

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 21 June 2021

Before :

HHJ JOHNS QC

Sitting as a Judge of the High Court

Between :

- (1) KELKOO.COM (UK) LIMITED**
- (2) KELKOO SAS**
- (3) JAMPLANT LIMITED**
- (4) KELKOO INTERNET S.L.**
- (5) KELKOO AS**
- (6) KELKOO SRL**
- (7) KELKOO NETHERLANDS BV**
- (8) KELKOO AB**
- (9) KELKOO DEUTSCHLAND GmbH**
- (10) KELKOO DANMARK A/S**
- (11) JOLT LIMITED**

(collectively, “Kelkoo”)

Claimants

- and -

- (1) GOOGLE UK LIMITED**
- (2) GOOGLE IRELAND LIMITED**
- (3) GOOGLE LLC**

(collectively, “Google”)

Defendants

MR KIERON BEAL QC and **MS SARAH LOVE** (instructed by **Linklaters LLP**) for the
Claimants

MR MEREDITH PICKFORD QC and **MS LIGIA OSEPCIU** (instructed by **Herbert Smith
Freehills LLP**) for the **Defendants**

Hearing date: 9 June 2021

JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 2 pm on 21 June 2021.

HHJ JOHNS QC:

1. This is an application dated 24 February 2021 by Kelkoo to fix confidentiality arrangements for disclosure in these substantial competition law proceedings. There is now a significant measure of agreement about those arrangements. But the matters of difference are said by Kelkoo to be of considerable significance to its ability to participate effectively in the proceedings and to the ability of the public to understand the issues and follow the case.

2. By the proceedings, Kelkoo (which I use to refer to Kelkoo.com (UK) Limited with its other claimant group companies), a provider of online shopping comparison services, complains that Google (which I use to refer collectively to the three defendant companies: Google UK Limited, Google Ireland Limited and Google Inc) has breached competition law by unlawfully abusing a dominant position, causing Kelkoo very significant loss and damage. Kelkoo alleges that Google has been operating its well-known search engine of that name in ways which favour Google's own shopping comparison service while reducing the visibility of Kelkoo's service, and has been concluding advertising contracts on terms which disadvantage Kelkoo. The claim is said to be worth in excess of £1bn. All elements of the claim are disputed.

3. The application for a confidentiality order was triggered by Google's disclosure of two documents in redacted form. Those documents are the confidential versions of decisions of the European Commission adverse to Google, one under case number 39740 – Google Search (Shopping) dated 27 June 2017, and the other under case number 40411 – Google Search (AdSense) dated 20 March 2019. The decisions resulted in fines of 2.42 billion EUR and 1.49 billion EUR

respectively but are the subject of appeals. Kelkoo wants versions of these documents with less redaction; initially for the purpose of amending the Particulars of Claim. Both sides are now of the view that there should be a confidentiality order dealing with these and other documents to be disclosed. The agreed elements of that order provide for two confidentiality rings, namely an inner and an outer ring. The inner ring comprises external advisers but also Mr Stephen Thomas. He is Kelkoo's in-house counsel. Kelkoo's external advisers within the inner ring include Mr Ian Lurie, Kelkoo's independent technical expert. The outer ring includes several members of Kelkoo's senior personnel. A disclosing party may designate a document at the point of disclosure as inner ring or outer ring information, the receiving party may challenge that designation, and if the challenge is not accepted by the disclosing party, the receiving party may pursue the challenge by way of an application to court.

4. The differences between the two sides which I must resolve concern proposed modifications to that regime in respect of two categories of documents, and directions about redactions.
5. On the first of those, the proposals are Kelkoo's and can be summarised as follows. A disclosing party wishing to designate a document over 5 years old as inner ring information must provide to the outer ring at the time of disclosure a brief summary of the document and an explanation of why it is said to require designation as inner ring information. If the justification is not accepted by the receiving party, then in order for the disclosing party to maintain inner ring confidentiality it must apply to court within a short specified period to uphold

the designation; otherwise, the document becomes outer ring material. Similarly, a disclosing party wishing to designate a document over 10 years old as outer ring information must provide to the receiving party at the time of disclosure a brief summary of the document and an explanation of why it is said to require designation as outer ring information. If the justification is not accepted by the receiving party it is for the disclosing party to apply to court, again within a short specified period, to uphold the designation; otherwise, the document becomes generally disclosed material.

6. On the issue of redaction, Kelkoo proposes that for each of the documents disclosed into the rings, further redacted versions be prepared; namely, a fully redacted version removing all confidential material, and, for those documents containing inner ring information, another version redacted so as to be suitable for disclosure to the outer ring. Kelkoo further proposes detailed directions prohibiting certain redactions and requiring the disclosing party to justify others and to redact using a colour coding system.
7. Google opposes the proposed modifications. Its stance is that there should be no requirement on the disclosing party to give a written justification of its designation of a document when disclosing it and that it should be for the receiving party to apply to court to challenge the designation in respect of all documents. Google also resists the directions asked for by Kelkoo in relation to redactions. It proposes directions which give the receiving party a right to request a version of inner ring documents suitably redacted for circulation in the outer ring, such requests not to be unreasonably refused.

8. I heard argument at a one-day remote hearing. Mr Kieron Beal QC appeared with Ms Sarah Love for Kelkoo. Google appeared by Mr Meredith Pickford QC leading Ms Ligia Osepciu. I am grateful to them for their excellent submissions.
9. In arguing for the proposed modifications, Mr Beal relied heavily on the following statement of principle in the recent decision of the Court of Appeal in *OnePlus Technology (Shenzhen) Co Ltd v Mitsubishi Electric Corp* [2020] EWCA Civ 1562 at para.39(v): “*If an external eyes only tier is created for initial disclosure, the court should remember that the onus remains on the disclosing party throughout to justify that designation for the documents so designated: TQ Delta at [21] and [23]*”. He also placed particular reliance on the decision referred to in that statement, being *TQ Delta LLC v Zyxel Communications UK Ltd* [2018] EWHC 1515 (Ch), and a rebuttable presumption that documents over 5 years old have lost any confidentiality - see the decision of the Grand Chamber of the Court of Justice in Case C-162/15P *Evonik Degussa v Commission*, EU:C:2017:205, at paras 64-66. He emphasised that there is no universal form of order suitable for use in every case and argued that the proposed modifications were necessary here as Google was guilty of over-designating documents in other High Court proceedings, being *Infederation v Google*; referred to before me as the *Foundem* proceedings. He further submitted that other cases in which Google is involved mean Google is already having to do much of the work which would be required by the proposed modifications. And that any concern of Google as to the costs of the exercise dictated by the proposed modifications must be placed in the context of Google’s very substantial means and the apparent value of the litigation. In relation to the

directions for redactions, he likewise made the point that there is no universal order suitable for use in all cases and emphasised the importance of open justice.

10. Mr Pickford argued the unmodified form of order followed a form commonly used and that *OnePlus* had not changed the law so as to make such orders now inappropriate. It was right, he submitted, that the onus was ultimately on the disclosing party to justify designation of documents as inner or outer ring information but that there was and should be no requirement to justify that designation in writing at the outset. He emphasised the very sensitive nature of some of the documents likely to be disclosed in this case; in particular, those relating to Google's algorithms for its searches. Those were secrets essential to a hugely valuable business. He argued that Kelkoo's proposed modifications and the directions sought as to redactions would add an unnecessary and costly additional burden on Google in the disclosure exercise, and promote unnecessary satellite litigation by way of applications on the topic of designation. Any suggestion that Google had been too ready to designate documents as highly confidential in the *Foundem* litigation was, he made clear, strenuously denied.

11. As I turn to consider the issues, I make one preliminary observation. While Mr Beal is of course right that the principle of open justice is important so that trials should be conducted and judgments given in public where possible, my primary focus at this very early stage of the proceedings must be, as I think he accepted, on the principle of natural justice, so fairness to the parties in enabling them properly to participate in the proceedings.

12. I start by considering the proposed modifications summarised at paragraph 5 above, which Mr Beal referred to as the onus issue.

13. As Floyd LJ said in *OnePlus* at para.1:

“Documents disclosed in the course of litigation under the CPR to an opposing party may only be used by that party for the purposes of that litigation unless they are read to or by the court, or referred to, at a hearing which has been held in public, the court gives permission or the party who disclosed the document and the person to whom the document belongs agree: CPR 31.22(1). In the vast majority of cases, this rule gives adequate protection against misuse of disclosure documents. It is not uncommon in intellectual property and other types of litigation, however, for highly confidential documents to be subject to more restrictive measures designed to prevent the documents from entering the public domain or being used for collateral purposes.”

14. Those more restrictive measures often involve confidentiality rings. Lord Dyson, referring to intellectual property proceedings, said in *Al Rawi v The Security Service* [2011] UKSC 34 at para.64 that *“It is commonplace to deal with the issue of disclosure by establishing ‘confidentiality rings’ of persons who may see certain confidential material which is withheld from one or more of the parties at least in its initial stages. Such claims by their very nature raise special problems which require exceptional solutions.”*

15. For the principles to be applied when considering the imposition of such more restrictive measures, both sides pointed to the non-exhaustive summary given by Floyd LJ in *OnePlus* at paras.39 and 40:

“39. Drawing all this together, I would identify the following non-exhaustive list of points of importance from the authorities:

i) In managing the disclosure of highly confidential information in intellectual property litigation, the court must balance the interests of the receiving party in having the fullest possible access to relevant documents against the interests of the disclosing party, or third parties, in the preservation of their confidential commercial and technical information: Warner Lambert at page 356; Roussel at page 49.

ii) An arrangement under which an officer or employee of the receiving party gains no access at all to documents of importance at trial will be exceptionally rare, if indeed it can happen at all: Warner Lambert at page 360: Al Rawi at [64].

iii) There is no universal form of order suitable for use in every case, or even at every stage of the same case: Warner Lambert at page 358; Al-Rawi at [64]; IPCom 1 at [31(ii)].

iv) The court must be alert to the fact that restricting disclosure to external eyes only at any stage is exceptional: Roussel at [49]; Infederation at [42].

v) If an external eyes only tier is created for initial disclosure, the court should remember that the onus remains on the disclosing party throughout to justify that designation for the documents so designated: TQ Delta at [21] and [23];

vi) Different types of information may require different degrees of protection, according to their value and potential for misuse. The protection to be afforded to a secret process may be greater than the protection to be afforded to

commercial licences where the potential for misuse is less obvious: compare Warner Lambert and IPCom 1; see IPCom 2 at [47].

vii) Difficulties of policing misuse are also relevant: Warner Lambert at 360; Roussel at pages 51-2.

viii) The extent to which a party may be expected to contribute to the case based on a document is relevant: Warner Lambert at page 360.

ix) The role which the documents will play in the action is also a material consideration: Roussel at page 49; IPCom 1 at [31(ii)];

x) The structure and organisation of the receiving party is a factor which feeds into the way the confidential information has to be handled: IPCom 1 at [33].

40. To this I would add that the court must be alert to the misuse of the opportunity to designate documents as confidential. It remains the case that parties should not designate such material as AEO, even initially, unless they have satisfied themselves that there are solid grounds for establishing that restricting them in that way is necessary to protect their confidential content.”

16. I consider the parties were right to adopt that summary, notwithstanding that *OnePlus* was an intellectual property, rather than a competition law, case. Floyd LJ referred in *OnePlus* to *Foundem* as one of the illustrations of the principles discussed in *OnePlus*. The principles are not therefore exclusive to intellectual property cases. And in *Foundem*, Roth J said at para. 29 of his decision under neutral citation number [2020] EWHC 657 (Ch) that “*the special problems raised by intellectual property proceedings may, in my view, similarly apply to competition law proceedings where rival commercial interests are involved.*”

17. Mr Beal’s submission for Kelkoo was that the unmodified regime contended for by Google is “*clearly contrary to the findings of Floyd LJ in OnePlus*” (para.23 of Kelkoo’s skeleton argument). He referred in particular to the statement at para. 39(v) of *OnePlus* already quoted as being consistent only with a requirement that Google provide written justification for designation of the two 5-year and 10-year categories of documents when disclosing them.
18. I cannot accept that submission. I do not read *OnePlus* as laying down a requirement that a disclosing party must provide a written justification of its designation decision at the point of disclosure.
19. At para.36 of the decision, Floyd LJ made clear that he disagreed with Henry Carr J in *TQ Delta* to the extent that that judge was outlawing the approach adopted in *OnePlus*. That approach was described in para.11 of *OnePlus* as follows:

“11. At the same CMC, Mann J established a confidentiality regime for the disclosure. Under this regime the parties could designate documents to one of three levels of confidentiality:

 - i) *Attorney’s Eyes Only (“AEO”): the parties cannot see or give instructions on the documents, which are only made available to external representatives (lawyers and experts) in the AEO Club;*
 - ii) *Highly Confidential Material (“HCM”): documents may be seen by the HCM Club, which includes the AEO Club and up to two representatives of each party, whose identity must be previously agreed;*
 - iii) *“Ordinary disclosure materials” governed by the CPR disclosure rules”.*

20. That approach or regime included no requirement for written justification of the initial designation. Floyd LJ cannot have been intending, therefore, by his reference to onus in para.39(v) to require written justification of the designation at the disclosure stage. Rather, read in context, including the context provided by para.36, he seems to me to be underlining the principle that in the event of a challenge to the initial designation the burden is on the disclosing party to justify it.

21. That reading does not seem to me undermined by para.34 of *OnePlus* where Floyd LJ referred to “*prima facie highly confidential documents*” being first disclosed on an external eyes only basis. I understood Mr Beal to suggest, using this paragraph, that the regime in *OnePlus* did not offend the onus principle because the documents in that case were all *prima facie* highly confidential. But the overall regime set up by Mann J was not concerned only with documents which were *prima facie* highly confidential. It catered for the full range of disclosed documents and was on the basis that the disclosing party would make the initial designation, without any requirement for written justification at the point of disclosure.

22. That reading also fits with his treatment of Xiaomi’s appeal on the second ground. That second ground of appeal was that the judge reversed the burden of proof; requiring Xiaomi as the receiving party to demonstrate the AEO designation was not justified – see para.60. But the judge had reminded himself “*that it was ultimately for the respondents to justify their use of the AEO designation.*” – see para.47. Rejecting this ground of appeal, Floyd LJ referred to that reminder and held that “*The judge did not in any way relieve the*

respondents of the obligation to show that an AEO designation was justified.”

– para.104. Putting the onus on the disclosing party to justify a designation in the event of a challenge before the court was, it seems to me, seen as satisfying the principle expressed in para.39(v).

23. All this is consistent with Floyd LJ’s treatment at para.101 of the decision of the regime adopted by Mann J in *OnePlus*:

“The regime adopted in this case recognised that some, perhaps most, of the documents initially designated AEO were likely to end up being of no or of only peripheral relevance. By allowing lawyers and experts to have access to the documents in the AEO category, an initial filtering exercise was made possible so that the parties themselves could gain access to the documents on suitable terms as required. Such a staged approach to disclosure is, in my judgment, entirely appropriate and in accordance with principle.”

24. That endorsement is difficult to reconcile with any suggestion that Floyd LJ intended to require a different regime under which the disclosing party was obliged to give a written justification for designation at the point of disclosure.

25. Nor does *TQ Delta* mean, in my judgment, that I must include such a requirement in the confidentiality order in this case. Floyd LJ made clear in *OnePlus*, as I have said, that he disagreed with that decision to the extent it was prohibiting the regime adopted in *OnePlus* and which reflects the unmodified regime proposed in this case. Further, *TQ Delta* was addressing a different issue than the one before me. The issue there was whether there should be an external eyes only ring at all. But the need for an inner ring is agreed in this case. And

the inner ring in this case is not a true external eyes only ring as it includes Mr Thomas of Kelkoo.

26. In addition, the judge's concern in *TQ Delta* seems to me to have been with the position at trial – see paras. 15 and 24 of the decision. I make it clear my decision is saying nothing about the treatment of documents for trial in this case. Different considerations will apply to different stages of the case. That is reflected in the way the quotation I have already given from Lord Dyson continues in *Al Rawi*: “*I am not aware of a case in which a court has approved a trial of such a case proceeding in circumstances where one party was denied access to evidence which was being relied on at the trial by the other party*”. And in the summary of principles in *OnePlus* at 39(iii): “*There is no universal form of order suitable for use in every case, or even at every stage of the same case.*”
27. There is then, in my judgment, no requirement laid down in *OnePlus* or otherwise for a written justification of designation at the point of disclosure.
28. Is such a requirement together with Kelkoo's other proposed modifications nevertheless the right course in the circumstances of this case? In my judgment, it is not. My reasons for that conclusion are these.
29. First, it is right that there is no universal form of order suitable for use in every case. But I do not see anything in this case to suggest that the proposed inner ring will not work as an initial filter in the way described by Floyd LJ at para. 101 of *OnePlus* so that there can be either agreed redesignation or redesignation following a challenge where appropriate. No particular feature of this case or of Kelkoo was identified which means that will not work to enable proper

participation by Kelkoo in the proceedings. Mr Beal emphasised that there will be material with a lot of technical detail relating to the operation of Google's website. But the inner ring includes Kelkoo's technical expert. And the agreed elements of the order are on the premise that the inner ring filter will work for documents less than 5 years old. The position as to workability is all the clearer in the case of 10-year old documents designated into the outer ring. That ring includes several of Kelkoo's key personnel.

30. Mr Beal pointed to a letter dated 21 May 2021 from Hausfeld LLP, acting for Google's opponents in the *Foundem* case, in an attempt to show that Google had taken an "overly broad" approach to confidentiality designations, causing prejudice to the other side. But I also have an answering letter from Bristows LLP dated 28 May 2021, solicitors for Google in those proceedings, hotly disputing that suggestion. I cannot resolve that dispute in those different proceedings on this application. There is no finding by Roth J in *Foundem* that Google has acted as alleged. In his decision under neutral citation number [2020] EWHC 657 (Ch) he noted allegations of this type but expressly did not reach any conclusion on them, instead confining himself to general observations:

"56. Ms Ford made strong complaint about what she asserted were excessive and unreasonable claims of confidentiality made by Google, through its solicitors, which were then progressively reduced in response to requests and protests by Foundem. Mr Turner vigorously rejected any suggestion that Google or its advisors had behaved improperly and pointed out that Foundem,

for its part, had made extensive designations of confidentiality in its own disclosure.

57. It is neither necessary nor appropriate for me to comment in this judgment on the particular conduct of the parties in this case and, quite rightly, I was not taken through all the correspondence in which these matters were contested. However, I find that there is an increasing tendency for excessive confidentiality claims to be asserted over documents and information in competition law proceedings, only for those claims to be curtailed or renounced in response to protests from the other side or intervention by the court. It is my understanding that the same is the case in intellectual property proceedings. This is wasteful of time and costs, and it is not the way modern litigation should be conducted.”

31. That apparent general tendency referred to by Roth J is not sufficient, in my judgment, to warrant the proposed modifications in this case, particularly given the further factors I now go on to identify.
32. Second, the likely dynamic which Kelkoo’s proposals will set up seems to me to be this. Where the issue of designation is open to argument, Kelkoo may at least wish to reserve its position and so not immediately accept the designation of a document. There will then be a very strong incentive on Google to make an application to the court whatever the relevance of the document ultimately in the case. That is because Google will not of course wish wider disclosure of documents it considers highly commercially sensitive, which wider disclosure will flow if it does not make the application. There will therefore be confidentiality contests over documents which may not ultimately matter to the case.

33. I do not accept the suggestion made for Kelkoo that all the inner ring information will necessarily be at the core of this case. Confidentiality is not relevance. Mr Pickford gave to my mind a good illustration of the difference. A document may reveal information concerning a secret algorithm which Kelkoo is able to accept in the course of the proceedings did not operate so as to harm Kelkoo so that the document ends up being of no relevance. But it will remain extremely commercially sensitive.
34. The unmodified version of the order, being that contended for by Google, and which reflects orders made in other competition cases (I was shown the order of Roth J as President of the Competition Appeal Tribunal in the CAT case no. 1284/5/7/18 *Royal Mail Group Limited v DAF Trucks Limited* as an example), has the benefit, as I see it, of not promoting unnecessary confidentiality contests in that way. It was submitted for Kelkoo that its proposals were born of a concern to avoid becoming embroiled in a series of expensive and time-consuming skirmishes relating to disclosure. I agree with and share the concern. But I am persuaded it is best met by rejecting Kelkoo's proposals.
35. Third, it is plain to me that the modifications will add significantly to the costs of the disclosure exercise. It is true that properly considered decisions as to designation should be taken by Google (see para.40 of *OnePlus*). But the exercise of offering a written summary of each and every document affected by the proposed modifications together with a written reasoned justification for its designation is a very significant extra burden. And there may well be very many documents affected by the proposed modifications. In that regard, this claim has been on foot since 2015, it relates to events going back to 2005, and Mr Beal

emphasised the drop off in Kelkoo's visibility on Google's site from 2011. The bulk of the disclosure can therefore be expected to be from more than 10 years and certainly more than 5 years ago. While not all, of course, or even the majority of it will be designated by Google as inner ring information, it is plain from the evidence and argument before me that Google considers there will be a significant amount of documentation so designated. The evidence of Mr Wisking of Herbert Smith Freehills for Google is that "*the details of (and in certain cases the names of) Google's general search algorithms still in use today but first implemented more than five (and indeed, in certain cases, ten) years ago, remain of significant commercial sensitivity to Google, and disclosure of that material other than subject to the protection of the External Adviser Only Confidentiality Ring would cause serious harm to Google's legitimate business interests.*" (para.32.2 of his first witness statement).

36. The blanket requirements in the proposed modifications mean that Google will be put to the effort and expense of a written justification even for documents where the designation can be accepted as obvious and so no justification would ever have been called for. It will likewise be put to the effort and expense of justifying the designation of and summarising documents which end up being of no or only peripheral relevance. Under the unmodified proposed order, there can be correspondence between the parties targeted to those documents whose designation is properly questionable and applications confined to documents for which the correspondence does not meet Kelkoo's concerns and which are or appear to be of real significance to the case.

37. I should add I am not satisfied that, as Kelkoo sought to suggest, Google has done much of the work already by reason of other proceedings or investigations. While there may be some overlap in relevant documentation between this case and others, I am unable to determine the extent of that overlap. And even where documents have already been considered in other cases, the exercise which it is sought to impose on Google in this case is not one which it has had to comply with in another case.
38. Finally on this topic, I do not ignore that Google is a party of substantial means or that this litigation is said to be of very high value. But neither point takes the case outside the scope of the overriding objective. That objective includes “*saving expense*”- see CPR 1.1(2)(b). The costs implications of steps must therefore be considered even in high value litigation between substantial parties.
39. Fourth, I am making an order at a very early stage of this case, despite the proceedings having been on foot since 2015. The statement of case which will set out the claim in the light of the European Commission decisions, namely the Amended Particulars of Claim, is not yet in existence. There has been no order for disclosure or other case management. And any trial is distant; it would happen only following the conclusion of the appeals process from the European Commission decisions, so after a decision of the Court of Justice of the European Union.
40. I am particularly reluctant to make an order incorporating these modifications when the very early stage of proceedings means I can have very little feel for what documents are likely to be affected by the confidentiality order. In that regard, the only documents in sharp focus, being those sparking the application,

are the two European Commission decisions. Those are each less than 5 years old and so will not engage the proposed modifications at all. Beyond that, while it seems clear that there will be documents relating to Google's algorithms used in producing and ordering search results, which have obvious potential to be very highly confidential, being hugely commercially sensitive, there is not much more that can be said at this stage. The factors relevant to the exercise of determining the terms of confidentiality arrangements include the nature of the confidential information and the importance of it to the issues in the case – see *Libyan Investment Authority v Societe Generale SA* [2015] EWHC 550 (Comm) at para.34. I have little by way of detail as to such factors at this early stage.

41. Given that, and as I indicated in argument, it seems to me there should be an express permission to apply in my order; recognising that once there are amended pleadings, there has been some case management, and disclosure is underway and it can be seen what documents are going into the confidentiality rings, the Court may well wish to vary the arrangements.
42. That the question of what the right arrangements are is very much affected by the stage proceedings have reached and the stance of the parties on evidence is illustrated by the decision of Roth J I have already referred to in *Foundem*. His decision included this:

“54. Contrary to the submissions of Ms Ford, I do not think it is appropriate at this stage to address the position for the rest of the action and as regards the more extensive disclosure that Google may have to provide in the future. For the reasons explained above, trial is still a long way off and disclosure is far from complete. The shape of these proceedings may change significantly. If

Google now abandons reliance on the technical evidence relating to LEO/RLEO documents for its pending application and that application should succeed, then the stand-alone claims drop out of the action and it seems likely that many of those documents will no longer be relevant. Further, the outcome of Google's appeal in the EU Courts may have a substantial effect on the future of the action. If Google's strike out application fails, then the Court will then have an opportunity to address the future conduct of the proceedings and the need to protect confidentiality going forward."

43. Fifth, from the little that is known about the material which may engage the proposed modifications, I am concerned that there may be very sensitive material indeed, namely relating to Google's algorithms (which have been called its crown jewels), at risk of being revealed beyond the inner ring by default. The proposed modifications could mean that through some procedural fault or oversight, such as Google omitting an adequate explanation for inner ring designation or missing the deadline for an application to court, key commercial secrets are revealed.
44. Sixth, Mr Beal also drew attention to what Roth J referred to in *Foundem* at para.59 as "*the guidance as to the likely extent of justifiable confidentiality given by the EU Courts: e.g. see the judgment of the Grand Chamber of the Court of Justice in Case C-162/15P Evonik Degussa v Commission, EU:C:2017:205, at paras 64-66 (rebuttable presumption that documents at least five years old have lost their secret or confidential nature)*". That rebuttable presumption will be one of the obstacles which Google will need to overcome in discharging the burden on it, in the event of a challenge to inner ring designation of documents

over 5 years old, to show that the document justifies being restricted by way of disclosure to the inner ring. But I do not see it as requiring the modifications sought, particularly in circumstances where it is already apparent that there are documents likely to be disclosed in this litigation which are confidential despite their age. In that regard, in the *Foundem* decision, Roth J was dealing with an application to admit an expert to a restricted legal eyes only or RLEO ring as well as a legal eyes only or LEO ring. Roth J decided to order admission of an expert to the RLEO and LEO rings unless Google renounced reliance on certain evidence for the purposes of its strike out or summary judgment application. As in this case before me, many of the claims in that case centre on the operation and effect of Google's complex search algorithms and so there are documents of a highly technical nature. One of the matters to which Roth J had regard in arriving at his decision was that the RLEO material relating to Google's algorithms remained highly confidential "*despite the lapse of time*" (para.45(b)).

45. Still less are the modifications required by a consideration of orders made in the United States. I was shown an order of The United States District Court for the District of Columbia in proceedings defended by Google which includes a definition of highly confidential material incorporating a presumption against protection for material more than 3 years old. But the definition also includes the important proviso that "*such material may be considered highly confidential information if it discloses current or future business practices or competitive strategies*".

46. Further, neither the European nor the US presumptions fit with the proposals very well. Documents over 5 years old would still only go as far as the outer ring, which is also for confidential documents, despite the European presumption being one that the document lacks confidentiality. And there is no requirement proposed in the draft order to justify inner ring designation of documents which are less than 5 years old despite there being no presumption that documents of such an age are confidential, still less highly confidential. Further, the presumptions do not include any different treatment for documents over 10 years old, unlike Kelkoo's proposals.
47. While Mr Pickford also criticised Kelkoo's proposals as failing to deal with information confidential to third parties and I was concerned about that lack, I do not rest my rejection of Kelkoo's proposals on that ground. It may be that, as Mr Beal submitted, the failure could be addressed by a revision to the proposal and I was sent, after the hearing, a suggested revision.
48. But for the reasons I have given, even if concerns about third party confidentiality could be met by a revision to the proposed modifications, the modifications do not represent the right course at least at this stage of the proceedings.
49. I move to the redaction directions proposed by Kelkoo. For all inner ring documents, the proposal is for the provision by Google of two further versions of such documents. One redacted so as to be suitable for circulation in the outer confidentiality ring. And another more heavily redacted so as to be a generally disclosed document. There are also proposed directions setting out in detail categories of information which cannot be redacted in the version prepared for

the outer ring, and setting out different categories of information which may be redacted but must be redacted using a different colour depending on category and be accompanied by a written explanation of the reasons for redaction.

50. Again, while acknowledging that there is no universal order suitable for every case, this proposal is not, in my judgment, the right order in this case at this stage.
51. The creation of versions of documents that can be deployed in court at a public trial will be something that must be considered in due course in this case. But I do not see that as justifying the creation now of redacted versions of documents which may never be deployed. On this application, I am concerned, as I have said, with confidentiality arrangements at a very early stage of the proceedings.
52. As to the production of versions of documents which can be viewed by the outer ring, that seems to me properly catered for by Google's suggestion of an order that gives the receiving party a right to request a version of inner ring documents suitably redacted for circulation in the outer ring, such requests not to be unreasonably refused. Certainly in the current absence of any real focus on what documents will be going into the inner ring, to require such a version of every document whatever its ultimate relevance and to give detailed directions as to what redactions may be made and how they must be made, seems to me to be the wrong course. It would be to put the parties into a costly straitjacket.
53. I do not ignore that colour coding schemes have been used in other cases and that there has been some colour coding in this case. Under cover of a letter dated 21 October 2020 from Herbert Smith Freehills to Linklaters, Google's solicitors provided a redacted version of one of the European Commission decisions

which employed colour coding. Google confidential information was redacted in blue, third party information in orange, and joint information in yellow. But these are different exercises from that now proposed in this case. That proposal does not represent the right course for the reasons I have given.

54. It follows from all that I have said that I decide the areas of difference in Google's favour. I will accordingly make a confidentiality order in terms reflecting the agreed provisions and incorporating Google's suggestion as to redactions but without adopting Kelkoo's proposed modifications or detailed directions dealing with redactions. There will be an express permission to apply. I ask counsel to agree a form of order which gives effect to my decisions.