those claims. Indeed, their claim is narrower, because it is
22 purely follow-on plus the end period, but nonetheless it wasn't their lawyers that made
23 those applications, and we say that that has infected their approach to all of this. So
24 when we have complained about the lack of coordination, it is not we are not saying
25 they didn't have some conversations, or didn't try, the problem is they seem to have,
26 to some degree, just said, "Okay, well, what happened in the past has happened in

1 the past, but we are not very interested in that, we are just going to go in with our
2 own –

3 **MR JUSTICE ROTH:** I understand that point. I think I made that point, yes.

4 **MR PICKFORD:** and R6 is an absolutely key example of that because what we have
5 ended up with is no order on that because we already have S1 and S2, but it is
6 a general point, sir, that I am going to be having to repeat, so I think it is worth setting
7 it out now.

8 **MR JUSTICE ROTH:** Well, you may not because with all respect, Mr Pickford, I have
9 that point and that's why we have disposed of R6 in the way we have and you don't
10 need to address it. So you can take that point as read.

11 **MR PICKFORD:** The other general issue, sir, is the reasons why the Commission file
12 isn't necessarily comprehensive. There were two points that were made by my learned
13 friend. One of them is valid and one of them is most definitely not valid.

14 Of course the Commission file is not comprehensive and we have never suggested,
15 contrary to what was said in submissions, that it is. We provided a very large amount
16 of further disclosure to address issues that the Commission file has not necessarily
17 covered, but the point to which we do take exception is it was said one of the problems
18 with the Commission file is that we had to exercise our judgment in determining what
19 was responsive. That is not a basis, in my submission, for criticising Google and its
20 lawyers, and saying therefore that we need to revisit things that should be the subject
21 of the Commission file, because we took a view.

22 We have to take a view in relation to disclosure. One always does and there is
23 absolutely no reason to impugn the approach that we have taken in terms of relevance.

24 So, in my submission, that's a bad point and it is important that that is not
25 misunderstood.

26 We probably don't have time to deal with all of R2, so with those general points, I can

1 | come back on that.

2 | **MR JUSTICE ROTH:** At the moment as regards R2 it does seem to me that this is
3 | specific the application of penalty server files to Connexity and various entities within
4 | Connexity. That is part of the claim Connexity brings and at the moment I don't see
5 | why that disclosure should not be given.

6 | **MR PICKFORD:** In my submission, it is not really part of the claim that Connexity
7 | brings. This disclosure was originally provided to Foundem and it was justified on the
8 | basis that they wanted to identify other algorithms other than Algorithm A and Panda,
9 | which they said were also causing them problems. It was part of their standalone
10 | claim where they say, "We are going outside the two algorithms identified in the
11 | Commission decision".

12 | So to assist them with that, we then had the penalty server files disclosure because
13 | Google said, "Well, insofar as you want to know about anything else, the best means
14 | that we can help you to find out about that is the penalty server".

15 | So that was the basis for the penalty server information being disclosed related to that
16 | part of Foundem's claim.

17 | Connexity's claim is pure follow-on. We already have the finding of the Commission
18 | in relation to the main part of their claim. The only additional part is that part that goes
19 | to the remedy period.

20 | **MR JUSTICE ROTH:** No, but I thought the Commission found that there were manual
21 | application of penalties in addition to the algorithm, and that's part of the conduct that
22 | was found to be an abuse, and that's pleaded and relied on by Connexity.

23 | That is all they are asking for, is the application of penalties to Connexity. I mean,
24 | that's within the scope of the Commission decision. You may say it is not binding and
25 | we will have that argument, but it is certainly there and they certainly plead it.

26 | **MR PICKFORD:** But my question, sir, is: where is it going? Because one can see

1 where it was going from Foundem's perspective because they wanted to say, "In
2 addition to the abuse that's in the Decision, we are not content with just that abuse".

3 **MR JUSTICE ROTH:** They are relying on the abuse I mean, if we go to the Decision,
4 it seems to me a fairly short point, isn't it? If we go to the Decision, where they describe
5 the conduct, it doesn't it may not be the greatest part of the conduct, but it is on
6 page 150 of our bundle, that's bundle 1, tab 10, under the heading on 149, 7.2.1:

7 "Google positions and displays, in its general search results pages, its own
8 comparison shopping service more favourably compared to competing comparison
9 shopping services."

10 That's essentially the conduct.

11 Then that's broken down and we hear about the webmaster guidelines, and recital 348
12 says:

13 "In a minority of cases, Google employees that are part of its "Webspam Team" and
14 "Bad URLs Team" also identify and apply manually demotions to websites that do not
15 comply with the Webmaster Guidelines."

16 Now, it is a minority of the total cases. How much that applied to Connexity, obviously
17 Connexity doesn't know, but they have alleged that as part of the abuse, it is within
18 the scope of the decision and this disclosure may help them identify to what extent
19 that happened.

20 **MR PICKFORD:** Sir

21 **MR JUSTICE ROTH:** Why is that not relevant and directly within the claim?

22 **MR PICKFORD:** Well, I have some further points to make, but if I could just turn round
23 to deal with this precise aspect. (Pause.)

24 **MR JUSTICE ROTH:** Yes.

25 **MR PICKFORD:** Sir, I think where this point cashes out, it is relevant to start, as I have
26 said before, with the pleaded claim, because one then has to ask how proportionate

1 is this, given what's being requested and where it is ultimately going to take us.

2 There are a number of points to make about the proportionality of this and the
3 proportionality, in my submission, is framed by what the nature of the claim is, because
4 it might be more proportionate to do it

5 **MR JUSTICE ROTH:** Let's look at the claim. It is in the supplementary bundle at
6 tab 4. If you have that, tab 4 is the Re-Amended Particulars of Claim, and it's on
7 page 238 of the bundle, paragraph 16.3B, last sentence.

8 **MR PICKFORD:** So one thing this is highlighting is a difficulty I had actually flagged
9 yesterday, which is there has been an enormous amount for us to do to prepare for
10 this hearing –

11 **MR JUSTICE ROTH:** No, I understand that.

12 **MR PICKFORD:** and this is not the pleading on the basis of which we prepared for
13 this hearing because this is Thursday's pleading, so it is quite hard for us always to
14 address the moving feast.

15 **MR JUSTICE ROTH:** Okay, but you have had this since the end of last week. In any
16 event, I am not criticising, I am not seeking to criticise you, Mr Pickford, I am just trying
17 to see, in the light of that, in the light of the Decision, which you have had for quite
18 a long time, as to what the abuse is, so that clearly they are relying on the decision,
19 why is this not (a) relevant, and if it is relevant, we can look at proportionality. The
20 starting point is relevance. It seems to me it is clearly relevant.

21 **MR PICKFORD:** Sir, my submission on that is its relevance is somewhat peripheral
22 and that is therefore going to colour the points I have to make on –

23 **MR JUSTICE ROTH:** We don't know suppose that, in fact, when the Commission
24 says a minority of cases, obviously Google is dealing with thousands and thousands
25 of cases, suppose that actually of the manual demotions quite a significant proportion
26 are Connexity sites, then it is not peripheral, but we don't know. It may be that no

1 | Connexity sites were ever manually demoted, in which case it will be peripherally
2 | relevant, but all that's being asked is to have the disclosure of the documents which
3 | specifically mention the Connexity sites, so that can then be tested.

4 | **MR PICKFORD:** Can I address you then on the proportionality issues, because there
5 | are a number of them?

6 | **MR JUSTICE ROTH:** Yes.

7 | **MR PICKFORD:** So the first is that the claim by Connexity begins 1 January 2008.

8 | **MR JUSTICE ROTH:** Yes.

9 | **MR PICKFORD:** What is being sought goes back to 2005 –

10 | **MR JUSTICE ROTH:** Yes you don't have to push on that because it seems to me
11 | be, subject to a clean period, you can get this from it should start in January '08, but
12 | I think you gave there is a logic in what was done to Kelkoo to provide a clean period,
13 | and I would have thought logically one should take the same period and the same six
14 | months, so if you do from 1 July 05 to 31 December 05 and then from 1 January 08
15 | onwards I can hear from Mr O'Regan in due course if he wants to push against that

16 | **MR PICKFORD:** Sorry, sir, it is my fault. So my complaint is that their claim begins
17 | in January 2008, and I think you said we should begin in 2005.

18 | **MR JUSTICE ROTH:** No, what I said is in principle is starts in 2008.

19 | **MR PICKFORD:** 08.

20 | **MR JUSTICE ROTH:** But just as it went back to July 2005 in Kelkoo to give a clean
21 | period, the same six months would be practicable, therefore from 1 July 2005 to
22 | 31 December 2005, which are six months, which are the same six months you are
23 | looking at from Kelkoo, and then from January 08 onwards; you understand what
24 | I mean?

25 | **MR PICKFORD:** Yes, I think so, sir. That's –

26 | **MR JUSTICE ROTH:** I think that's probably convenient for you, for Google to have

1 the same six months that you are already having to produce them for Kelkoo.

2 **MR PICKFORD:** Sir, I haven't yet finished on the proportionality point, but I also see
3 it is 1.10.

4 **MR JUSTICE ROTH:** Well, have some thought with those instructing you as to what
5 you suggest is proportionate as you will have gathered, I am sympathetic to this
6 request from Connexity, but it's got to be obviously proportionate. I think it is relevant,
7 so I don't accept Google's first response because it is not relevant, and then it is
8 a question of proportionality. I agree with you it shouldn't run from July '05 right the
9 way through, I said it should start in January '08, but with a six month clean period,
10 which logically should be the same one as the one provided to Kelkoo.

11 Then you can consider how further you suggest it needs to be limited and come back
12 on that at 2.10.

13 **MR PICKFORD:** Thank you.

14 **(1.09 pm)**

15 **(Lunch break)**

16 **(2.10 pm)**

17 **MR JUSTICE ROTH:** Yes, I think we were -I am so sorry. It looks as though my -
18 I think I left the schedule outside. I am so sorry. I will go back and get it. (Pause.)
19 I think we were in R2, Mr Pickford.

20 **MR PICKFORD:** We were, sir. I had two remaining points to explain about the
21 proportionality of what was being requested and how one might approach that issue
22 in order to be able to provide something that was proportionate.

23 **MR JUSTICE ROTH:** Yes.

24 **MR PICKFORD:** So the first of those is about the end date. So this disclosure is
25 seeking to replicate some disclosure that was already given previously in connection
26 in particular with Foundem. We explained in evidence that it was going to be very

1 difficult to provide such disclosure after 2011, when there was a proliferation of
2 algorithms, and in particular Panda came into play. So the original disclosure that was
3 given under this head or its equivalent was limited in time and ended in 2011.

4 Now I can take you, sir, to the evidence that explains that point if that's necessary.

5 **MR JUSTICE ROTH:** No. Sorry to interrupt you, but that's how it's been done for
6 Foundem and for Kelkoo, is it?

7 **MR PICKFORD:** Yes.

8 **MR JUSTICE ROTH:** Yes.

9 **MR PICKFORD:** So that point is explained in a letter from Herbert Smith and it's
10 further expanded upon in the evidence of Mr Kwok in one of his witness statements.

11 **MR JUSTICE ROTH:** Yes.

12 **MR PICKFORD:** I don't know if it's one or four, but we can go to it, if necessary.

13 **MR JUSTICE ROTH:** Yes.

14 **MR PICKFORD:** So the point is in terms of proportionality, that's something that we've
15 already debated once and that was the position that was arrived at because it was
16 proportionate both in terms of the difficulty on our side, because the exercise became
17 very difficult to provide disclosure on all algorithms after and also in terms of where it's
18 really going to go in terms of helping the claimants, because once Panda comes in,
19 that is the core algorithm that's actually really in play at that point, and that's the
20 algorithm that matters and that's why the Commission focused on it.

21 **MR JUSTICE ROTH:** Yes.

22 **MR PICKFORD:** So –

23 **MR JUSTICE ROTH:** That's the end date point.

24 **MR PICKFORD:** That's the end date. We say if we're going to give disclosure, it
25 should be to the same end date for the same reasons the Tribunal has already
26 accepted.

1 The second point is about the number of domains that we search for. Now our
2 evidence again that's Mr Kwok's statement is these reconstructions of penalty server
3 files are difficult and onerous to produce. He gives evidence that when we were asked
4 previously to add a further nine domains, that would take a very senior engineer in
5 Google, and they are a limited resource, two weeks to do. The reference for that is
6 para 20 of his first statement.

7 **MR JUSTICE ROTH:** The first statement is where?

8 **MR PICKFORD:** Sorry?

9 **MR JUSTICE ROTH:** Where is the first statement, the bundle reference?

10 **MR PICKFORD:** The bundle reference, if you want to go to it, it's page 2278 of the
11 main bundle.

12 **MR JUSTICE ROTH:** In the main?

13 **MR PICKFORD:** Yes. If it's helpful, I think it's tab 125.

14 **MR JUSTICE ROTH:** Yes, I have the witness statement. I'm just looking for
15 the which do you know the paragraph?

16 **MR PICKFORD:** Yes. It's paragraphs 19 and 20 on page 2278.

17 **MR JUSTICE ROTH:** Reconstructing equivalent files?

18 **MR PICKFORD:** Yes.

19 **MR JUSTICE ROTH:** Let me just read those paragraphs. (Pause.) Yes.

20 **MR PICKFORD:** Where we say this goes, sir, is for Foundem in the previous
21 disclosure we ultimately provided the data in relation to a total of 11 domains. I think
22 that's the maximum we have provided, as I understand it, for the claimant.

23 **MR JUSTICE ROTH:** Yes.

24 **MR PICKFORD:** What is being sought here is for 45 domains, and what we propose
25 is that Connexity chooses its top 11 domains that it would like us to search for,
26 reflecting the amount of resources that we have already invested in this for other

1 claimants, and potentially it can come back, if it says, "Well, actually, we think this is
2 now terribly interesting and the reason for that is we can show that in relation to these
3 11 this is why we say so", but in our submission, that's we don't actually think that's
4 likely to happen. The proportionate approach would therefore be to allow them to have
5 the same amount of resources that have been devoted to this as to Foundem, in
6 particular, in light of my original submission, that this actually originated in the fact that
7 there was a standalone element of the claim for Foundem and we are giving this purely
8 to cover off what we say is a relatively small point in this case.

9 **MR JUSTICE ROTH:** Kelkoo I haven't looked at the order of Mr Turner of September
10 last year, but they are getting something similar, are they, or is that the same as the
11 Foundem?

12 **MR PICKFORD:** I am sorry, I had clearly misunderstood, in fact. It was two for
13 Foundem; it was nine for Kelkoo. That was my mistake.

14 **MR JUSTICE ROTH:** Yes, I see.

15 **MR PICKFORD:** I am sorry. It was two for Foundem; it was then two for Kelkoo and
16 then it was a further nine for Kelkoo. So it was 11 for Kelkoo. I told you it was
17 Foundem, it was Kelkoo, that we did the bulk of the searches for. What we are offering
18 to do is replicate that.

19 **MR JUSTICE ROTH:** Mr O'Regan, there are two points. It is in your choice to choose
20 11; secondly, there is the point about August 2011, and that will put you in the same
21 position as Kelkoo. I appreciate you have more domains than Kelkoo, but as has been
22 made clear, if you find looking at what has happened to your 11, but actually more
23 seems to be going on, you can come back and ask for more.

24 **MR O'REGAN:** Sir, in relation to the time obviously we will adopt the same position
25 as has already been ordered in previous proceedings.

26 **MR JUSTICE ROTH:** Yes. It won't be quite the same

1 **MR O'REGAN:** In terms of end date.

2 **MR JUSTICE ROTH:** End date, yes.

3 **MR O'REGAN:** Start date, sir, I think you were minded to order from July 2007.

4 **MR JUSTICE ROTH:** No, from July 2005 to December 2005 is a clean six months,

5 and then from 1 January 2008 to I think it is I don't know if it is 31 January 2011.

6 Panda comes in this April I think, does it? They say August, so 31 July 2011.

7 **MR O'REGAN:** That's in total about four years' worth of data server ...

8 **MR JUSTICE ROTH:** Yes, and you choose your 11 sites.

9 **MR O'REGAN:** If I can just address you on the evidence of Mr Kwok.

10 **MR JUSTICE ROTH:** Yes but you are not being shut out from coming back.

11 **MR O'REGAN:** No, sir, just to clarify the evidence that was given, paragraph 19:

12 "Kelkoo is further seeking disclosure in respect of (at least) nine additional domains

13 over... a total period of nine years."

14 So that's more than twice as long as what we are looking for.

15 Then in paragraph 20, Mr Kwok estimates:

16 To provide this additional work, that is nine years' worth of nine domains "it would

17 require at least two weeks of work by a senior engineer spending half their time on the

18 task (assuming that [there are] nine further... domains)".

19 So that's one week to do nine.

20 Google is obviously an extremely large organisation. It claims to be resource

21 constrained, but it must have sufficient engineers, in our submission, to be able to

22 address this, whether at a senior or more junior level. So it is not as world ending, as

23 my learned friend, or burdensome as my learned friend has submitted.

24 **MR JUSTICE ROTH:** Well, I think –

25 **MR O'REGAN:** In relation to the 11 –

26 **MR JUSTICE ROTH:** Can I interrupt you, I take that point. That's why, if, in fact, this

1 revealed useful information when you have seen what happens with the 11 and you
2 come back and say, "Look, we have some very interesting things that we have seen
3 about the 11, we therefore want the rest", then for Google to say, "This will take up
4 a certain amount of time", will not be very persuasive but if we do it in stages because
5 equally, if the 11 you think most likely to be affected and it turns out there's very little
6 application, then one thinks, "Well, really this is not going to be a key to your case".
7 So it's a sensible staging, I think.

8 **MR O'REGAN:** Sir, I am instructed we can adopt that approach.

9 **MR JUSTICE ROTH:** And you notify Google of the 11 you think are most significant.

10 **MR O'REGAN:** Yes, sir, and those instructing me have informed me that the order in
11 Kelkoo was to 31st August. I don't have independent verification of that. (Inaudible)
12 afterwards.

13 **MR JUSTICE ROTH:** Yes, I think we are going to deal with timing out of the hearing
14 because I don't know when the work started with Kelkoo and so on.

15 **MR O'REGAN:** Yes, sir.

16 **MR JUSTICE ROTH:** I hope people will be sensible about time. Yes. So that's R2.

17 **MR O'REGAN:** R3 is data relating to the algorithm A dimension.

18 **MR JUSTICE ROTH:** On R3, in my copy on page 43 there is a paragraph in the fourth
19 column and in the fifth column that's highlighted as confidential, but I think - I don't see
20 that it is likely to be confidential. This is really Mr Pickford's department.

21 Is there anything confidential there, Mr Pickford?

22 **MR PICKFORD:** My instructions are no, we didn't mark it as "confidential". We don't
23 know how it got there.

24 **MR JUSTICE ROTH:** Okay, that's helpful.

25 Yes, Mr O'Regan.

26 **MR O'REGAN:** The period we are seeking for, sir, we cut back to 1 July 2007 to be

1 consistent with your approach on penalty server data. That's obviously six months
2 before the infringement period started. In our submission, Algorithm A was a key
3 factor certainly until 2011. That was the key algorithm that was applied, and therefore
4 is, in our submission, front and centre to the issue of causation in this period, and it
5 goes to the effect of Google's conduct on the Connexity websites as regards each of
6 its domains. It is also in the period before 2008 relevant to determination of the
7 counterfactual, and therefore after that causation and loss up to the present day.

8 These documents have already been disclosed to Kelkoo and to Foundem, and we
9 are seeking obviously equivalent disclosure in relation to the effects

10 **MR JUSTICE ROTH:** But they have been disclosed just for a period of some six
11 months; is that right?

12 **MR O'REGAN:** It says 1 November 2006 and April 2007.

13 **MR JUSTICE ROTH:** That's about six months.

14 **MR O'REGAN:** About six months, sir, yes.

15 **MR JUSTICE ROTH:** You are asking it for many years.

16 **MR O'REGAN:** It is not clear to us, sir, on what basis it was so limited, but in our
17 submission the effects of Algorithm A demotions would have been seen throughout
18 the period of the infringements that's central to causation in the same way as the
19 penalty server data would do so.

20 Certainly I hear what my learned friend says about Panda taking over during 2011;
21 that might be an appropriate point at which to have a first cut in terms of the data.

22 **MR JUSTICE ROTH:** I think the reason it was limited to 2007 is because that had
23 been the focus to 2007 because that was the focus of where the Commission was
24 looking at things.

25 **MR O'REGAN:** The background in Google's response over the page on page 44, sir.

26 **MR PICKFORD:** Would it help you if I address you?

1 **MR JUSTICE ROTH:** Yes, perhaps you can explain.

2 **MR PICKFORD:** Yes, so the original purpose behind the equivalent disclosure that
3 was provided to Foundem was to give some limited further disclosure to Foundem for
4 its standalone claim, and in particular covering an early period prior to the Commission
5 infringement decision period because of their standalone claim for that period.

6 The original as I understand it, the original data extraction progress was possible
7 because there had already been a substantial data extraction progress for Foundem
8 when we were responding to questions from the Commission during the Commission
9 investigation.

10 So what we had to do in order to fulfil this request when it was made by Foundem was
11 some very limited additional searches for a period that fell before what we had looked
12 at for the Commission.

13 In our submission, that is one order of exercise. What is being sought, on its face,
14 under R3 is a totally different and vast exercise that is not sufficiently anchored to
15 an issue that we understand needs to be investigated as a result of the pleaded claim,
16 which is a follow-on.

17 So that is why we resist providing anything further, because in my submission it's going
18 to be very substantial a very substantial exercise to engage in.

19 Also, it has to be noted that Connexity have already been provided with the underlying
20 data for seven of their sites as a result of the common disclosure that they have
21 received. So it is not like they don't have any data on this.

22 Then, of course, we have had S9 and S10 from yesterday covering Algorithm A, which
23 is a more focused approach to disclosure on algorithm A, and this is precisely this is
24 another example in my submission, sir, of an R6, where we have got the Kelkoo
25 version that we have debated, and was with due respect to Kelkoo, more focused, and
26 now we have an enormous one that Connexity comes along with, and says, "Can we

1 just have this huge disclosure exercise, please, on the same issue?"

2 At the very least what would be sensible would be for Connexity to take stock of what
3 they get through the disclosure that they are the further disclosure that they are going
4 to get, in any event, through common disclosure on Algorithm A, and if they really think
5 it is necessary, to then come back and make some more tailored application then.
6 That's without prejudice to my submission that it is always going to be difficult and
7 disproportionate.

8 **MR JUSTICE ROTH:** Yes.

9 **MR O'REGAN:** Sir, on that basis we can defer R3.

10 **MR JUSTICE ROTH:** I think that's sensible.

11 **MR O'REGAN:** I would put down the marker, sir, this goes it is not a question of
12 infringement, it is a question of causation.

13 **MR JUSTICE ROTH:** No, I understand that.

14 **MR O'REGAN:** It is no answer to say the Commission found Algorithm A was applied
15 after 2008. That's just a general statement that has nothing to do with Connexity at
16 all we are also very anxious to avoid considerable further delay. We anticipate
17 hopefully getting this disclosure and for it to be short order.

18 **MR JUSTICE ROTH:** Yes.

19 **MR O'REGAN:** I would also just point out, sir, on page 44 that the other parties have
20 had this disclosure for a considerable period and the period before 2007 was a six
21 month add-on for my learned friend.

22 **MR JUSTICE ROTH:** You have the disclosure for the seven sites.

23 **MR O'REGAN:** It is a relatively small number of domains in the context, both of the
24 claim and the scope of the Connexity business. There are two Bizrate and five
25 Shopzilla sites. Of course there were plenty more domains that were being applied at
26 various times, so they will provide a snapshot but no more.

1 **MR JUSTICE ROTH:** Just pause a moment. Can I just ask you so I understand it
2 a bit, you have pointed out to me, Mr O'Regan, the large number of domains within
3 Connexity by taking me to the annex to your amended particulars of claim, which is
4 supplementary bundle at 297 and 298.

5 Can you just help me a bit? What is the difference between the different UK sites? Is
6 it a time period? Is it a subject matter? What -

7 **MR O'REGAN:** They relate in part to different companies that are now within the
8 Connexity Group, if you wish, that were under independent ownership and cooperation
9 at the time, when they were acquired or merged into what is now Connexity Inc.

10 **MR JUSTICE ROTH:** But do they compete with each other?

11 **MR O'REGAN:** At different times they would have obviously been under independent
12 ownership then would have competed. If we are talking about a .co.uk domain for
13 different domains, they would have had a different focus or a different consumer
14 proposition, even if in periods in which they were under common ownership. So each
15 of them would have been an active site.

16 If they are under common ownership, which I have a feeling they probably weren't in
17 2007 and 2008, then even under common ownership they would have had a different
18 consumer relationship and different market operations, so each of them would have
19 been independently at risk of demotion.

20 **MR JUSTICE ROTH:** Yes, I understand

21 **MR O'REGAN:** Some of them are more important than others.

22 **MR JUSTICE ROTH:** If you do at any point have to come back, and probably it would
23 be helpful any way, if you could prepare a chart just explaining for the different .co.uk
24 site what is the particular focus and when they came under common ownership, and
25 it may be that they weren't all active throughout the period, because it may be that
26 when Connexity acquired what was an independent site, as sometimes happens, it

1 sort of merges its operation into its existing site and no longer maintains the other one.
2 I don't know if that happened or not, but it's fairly normal for that to happen, otherwise
3 they are sort of competing against each other just so one has a clearer picture,
4 because there are quite a lot of your 47 sites. Just on a first glance look, it seems that
5 close to half of them are UK.

6 **MR O'REGAN:** The UK would have been fairly important, one of the three most
7 important companies in which (overtalking)

8 **MR JUSTICE ROTH:** I am sure I understand the UK was very important. What I am
9 trying to understand, or not for today, is which sites were the important UK sites at
10 what period, because I would be surprised if they were all important throughout this
11 long period, and if they were all to the extent that several are important, what is, as
12 you just mentioned, their different focus, just to get more of a picture of the business.

13 **MR O'REGAN:** Yes, sir.

14 **MR JUSTICE ROTH:** But that's not for today.

15 **MR O'REGAN:** We will take that away, sir. I think it will be something that, in any
16 event, will be very helpful to trace through the history of the group.

17 **MR JUSTICE ROTH:** I think if you could prepare that and send it to the defendants
18 as well, I am sure them also find that helpful.

19 **MR O'REGAN:** Yes, sir. We can prepare it and circulate it to the other parties, and
20 send a copy to the Tribunal and it will go on file that way.

21 **MR JUSTICE ROTH:** Yes. I am not making an order about it, but I just think it would
22 be useful.

23 **MR O'REGAN:** That is very helpful, sir.

24 **MR PICKFORD:** I have risen, sir, because I hope I can be of some assistance on
25 some aspects of R4. Over the short adjournment, we have applied, sir, your reasoning
26 on some previous items to some of R4, and we are prepared to give on R4(a) and

1 R4(c) what is requested, subject to simply making the point that on R4(a) we don't
2 anticipate there is going to be very much of it, because so far the disclosure has been
3 general across all of the claimants rather than having rather than specific searches
4 for specific claimants having yielded anything of any value, but we are willing to do the
5 search to see whether it's also a nil return.

6 That was on (a). So on (a), we have already done some searches on this topic and
7 most of the searches, as I understand, in terms of what has actually yielded relevant
8 results have been they have not come from the claimant specific search words, they
9 have come from other search words.

10 However, we did search for specific claimants and we are willing to do that for
11 Connexity as well, even though we are not anticipating it is going to yield a great deal,
12 but obviously we will do the search.

13 On (c), we actually think we have already done what is required on (c), but we are
14 happy to look again to ensure that insofar as there is anything remaining, we will give
15 it to them, though we think actually this is likely to be either a zero to a very low return.
16 So hopefully, therefore, that assists matters, because Mr O'Regan can then focus on
17 the other bit of R4.

18 **MR JUSTICE ROTH:** (b) has been done.

19 **MR PICKFORD:** (b), they already had it. They asked for it and we pointed out they
20 had the document and I think they now accept they do have the document.

21 **MR JUSTICE ROTH:** Right, that's very helpful. So we go to (d).

22 **MR O'REGAN:** I am grateful for my learned friend's clarifications on (a) and (c), and
23 (b) has also been addressed in correspondence.

24 In relation to (d), (e) and (f), sir, in view of your ruling yesterday in relation to Kelkoo's
25 S8 to do with the quality launch review meetings and similar documentations, our
26 proposal would be to again defer those ones, because I think you ruled yesterday that

1 we would search for and disclose other documents first, and then come back to
2 whether or not these reports are necessary. So we propose taking the same approach
3 and deferring those.

4 **MR JUSTICE ROTH:** Yes.

5 **MR O'REGAN:** Which means the only live one is (g), G for golf, the last one. (a), (b)
6 and (c) have been resolved; (d), (e) and (f) we are deferring, so that brings us to 4(g),
7 which is reports by Google's Product Search or Shopping team to the Executive
8 Management Group relating to the Panda and Coati algorithms. It seems to us that is
9 broader than Kelkoo's S2 and not within S2, but you may well tell me otherwise, sir.

10 **MR JUSTICE ROTH:** The order of 16 May that's referred to, that will be in one of
11 these bundles, so I can remind myself what it says.

12 **MR O'REGAN:** The main bundle, tab 156, sir.

13 **MR JUSTICE ROTH:** 156.

14 **MR O'REGAN:** Page 2559 in the hard copy. 2571, sir. It is in the second tranche.

15 **MR JUSTICE ROTH:** Yes, I have found it. Yes. Just a moment.

16 Yes. Mr Pickford, are EMG meetings minutes is that the sort of meeting where Google
17 prepares minutes or not?

18 **MR PICKFORD:** I will take instructions on that, sir.

19 No.

20 Shall I address you on the application?

21 **MR JUSTICE ROTH:** Yes. Just one minute.

22 Yes, Mr O'Regan.

23 **MR O'REGAN:** Sir, we have had disclosure, as the schedule says, in relation to the
24 reports that have gone to the Executive Management Committee, and as my learned
25 friend has just confirmed, there are no formal minutes. So the documents that we are
26 seeking - to the extent they exist - are any other documents that record what was

1 discussed by the executive board management, Executive Management Group.
2 The importance of that, to labour the point again, is any decisions that would have
3 been taken in relation to Coati and Panda would have been taken at the highest level.
4 That's why one assumes reports were made to the Executive Management Group, the
5 highest decision making organisation in Google.

6 So what we are seeking disclosure of, if the minutes don't exist, are any other notes,
7 formal or otherwise, or emails or similar that record, what was discussed, the decisions
8 that were taken and the instructions that were given back to the relevant business unit.
9 That's all that we are seeking.

10 **MR JUSTICE ROTH:** Have you been through the reports?

11 **MR O'REGAN:** Those instructing me have, sir, but they only are the reports up. There
12 is nothing –

13 **MR JUSTICE ROTH:** But some of the reports may be of matters that are not relevant
14 to this case and we are looking at precisely because there are no minutes. If there
15 were minutes, that would be much easier, because it bounds the search and - just
16 listen for a moment, please. As there aren't something as succinct as minutes and
17 that's not unusual with just management meetings of this sort, one has to start looking
18 for people's emails and so on, which is much more time consuming and complicated.
19 It may be that there are some meetings where something was very relevant and others
20 where, although there's a report that goes up to them, it is on something that's got
21 nothing to do with this case, with some other aspect of Google Product Search that
22 doesn't relate to the alleged abuse.

23 So what I would wish you to do is to go through these reports, identify reports which
24 suggest action that is relevant to the case and then say, "Well, we can see what the
25 proposal or concern was raised by the Google Shopping team, and it's a concern or
26 a proposal that's relevant to the abuse, so we want to know what happened at the

1 | EMG as a result of that report".

2 | I would be surprised if all 160 reports are relevant, but there may well be some that
3 | are, and that will target this request. If you then say - and you can - if I have to come
4 | back to the Tribunal, you can prepare a bundle of those documents, but before coming
5 | back you would write to Google's solicitors saying, "Well, look at the report submitted
6 | to the EMG on 3rd April 2011. That clearly goes to something that's very pertinent to
7 | this case. Please disclose any followup or record of discussion of this at the EMG,
8 | including emails of those who were present". I think that will target your request in
9 | a proportionate way rather than ordering all emails be searched discussing all aspects
10 | of the report.

11 | **MR O'REGAN:** Sir, I am grateful for your clarification and guidance and we will take
12 | that approach and go away and review the 160 odd again and come back accordingly.

13 | **MR JUSTICE ROTH:** Yes. I think Google will appreciate where I'm coming from and
14 | how that may be taken forward, depending on what is discovered.

15 | **MR PICKFORD:** Yes, sir.

16 | **MR JUSTICE ROTH:** Right.

17 | **MR O'REGAN:** That's R4, sir.

18 | R5 relates to documents concerning manual or algorithmic demotion of the Connexity
19 | sites. Obviously we will take advice in view of your ruling I think it was on R3 it would
20 | be appropriate take a sample approach in relation to that rather than expect disclosure
21 | on all 45 odd.

22 | **MR JUSTICE ROTH:** Yes. I think it is a similar exercise of basically starting in I think
23 | January '08 and again if you would like to choose eleven sites, and I think I will hear
24 | from Mr Pickford how that fits with the introduction of Panda in terms of what has to
25 | be done, but I think, Mr Pickford, I made the point that I think this is pleaded and is
26 | within the scope of the claim. So it's a question of what can reasonably be done.

1 **MR PICKFORD:** Sir, we do resist this application notwithstanding, sir, what you have
2 said on other points, because, amongst other reasons, of its very nature as a catch-
3 all, because we have more targeted disclosure going to the issue of manual
4 demotions, because we have the penalty server that we discussed.

5 **MR JUSTICE ROTH:** That's where it will appear, will it, I mean, if it's covered by the
6 ruling that I made on what was it - R2?

7 **MR PICKFORD:** Yes, sir. In terms of what is a sensible and proportionate way of
8 trying to identify the documents, yes, because that's the whole reason why penalty
9 server originally came into play. It is because Google went away and said, "How can
10 we best deal with this particular issue?" and they said, "Okay. We have the penalty
11 server. That is going to be by far the most fruitful, insofar as there's going to be
12 anything fruitful, avenue of enquiry". So that's what we have searched on.

13 The core the difficulty with R5 is that as a catchall it is liable to be incredibly broad and
14 it brings into question where do we look? How are we supposed to identify these
15 documents? It is also for a very long period of time, because I have already explained
16 the difficulties of going past 2011, which we have dealt with.

17 So, very like some of the other points, in my submission Connexity need to take stock
18 of what they have got and what they are going to get and then make more targeted
19 requests if there are things that they really think they need further, and a catch-all of
20 this is liable to be highly onerous and not proportionate.

21 **MR JUSTICE ROTH:** Well, I think, Mr O'Regan, this goes a bit with R2, of which you
22 are getting, as it were, a subset in a more targeted way by reference to the penalty
23 server, and I think, insofar as it goes, that should capture manual demotions for that
24 period for those eleven sites. So I think it goes together with that as to whether you
25 come back and ask for more.

26 **MR O'REGAN:** Sir, there is a difficulty we faced in framing these requests, which is

1 information asymmetry. We have no idea how or in what way our business was
2 affected by algorithms other than Panda and Algorithm A.

3 The Commission decision is quite clear. You took my learned friend to Decision 248
4 this morning, but over the page on 349 the Commission found that:

5 "Competing comparison shopping services... were prone to be demoted by at least
6 two dedicated algorithms."

7 There may well have been others. We don't know. Google has a clear understanding
8 of its business and ought to know which, if any, other algorithms in addition to anything
9 that would be covered by the penalty server existed and what was done. We simply
10 do not know. We are going to be in no better a position after having the penalty server
11 data, because we don't know if that relates to everything unless we have been told
12 that it does or is within the scope of the penalty server data.

13 **MR JUSTICE ROTH:** Well, in that respect you are in the same position it seems to
14 me as everybody else, because you are all making at least a follow-on claim on what
15 the Decision found, and the basis of the Decision was very much on the two
16 algorithms, Algorithm A and then Panda. If what you are making is a follow-on claim,
17 the fact that the Commission says "There might be other things", that's not a follow-on
18 claim in my view and I don't see that you should get more on that than essentially
19 everybody else.

20 The focus is on clearly the Commission's findings, and we looked at them in some
21 detail, Algorithm A and Panda, plus, and I have acknowledged the plus, some manual
22 demotion, which is why I have given you in this application some disclosure relating to
23 manual demotions, but starting to look for other algorithms, as I say, is something we
24 have been through with the other claimants and I don't think you should get any more
25 than they do.

26 **MR O'REGAN:** Very well, sir. On that basis we will not pursue R5 today and we will

1 see where we get to on disclosure. We are somewhat approaching the end cautiously.
2 R8 is traffic data. That was already discussed and dealt with this morning, sir, with
3 Mr Moser. We would simply propose adopting the same approach in relation to traffic
4 data as you ruled this morning with an explanation of what data is held by 20th
5 December and a meeting of the experts in January 2025. So we take the same
6 approach.

7 **MR JUSTICE ROTH:** I think the expert is actually for your clients as well.

8 **MR O'REGAN:** If it is the joint expert, yes.

9 **MR JUSTICE ROTH:** R9 is crossed out in my copy.

10 **MR O'REGAN:** The last one, sir, that needs dealing with today - there are two more,
11 sir. I do apologise.

12 R10. That is missing attachments. Sir, numerous emails, internal Google emails,
13 were disclosed without the disclosure of any attachments or other linked documents
14 to them. The problem appears to be because, to the extent these came from the
15 Commission file, Google had only disclosed them as images and not as original native
16 Outlook or Google Mail or whatever format they would have been in with any metadata.
17 So if they had been disclosed in that format, in our submission any attachments and
18 linked files to a responsive email would also be disclosable as being relevant.

19 I am going to take you just to one document, sir, by example.

20 **MR JUSTICE ROTH:** If you can take me, if possible, to one of the non-confidential
21 ones. Is that possible?

22 **MR O'REGAN:** Yes, sir. I was proposing to take you –

23 **MR JUSTICE ROTH:** But if that's difficult –

24 **MR O'REGAN:** The one I was proposing to take you to is non-confidential, sir. It is
25 the one at 10(a). That's in the main bundle at page 1943 - 1929, sir. I am on the
26 electronic bundle. I don't have the –

1 **MR JUSTICE ROTH:** 1929?

2 **MR O'REGAN:** 1929 is the hard copy number. I do apologise. I am not sure which
3 volume that is in. Volume 3. I am grateful. 1929. The electronic version is at 1943.
4 Tab 107, sir.

5 **MR JUSTICE ROTH:** Yes. One moment. This is an email of –

6 **MR O'REGAN:** Some time late in 2006.

7 **MR JUSTICE ROTH:** either 12th November or 11th December. Probably 11th
8 December. This document links in with your ...

9 **MR O'REGAN:** The participants seem to be discussing the results of some
10 comparison shopping experiments that have been conducted at the time. In fact, three
11 are referred to. The author at the very top of the email says:

12 "I have provided convenient links from the page."

13 Then there is a page to an internal Google document repository of some sort or shared
14 drive. That is where the underlying documents relating to those experiments are
15 stored.

16 **MR JUSTICE ROTH:** Let me just look at it.

17 **MR O'REGAN:** The document itself is not of particular relevance other than the
18 existence of the linked file rather than an attached Word or Excel or pdf or whatever it
19 is.

20 **MR JUSTICE ROTH:** In (a) you refer to a URL link and that URL link is - where is that
21 in the document? I am a bit confused. I am on page 1929 and the second
22 paragraph says:

23 "I have provided convenient links from the page."

24 That's a different link from the link ...

25 **MR O'REGAN:** It was a link to the page I meant to take you to. Unfortunately that's
26 confidential.

1 **MR JUSTICE ROTH:** Ah! I think this document is (b), isn't it?

2 **MR O'REGAN:** It is (b), sir, yes. I do apologise. I had thought it was (a). My point is
3 a general one, that that's how Google shares documents, by sending links rather than
4 actual physical documents, no doubt because they all have documents in real time.
5 The only point we make is in our submission Google cannot hide behind a link to
6 an internal drive to avoid disclosure of what is effectively an attachment to a document
7 that has been disclosed between relevant –

8 **MR JUSTICE ROTH:** I understand.

9 **MR O'REGAN:** That's the only point we are making. I can go through all of them, but
10 the same point is going to arise in respect of each of them. There are no documents
11 with any physical attachments. They are all in this particular format.

12 **MR JUSTICE ROTH:** Yes. Let me just, now that I have resolved that confusion, have
13 a look at it.

14 Well, Mr Pickford, there is this difficulty. Without going through each one of the
15 however many it is documents there are under this head, and there are quite a lot of
16 them - a full alphabet by the looks of it - it is very difficult for me to address whether
17 the document is relevant or not.

18 I have been given one example which relates to (b) and it does seem to me it is very
19 hard to understand this email properly without having the linked document which is the
20 context of what is said in the email. This email, I don't know what the base algorithm
21 is, but may or may not be relevant. Did this email come in the common disclosure or
22 from the Commission file? Do you know?

23 **MR PICKFORD:** The Commission file is my understanding. Would it be helpful for
24 me to address you on some general points on this? It may assist in terms of –

25 **MR JUSTICE ROTH:** Yes, because we can't go through 26, or whatever it is,
26 documents.

1 **MR PICKFORD:** No. The first point to Mr O'Regan's point that we can't hide behind
2 the fact that a document has been attached to another document in order not to
3 disclose it, we are not doing that. Obviously if the attached document is itself
4 responsive, because this is only their electronic searches, then they will get the
5 attached document. We have not been through to see which of these documents they
6 do or don't already have, because that's potentially quite a large exercise and it is not
7 really for us to do. So we are not seeking to hide behind anything.

8 The first point is if there is a document that's responsive to the search that has been
9 requested of us, they will get that document, point number one.

10 Point number two is that as one may glean from these extracts and seeing the
11 page that Mr O'Regan took you, to there is something of if I can call it a house style of
12 Google, which is to provide lots of links to any other document that is even potentially
13 relevant or being referred to in one given document. Links are - perhaps
14 unsurprisingly, given the nature of Google's business - something that Google
15 provides a lot of.

16 So as a general matter if already they are getting any document that is itself
17 responsive, where do we draw the line in terms of linked documents, because if we
18 provide all of the linked documents and then we provide all the linked documents to
19 linked documents, then we will never stop. So we have to find some pragmatic and
20 sensible basis for drawing the line. We say that that is well, is the document itself
21 responsive or not?

22 If there were a selection of genuinely specific requests where it is said, "Look, we have
23 this document here, but there doesn't seem to be a really important attachment or
24 a really important link that we would expect to see and that hasn't turned up in the
25 disclosure. Therefore, can you have a look again and give us that document and tell
26 us why that has not turned up in disclosure?", that would be one thing, but we haven't

1 got that here. We have a very long shopping list of documents that seem to us pretty
2 well exclusively to cover other demotions other than Algorithm A and Panda, and for
3 reasons that I don't need to canvass yet again, that really isn't the focus of what either
4 is the Connexity claim or what we should be spending a lot of time investigating, given
5 that they have a follow-on claim.

6 So our response, therefore, is that the difficulty in responding to this long list in this
7 hearing is part of why this general request is misconceived, and if what they want is
8 what I have described, that is to come back and say "Here is something that's actually
9 really relevant, because it is going to Algorithm A and Panda and we have looked and
10 the actual attachment is not there in the disclosure, and we can't understand why,
11 because it should be responsive. Please could you look into that?", that's something
12 different. That is not this request.

13 **MR JUSTICE ROTH:** Well, whether it is or is not the one example that I have got, this
14 document on page 1929 was disclosed and not excluded as being potentially relevant.
15 This document, I have to say, is impossible to understand properly without the
16 reference document that it is based on, which is the URL link document at the top. It
17 can only be read sensibly, it seems to me, if one has that document, because it is
18 looking at how algorithms, I think, might work on that document on the scoring and
19 that document. That's what it appears to be doing. So I would have thought this one
20 should be disclosed.

21 That doesn't mean that all the others need to be disclosed and it really is a case
22 of, I mean, I would hope in litigation like this that Google's solicitors should go through
23 these requests not in a hearing but as part of the conduct of the litigation on their part
24 just looking to see and look at the basis of the document referred to and then see
25 whether the particular linked document seems relevant and address that in
26 correspondence.

1 One may refer to dealing with the different algorithms all together, like Anchor++,
2 which is not part of the litigation, so you can say that is not part of the follow-on claim.
3 Another might - this one, as I say, which is the only one I can express any opinion
4 about, because I have got it and I have read it, it seems to me potentially is relevant
5 and it is certainly not comprehensible without the linked page.

6 **MR PICKFORD:** Sir, I understand that. We have not just batted this away. We have
7 looked at them and our understanding was that these were focused on other
8 algorithms, which is what we say in the Redfern. One clear example is Anchor++,
9 but –

10 **MR JUSTICE ROTH:** I think this one you need in correspondence to address it more
11 specifically and not just say it is another algorithm, but also explain what it is talking
12 about and why it is, in very brief terms, why this is completely irrelevant, but this looks
13 like it is testing how different potential algorithms might impact upon ranking and what
14 effect that can have, not any specific algorithm that was eventually used, but there are
15 examples of how algorithms will impact on ranking and they are described as
16 experiments. So I would have thought that is within the scope of this claim, but
17 I haven't seen the link, so I can't express a definitive view.

18 **MR PICKFORD:** Sir, we can seek to do what is proportionate and sensible in relation
19 to that. Of course, the people who are dealing with this in the first instance are
20 Google's lawyers. It may be that there are many documents in disclosure that we don't
21 know precisely what they mean. It may be that even after factual disclosure and after
22 factual witness evidence, we still don't necessarily know what they mean. It is the sort
23 of thing that one potentially investigates at trial if they are important.

24 I hear what you are saying, sir. We can do our best. What I am not sure we can do
25 is a counsel of perfection to be able to say –

26 **MR JUSTICE ROTH:** No, but what has happened is Connexity's legal team have

1 | been through the disclosure they have had. They have identified these 26 or so
2 | documents. That's far too many to go through in a minute way in a Tribunal hearing
3 | with everyone sitting here, but it's not too many to go through solicitors working on the
4 | case by any means. That's not a disproportionate number, given the totality of the
5 | documentation in this case, and they can respond, it seems to me, on each one saying,
6 | "We have looked at the link. Neither the base document nor the link are relevant,
7 | because ...", in a sentence why not, or "Indeed we think it might be relevant on
8 | reflection and here is the linked document". I think that's something you should be
9 | able to do reasonably quickly. So I think that's how I would like to deal with that.

10 | So you will give an answer to Connexity's solicitors on each of these identified
11 | documents. One of them I think - one moment. I do see, for example, in (y) on
12 | page 60 there is a document which I hadn't seen. It has a URL link and the document
13 | seems to also refer to something dealing with a penalty on one of the Connexity sites.
14 | So one can see why those advising Connexity think that might be potentially relevant,
15 | but without looking at the document which part of the document refers to that rate you
16 | can't possibly say whether it really is or not, but I think one has to go through that
17 | exercise and I think it is for Google's solicitors to do it.

18 | So you will get a proper answer, Mr O'Regan, to these questions.

19 | **MR O'REGAN:** I am grateful, sir.

20 | **MR JUSTICE ROTH:** Depending on that answer you will see whether you need to
21 | apply specifically. If you want to apply specifically, don't wait till the CMC in April.
22 | Issue an application which can either be dealt with on the papers and this applies to
23 | all the claimants or we can have a one hour hearing, probably a virtual hearing, to
24 | deal with any specific disclosure requests. In my experience and the experience of
25 | the Tribunal in these heavy cases, that is the way to make progress with disclosure
26 | and not to deal with it in sort of six monthly grand hearings.

1 **MR O'REGAN:** I am very grateful for that direction, sir. We are now, you will be
2 pleased to hear, at the last one, which is R15, page 64 or internal page 25 in hard
3 copy, sir.

4 **MR JUSTICE ROTH:** Some have been agreed I think by Google, haven't they?

5 **MR O'REGAN:** Some have been agreed.

6 **MR JUSTICE ROTH:** R21 and R22 have been agreed.

7 **MR O'REGAN:** The only one I need to detain the Tribunal further on today is R15, sir.
8 We have either dealt with all of the others in the hearing, before the hearing or they
9 have been deferred.

10 R15 is the quality of results from Froogle, Google Product Search and/or Google
11 Shopping. It would appear this information has already been disclosed to other parties
12 pursuant to your order of 16th May 2023, sir. We are simply seeking disclosure of
13 copies of similar documents for the same subject matter for the period of Connexity's
14 claim starting on 1st January 2008.

15 If you see in Google's response –

16 **MR JUSTICE ROTH:** You have the common disclosure which goes up to
17 31st December 2013.

18 **MR O'REGAN:** I will take instructions on that, sir.

19 Sir. I am grateful. The position seems to be somewhat unclear as to exactly what we
20 have received by way of common disclosure. It is not clear from Google's response
21 either as to whether or not it has yet been provided. I make no point on that beyond it
22 is just unclear. So I propose that we take that one back and check again what we
23 have and don't have by way of common disclosure on this point.

24 **MR JUSTICE ROTH:** Well, Google might be able to help on this because of what it
25 says in the sixth column.

26 **MR PICKFORD:** They do have this disclosure, sir.

1 **MR JUSTICE ROTH:** So they have got it for the period 1st January 2006 to
2 31st December 2013. Is that right?

3 **MR PICKFORD:** Yes. That's proportionate in relation to these products which are
4 precursor products in respect of which Connexity does not have any pleaded specific
5 claim. So they already have that. They haven't made out any justification for why they
6 need a much longer period to date certainly for Froogle and Product Search.

7 **MR JUSTICE ROTH:** There won't be anything for Froogle in the later period –

8 **MR PICKFORD:** Quite.

9 **MR JUSTICE ROTH:** or indeed Google Product Search, but there will be for Google
10 Shopping.

11 **MR PICKFORD:** Yes. By the time we get to Google Shopping that, of course, is
12 a paid service. So we understood that the reason for this, the original justification for
13 this disclosure was because the original service was not a paid service. It was simply
14 one that was based solely on Google's attempts to provide relevant searches without
15 receiving any payment for what appeared on the page. So there was a dispute, as
16 I understand it, then in relation to is that truly based on the relevance and the quality
17 of those documents - sorry the quality of those sites. So there has been disclosure
18 produced in relation to that.

19 By the time we have got to the Google Shopping era we are dealing with an auction
20 based website and it is not clear to us where this keys in to Connexity's claim. What
21 are the pleaded issues that they are seeking this disclosure for?

22 **MR JUSTICE ROTH:** Wasn't Google Shopping then, once it began operating in 2012,
23 the Google CSS in respect of which Google is said to have preferred its own product
24 over other comparison shopping sites. I thought that was Google Shopping.

25 **MR PICKFORD:** Yes, but in the period from 2013 onwards there we are in
26 a paid an auction world, not in a world that's purely focused on relevance without any

1 regard to what someone is willing to pay to appear.

2 **MR JUSTICE ROTH:** But it was still - the abuse did not come to an end at that point,
3 did it?

4 **MR PICKFORD:** No, sir. Our point is what's the issue in Connexity's claim that this
5 really goes to that will be elucidated by the disclosure that's being sought? We say
6 they have not sufficiently explained that and why they need something, given their
7 more limited claim, that's broader than what we have already provided for the other
8 claimants. This is a potentially a very large - from the period from 1st January 2008
9 to the date of the order it says "All documents presumably going to the quality of results
10 from Froogle, Google Product Search and/or Google Shopping".

11 **MR JUSTICE ROTH:** I am not looking at that wording so much, but looking it at the
12 Google comment in comment 6, where you say
13 it "was limited to any documents created, sent... by members of the EMG and two
14 individuals."

15 So one has that limitation, but was limited in time to the period up to
16 31st January 2013.

17 What I am thinking is whether it should go on on the same basis up to today and why
18 it should stop on 31st December 2013. I don't understand the significance of that date.

19 **MR PICKFORD:** Sir, one point here is that I think in relation to any documents relating
20 to the EMG we have only ever gone to 2018. From 2018 onwards we obviously have
21 a whole different set of disclosure and a new regime which is focusing about the
22 remedy.

23 **MR JUSTICE ROTH:** Let's say for the moment to the end of 2017. It's another four
24 years.

25 **MR PICKFORD:** We are content with that, sir.

26 **MR JUSTICE ROTH:** Yes.

1 **MR O'REGAN:** I am grateful, sir. That concludes our application you'll be very
2 pleased to hear, and everybody else, sir. (Inaudible) costs in the case.

3 **MR JUSTICE ROTH:** Costs in the case.

4 **MR O'REGAN:** Unless I can assist you further, sir.

5 **MR JUSTICE ROTH:** Can I just say for when any other applications are made in this
6 case just as regards documents different tribunals may have different preferences, but
7 as far as I am concerned, or so long as I am involved, I find it much more manageable
8 to have hard copies restricted to pleadings and witness statements I do work in hard
9 copy and to have all other documents electronically. It means then the witness
10 statements are effectively in one bundle instead of having to jump between about eight
11 bundles, and one can get the other documents much more quickly on the screen, and
12 operating in this way is really quite inconvenient. So I hope you will take that away for
13 any future hearings.

14 If you can agree and draw up between you the order in the two cases we are
15 concerned with, or one is a joint case I think, Mr Moser's clients, and then submit them
16 to the Tribunal.

17 Is there anything else from any of you? Right. That concludes this hearing.

18 **(3.33 pm)**

19 **(Hearing concluded)**

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