



### **Case management of confidentiality rings in competition cases: *Foundem* (in 1000 words)**

Confidentiality rings (or ‘clubs’) are arrangements between litigants which are designed to protect sensitive confidential information revealed during the disclosure process.

The aim of a club is to “protect both the legitimate interests of the party seeking disclosure to ensure that all relevant materials potentially influential on the result of the case are before the court and, to the extent that it may be proportionate, the legitimate interests of the confidence asserted” (see Clarke J in *Telefonica O2 Ireland Limited v. Commission for Communications Regulation* [2011] IEHC 265).

Sanctioned (or made) by orders of the court, they are increasingly becoming areas of trench warfare.

The judgment of Roth J in *Infederation Limited v. Google LLC* (“*Foundem*”) (18 March 2020, High Ct, London) provides an excellent survey of the authorities in this area since *Al Rawi*, an ‘ordinary’ civil claim for damages decided in 2011.

The judge explains the guiding principles which are applied to these arrangements (derived from patent cases), and gives detailed assistance as to (i) the basis for the admission of an expert to a confidentiality ring and (ii) the professional requirements of solicitors. He also shows the active role which a judge is willing to take in their management.

In this context the words of a recent Irish Court of Appeal judgment are apposite: “the court needed to avoid creating an unfair and undesirable situation in which a plaintiff would walk away from the proceedings with a legal loss but a commercial win because it would have gained access to what is most valuable, thereby acquiring a competitive advantage that it would never otherwise have obtained” (*Goode Cement v. CRH Plc* [2020] IECA 55, 19 February 2020 [para.136], citing the trial judge).

#### Narrative

*Foundem* operates an on-line comparison website. It complained that by various means Google applied algorithmic penalties or discriminated against its site, whilst unjustifiably favouring its own comparison site. Google thereby abused its dominant position.

The Court had made orders setting up three separate confidentiality rings to give effect to the parties’ agreements, namely a confidentiality ring to which the founders of the claimant had access, an ‘LEO’ ring (an ‘external eyes only’ ring) and a yet more restricted inner ring, ‘RLEO’. The claimant wanted to get an expert admitted to the two external eyes-only rings. Google had applied to strike out much of the claim.

Questions for the court were: (1) is there a difference in the approach of the Court between the disclosure (inspection) stage and final disposal (trial), (2) what should the approach of the Court be to an application to strike out (i.e. is this an interim or a trial stage), (3) to what

extent should an expert be prevented from access to confidential material if that expert has business interests, (4) do parties unreasonably make unjustified claims to special forms of confidentiality, (5) what are the duties of solicitors?

The fact that the Court went on to make its own proposals as to an alternative way forward, involving the removal of paragraphs from the Defendant's witness statements, was at least as interesting as the formal decisions of the Court.

### Summary

The 'headline' answers are as follows:

- (1) Save for exceptional circumstances (for instance where confidential material relates to third parties who are competitors), the notion that a confidentiality arrangement should have the result that the parties themselves cannot see material used at a final hearing is one which is inimical to natural justice; a more 'relaxed' approach is appropriate during disclosure and inspection;
- (2) An application to strike out may finally dispose of proceedings and may be treated as a final disposal;
- (3) On the giving of an appropriate undertaking to the Court, and in the correct circumstances, an expert will ordinarily be admitted to an 'external eyes only' confidentiality ring where this is likely to ensure a fair disclosure process. Should any information be obtained from the disclosed documents which may be of commercial advantage to the expert, then the consequences are ones which the expert must face in respect of his / her own future ethical position. The Court must acknowledge that an independent expert may become involved in 'collateral commercial activities'. (The definition "trade witness" is one which should not be applied to an independent witness.)
- (4) There is undoubtedly an increasing tendency for excessive confidentiality claims to be asserted over documents, only for those claims to be curtailed or renounced in response to protests from the other side or intervention by the Court [para.57].
- (5) There is no difference in principle between the ambit of a solicitor's duty in (a) the conduct and supervision of disclosure, (b) the redaction of disclosable documents and (c) advice as to a claim to confidentiality.

### Additional

The judge decided that the claimant's expert should be admitted to the two external eyes only confidentiality rings. It was necessary in order fully to comprehend the evidence submitted by Google.

The judge also volunteered that an alternative course was available to Google, should certain limited parts of its evidence be withdrawn. If that were Google's position, then the expert would not be admitted to the two inner rings. He gave Google time to consider before making his final order.

### Principle cases

C-162/15P *Evonik Degussa v Commission*, EU:C:2017:205 (rebuttable presumption that documents at least five years old have lost their secret or confidential nature)

*Roussel Uclaf v Imperial Chemical Industries plc* [1990] RPC 45 (confidentiality procedures and the disclosure process; the relevance of potential ‘collateral commercial activities’ of an expert)

*Al Rawi v Security Services* [2011] UKSC 34 (‘closed material’ and principles of natural justice)

*CMCS Common Market Commercial Services AVV v Taylor* [2011] EWHC 324 (Ch) (solicitor’s duties in respect of disclosure and redaction)

*Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2017] EWHC 711 (Pat) (confidentiality and the commercial interests of third parties)

*TQ Delta llc v Zyxel Communications UK Ltd* [2018] EWHC 1515 (Ch) (‘external eyes only’ procedures in relation to documents: their exception nature, blanket exclusion, redactions and specific documents)

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