



Neutral Citation Number: **[2021] EWHC 3295 (Pat)**

Case No: HP-2016-000018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (CH D)
PATENTS COURT

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

Date: 6th December 2021

Before :

THE HON MR JUSTICE MELLOR

Between :

(1) **ANAN KASEI CO. LTD**

(2) **RHODIA OPERATIONS S.A.S**

- and -

(1) **NEO CHEMICALS & OXIDES (EUROPE) LTD**

(2) **NEO PERFORMANCE MATERIALS, INC.**

(3) **NEO CAYMAN HOLDINGS LTD**

Tom Mitcheson QC and Miles Copeland (instructed by **Hogan Lovells International LLP**) for the
Claimants

Hugo Cuddigan QC and Adam Gamsa (instructed by **Bird & Bird LLP**) for the **Defendants**

Party B provided written representations from **Baker & Mackenzie LLP**

Hearing date: 29th November 2021, further brief written submissions and decision on 30th November,
draft Judgment distributed 2nd December 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this
Judgment and that copies of this version as handed down may be treated as authentic.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be Monday 6th December 2021 at 10am.

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THE HON MR JUSTICE MELLOR

Mr Justice Mellor:

Introduction

1.

This is the second instalment of an ongoing dispute as to confidentiality which is concerned with what highly confidential material should be disclosed to a representative or representatives from the Defendants ('Neo') so as to ensure that Neo (via the chosen representative(s)) are able to participate in a meaningful way in the lead up to and in the trial of the inquiry as to damages that is due to start in late January 2022.

2.

I heard argument on Monday 29th November and received further submissions in writing on the morning of Tuesday 30th November 2021. Because time was short, I provided my decision in writing to the parties at around lunchtime on that Tuesday, which included a reset timetable down to the start of trial. In the event, my decision on confidentiality is somewhat complicated, as I shall explain in this judgment.

3.

The first instalment is detailed in my previous judgment from 22nd October 2021 [[2021\] EWHC 2825 \(Pat\)](#)], delivered following the previous hearing which took place on 8th October 2021, and provides important background.

4.

However, rather than include many cross-references to paragraphs in my previous judgment, I think it better to make this judgment reasonably self-contained, not least because certain matters I related in that previous judgment need to be updated in the light of (a) the further progress in the inquiry and (b) additional information which I have identified in the course of this application, having had the benefit of the weekend before this hearing to read more fully into the materials. For this reason, some passages in this judgment are copied or adapted from my previous judgment.

Summary of events since the previous hearing

5.

In broad outline, the parties exchanged their evidence of fact on the inquiry on 26th October 2021, and CEA Notices on 8th November. Expert's reports in chief were due to be served on 19th November 2021. On that day, Rhodia offered their expert report for exchange but Neo did not, the reason stemming from the confidentiality of information contained in two of Rhodia's witness statements and other information contained in Neo's expert's report.

6.

The two Rhodia witness statements in question are from Dr Rohe and Dr Richards. Each contains a considerable amount of information designated EEO. Although neither I nor Rhodia have seen Neo's expert report, I have no doubt that it will contain a lot of information currently designated EEO.

7.

So, on 19th November 2021, the solicitors for Neo wrote explaining they were not in a position to serve the expert report because Neo's COO, Mr Kevin Morris, was not able to approve the report for service. On the same day, Neo issued an application seeking an extension of time of 5 days following the hearing of their application to have all EEO information disclosed to Mr Morris. In due course, Rhodia issued their own application which was concerned with various complaints about Neo's disclosure. Only one point on Rhodia's application remained to be argued at the hearing on 29th November and in the event, the point was resolved through Neo giving an undertaking to elect within 7 days its position on the relevance (if any) of the manufacturing process(es) used to manufacture the development samples. Accordingly, nothing more needs to be said on Rhodia's application.

8.

Although, on Neo's application, it was readily apparent that the key issue was what material should be disclosed to Mr Morris and on what terms, Mr Cuddigan QC for Neo insisted on arguing that the witness statements of Dr Rohe and Dr Richards had not been validly served because they were served in a form which Neo's solicitors could not show to Neo, that Rhodia had not applied for an extension of time nor relief from sanctions and therefore Rhodia could not rely on those witness statements at the trial of the inquiry.

9.

At all material times throughout this action, Bird & Bird LLP have remained on the record as the solicitors for Neo and, in accordance with [CPR 6.23\(1\)](#), Neo gave the address of Bird & Bird LLP as the address at which Neo may be served with documents relating to this action. Accordingly, any documents to be served on Neo have been and are served on Bird & Bird LLP. Certainly, many documents have been served on Bird & Bird LLP in this action containing confidential information which could not (at the time of service) be shown in unredacted form to anyone at Neo, yet without complaint until now. There is no exception to [CPR 6.23](#) which disqualifies service of documents which contain confidential information which cannot be shown to the client. Mr Cuddigan's argument was a bad point.

10.

Mr Cuddigan also argued that it was not open to Rhodia to argue about disclosure to Mr Morris because Rhodia had no application before the Court to establish a confidentiality regime for witness statements, experts reports or the trial and because the onus was on Rhodia to justify any confidentiality regime. The last point is uncontroversial: the earlier point is, in my view, misconceived. Confidentiality regimes (and this case is no exception) apply to specified information, whether it is contained in a document, in a witness statement, in an expert's report or in a trial bundle. It is therefore not necessary to establish a separate regime for each stage of an action, although it is necessary to pay attention to [CPR 31.22](#) whenever material which is alleged to be confidential is deployed at a hearing.

11.

With those points out of the way, I can turn to the principal issue which is, as I have indicated, whether all the information currently designated EEO should be disclosed to Mr Kevin Morris, as Neo contend.

12.

On this, Mr Cuddigan sought to establish the following points from the authorities:

(a)

That there was a distinction in principle between the types of confidentiality regime which the Court can order at an interim stage and the types of confidentiality regime which should be applied at trial.

(b)

That the judgment of David Richards J in *McKillen v Misland* [2012] EWHC 1158 (Ch) ('McKillen') established that (a) the Court had no jurisdiction to deny a party access to the evidence at trial or (b) that any such jurisdiction was so exceptional to be of largely theoretical interest only. I will refer to this as the 'no jurisdiction' contention.

(c)

That it was only if I rejected both those propositions that reference could be made to the competing interests (i.e. of Rhodia, Neo and Party B).

13.

It is relevant also to record some other important aspects of the position taken by Neo:

(a)

First, that Neo is a small lean organisation such that there is no person other than Mr Kevin Morris who is suitable to have access to the EEO information in this inquiry.

(b)

Second, that no conditions should be imposed in an attempt to preserve the confidentiality of the EEO material or prevent its misuse (whether deliberate or inadvertent) other than the undertakings already offered by Mr Morris.

(c)

Third, that despite the advice contained in paragraph 57 of my previous judgment (where I acknowledged that I had put in place an interim solution and the matter would be likely to have to be reconsidered), the advice being that 'Neo's team would be well advised to bring concrete examples of the difficulties being experienced and proposals to limit the quantity of information which they wish to be disclosed to Mr Morris (or possibly some other representative of Neo)', Neo produced no proposals to limit the quantity of information for disclosure to Mr Morris, nor did they nominate any other possible candidate. In other words, Neo are insisting that Mr Morris should have access to all the EEO information disclosed in this case - and apparently without regard to the relevance or importance of the information for the trial of this inquiry. I will refer to this as the 'all EEO' contention.

14.

Finally, by way of setting the scene, it is relevant to have in mind the nature of the information in question. In this regard, I repeat paragraphs 32-40 of my previous judgment. The observations I made in those paragraphs continue to apply. Indeed, my further review of the EEO materials for this hearing reinforced those considerations, although, as will be seen later, I accept the general point that the protection required for particular information may reduce over time. I return to these points below.

15.

From the above, it follows that Neo presented an unyielding position to the Court, in the respects I have indicated. Nonetheless, in response to a request from me during the hearing (which raised the possibility of the addition of a negotiating time bar) at the conclusion of the hearing, Neo offered a further undertaking from Mr Morris in these terms:

'For six months from trial [to take place in January 2022] not to have any involvement (either directly or indirectly) in commercial negotiations or discussions with Party B relating to high surface area cerium oxide products or any substitute for such products in diesel applications'

16.

This further undertaking was not acceptable either to Rhodia or Party B. Rhodia's counter-proposal ended up suggesting Mr Morris should be required to provide two additional undertakings but subject to two qualifications:

(1) For the avoidance of doubt, I confirm I will not play any part in discussions or decisions relating to: (i) the setting of the price of high surface area cerium oxide products or any substitute for such products for use in diesel catalyst engines either alone or as part of a portfolio of products; (ii) the allocation of manufacturing capacity for such products, or the time within which such products are to be supplied from the date of the request for supply. [It will be noted this first undertaking is that proposed in KM-1, paragraph 1(v) and recited in [19] of my previous judgment].

(2) I will not play any part in discussions or decisions relating to the setting of the price of mixed oxide products.

(3) The undertakings in paragraphs 1 and 2 shall cease to have effect 5 years from the end of the trial in the damages inquiry in this matter.

(4) The activities restricted in paragraphs 1 and 2 are activities involving Party B.

17.

Party B submitted that a six-month period would be commercially inadequate, having regard to the timescales over which these contracts are negotiated and operate. It supported Rhodia's initial counterproposal of an undertaking with no time limit but, recognising that I was interested in a suitable time limit, commented that it was its experience that predicting volume requirements beyond a 5-year period can be difficult although price data remains relevant beyond that.

18.

With that introduction, I can turn to consider Neo's submissions on the law, as summarised in paragraph 12 above.

The Law

19.

In my view, it is possible to deal with Neo's contentions at three levels, but I will deal with all three levels in view of the arguments put to me.

20.

At the first level, I fully accept the two features of a common law trial which the Supreme Court identified in Al-Rawi as fundamental to our system of justice - the open justice principle and the principle of natural justice - see Lord Dyson at [10]-[13]. I referred directly to these two principles in a judgment I delivered the working day before this hearing: see *Interdigital v Lenovo* [2021] EWHC 3192 (Pat) at [15]. *Interdigital* is a case where the financial terms contained in various comparable patent licence agreements are highly confidential to *Interdigital* and to the respective licensee, some of whom competed directly with and/or had or would have their own negotiations with *Lenovo* over patent licenses. As I said at [17.4]:

“...I need to keep in mind that at least some of IDC’s counterparties may have licences with Lenovo or may seek to negotiate such licences in the future or, indeed, they may have such negotiations ongoing at the moment. I am reminded that I need to be astute to avoid Lenovo obtaining an unfair advantage in any such negotiations via disclosure in this action, albeit those concerns need to be balanced against the requirements for Lenovo to be able to have meaningful participation in this important FRAND trial.”

21.

In Interdigital, with the assistance of the parties, I established a new confidentiality tier because I concluded it was essential to allow Lenovo (via two representatives) to be able to participate in a meaningful way in the lead up to and during the FRAND trial – see [19] – but on the conditions I imposed to protect the highly confidential information at [22] and [25].

22.

Accordingly, at this first level, it could be sufficient to apply the balance which I indicated in Interdigital, namely, that provided sufficient protection was put in place to prevent [Neo] obtaining an unfair advantage from the disclosure of the EEO information to [Mr Morris and/or some other representative], Neo must be able to have meaningful participation in the lead up and during the trial of this inquiry.

23.

Second, a further answer to Neo’s related unyielding contentions of (a) ‘no jurisdiction’ and (b) ‘all EEO’ is provided in the summary of the principles provided by Floyd LJ in *Oneplus v Mitsubishi* [\[2020\] EWCA Civ 1562](#) at [39]-[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]; ICom 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 ICom 1; see ICom 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.

24.

As before, Neo placed particular emphasis on sub-paragraphs ii), viii), ix) & x). For that reason, I was also referred to and I have had regard to the citations in earlier paragraphs which support those sub-paragraphs, especially [29], [30], [33] & [35].

25.

Although all of those principles are important, in addressing Neo's contentions I draw attention to the particular passages which I have underlined in the above quote. The principles clearly identify a balance (principle (i)) is to be struck, and that the balance may differ, depending on the importance of any particular document to the issues at trial, the extent to which a party may be expected to contribute to the case based on a document, and of course, what protections may be appropriate to put in place to preserve confidentiality and to avoid misuse (either deliberate or inadvertent). Again, to my mind, the Oneplus summary points to the need for the Court to strike an appropriate balance.

26.

At the third level, I must address the detail of the argument Mr Cuddigan presented and the answers to that argument. The starting point is the two features of a common law trial which the Supreme Court identified in Al-Rawi as fundamental to our system of justice - the open justice principle and the principle of natural justice - see Lord Dyson at [10]-[13], which, as I said earlier, I entirely accept.

27.

I also accept Mr Cuddigan's submission that these principles are enshrined (at least in one form) in the Overriding Objective where it refers ([CPR 1.1\(a\)](#)) to 'ensuring that the parties are on an equal footing and can participate fully in proceedings and that parties and witnesses can give their best evidence;'.

28.

Mr Cuddigan also relied on the mandatory provisions of The [Trade Secrets \(Enforcement, etc.\) Regulations 2018](#). He drew my attention to Regulation 10(5) and (6). Regulation 10 is concerned with the preservation of confidentiality of trade secrets in the course of proceedings. It is necessary to have regard to the whole of Regulation 10, but 10(4) and 10(7) in particular in addition to 10(5) and (6). Regulation 10(5)(a) & (b) give the Court power to restrict access to documents containing a trade secret or hearings when trade secrets may be disclosed to a limited number of persons. Regulation 10(6) then provides that

'The number of persons referred to in paragraph 5(a) or (b) must be no greater than necessary to ensure compliance with the right of the parties to the legal proceedings to an effective remedy and to a fair trial, and must include, at least, one individual from each party and the lawyers or other representatives of those parties to the proceedings.' (emphasis added).

29.

Mr Cuddigan submitted that these provisions support his contentions. However, regulation 10(7) clearly points to the Court undertaking a balancing exercise which can include the interests of third parties (such as Party B) in addition to the interests of the parties to the litigation. In my view, these regulations reflect the existing position on the authorities and do not support a hardline view.

30.

As regards the position at a trial, it is necessary to have regard to Lord Dyson in *Al-Rawi* at [64], but this can conveniently be done by citing from *McKillen*, since Mr Cuddigan relied on the following passages from the latter case:

"39. Not only does Mr. McKillen apply for the hearing to be in private, but it was until the letter yesterday put on the basis that the defendants would be excluded from it. The wholesale departure from the principle of natural justice, which this would involve, would be highly exceptional if indeed it is permissible at all. Mr. Marshall cited a number of decisions which, as in the present case, excluded or heavily restricted a party's access to documents on disclosure. In addition to the patent cases to which I later refer, these included *Church of Scientology of California v Department of Health and Social Security* [1979] 1 WLR 723 and *Porton v 3M* [2010] EWHC 114 (Comm). Such regimes, as I mentioned in my judgment of 28th February, are not uncommon in intellectual property cases involving secret and valuable formulae processes and so on.

40. Lord Dyson referred to this in *Al Rawi* at paragraph 64 where he says:

"Similarly, where the whole object of the proceedings is to protect a commercial interest, full disclosure may not be possible if it would render the proceedings futile. This problem occurs in intellectual property proceedings. 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 to the litigation at least in its initial stages. Such claims by their very nature raise special problems which require exceptional solutions. 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."

41. In patent and similar cases it may be necessary to limit severely the officers or employees of a party who may have access to the evidence. But as Lord Dyson said, he was not aware of any case in which the trial had proceeded without any access by a party to the evidence, and Mr. Marshall was unable to cite one.

42. As I mentioned in court on Tuesday, 24 April 2012, I asked the current specialist patent judges, Kitchin LJ, Floyd J and Arnold J, whether they had any experience, either at the bar or on the bench, of such a trial. None of them could remember any instance of it.

...

48. That [i.e. the difficult, if not impossible position of the special advocate], it may be observed, would be precisely the effect of the regime which Mr. McKillen was proposing in this case. The lawyers for the defendants would have access to the evidence, but they would be unable to discuss it

with their clients and would be unable to take instructions from their clients on it. The only feature of the special advocate regime proposed in Al Rawi which is not present here is that the special advocates in question were separate from the lawyers regularly acting in the case for Mr. Al Rawi. But in my judgment the essential feature was the inability of Mr. Al Rawi to know the evidence against him or to give instructions to his lawyers.

49. If such a departure from the principles of natural justice is not permitted in a case where there are good grounds for considering that serious issues of national security arise, it can hardly be supposed that it would be available in a case concerning the financial circumstances of a party.

50. In the light of the decision and discussion in Al Rawi, it is my view that at common law the court has no jurisdiction to deny a party access to the evidence at trial. But if the jurisdiction does exist, it is in my judgment so exceptional as to be of largely theoretical interest only...

...

74. It will be apparent therefore that there was no conceivable basis for an order that the defendants are not to have full access to all the evidence at trial, even assuming that I had jurisdiction to make such an order. Nor is there any basis for a continuation of a regime which denies the defendants access to the documents disclosed by Mr. McKillen which are, as I have mentioned, until used in court, subject to the duty not to use otherwise than for the purposes of the proceedings."

31.

It is helpful to note the circumstances in McKillen. As Roth J. noted in Infederation the trial was the hearing of Mr McKillen's unfair prejudice petition under the Companies Act and the information in question concerned Mr McKillen's own financial circumstances which, as I understand it, were directly relevant to an issue in the petition. It was a case, as he observed, which was far removed from the situation of a dispute between competitors which arises in intellectual property and competition litigation.

32.

I was also referred to a section from Hollander on Documentary Evidence entitled Confidentiality Clubs and Open Justice. In the very recently published 14th Edition, having cited Al-Rawi at [64] and McKillen at [49]-[50], the extract continues at 10-09 as follows (in which I have inserted the full case references, and removed the incorrect references to Infederation being in the CAT):

"Whatever the position may be in intellectual property cases, in competition cases there are certainly cases when evidence is heard in private and some of the parties do not have access to parts of it. David Richards J does not refer to competition cases. Indeed, given that parties to a competition reference will be business competitors, the position could hardly be otherwise. [fn 34 reads: The Pay TV cases, one of the biggest competition appeals in recent years before the Competition Appeal Tribunal, involved significant parts of the evidence being dealt with in confidence from other parties to the reference. The passage to this effect in the previous edition was referred to by Roth J inInfederation..] In BMI Healthcare [v Competition Commission [2013] CAT 24] the Competition Appeal Tribunal dealt with position rather more robustly: (at [44]-[45])

"Taken to their logical extremes, Al Rawi and Bank Mellat might be taken to express extreme disapprobation of the Commission's use of confidentiality rings and data rooms— and, indeed, this Tribunal's use of confidentiality rings. After all, confidentiality rings tend to be limited to external advisers (generally). We are very confident that the Supreme Court did not have in mind market

investigation references in the Commission in either Al Rawi or Bank Mellat, and certainly these were not considered by the Supreme Court. Before us, none of the parties suggested that these decisions did anything more than highlight the fact that closed material procedures—and we use that term widely to embrace both confidentiality rings and data rooms—have to be justified by the circumstances, and should be as narrowly used as is possible in those circumstances. But, what those circumstances are is of enormous significance.”

In *Infederation* [[\[2020\] EWHC 657 \(Ch\)](#)] Roth J declined to express a view as to whether the comments of David Richards J required some qualification. However, he did say that (i) such arrangements are exceptional; (ii) they must be limited to the narrowest extent possible; and (iii) they require careful scrutiny by the court to ensure that there is no resulting unfairness.

In *Commercial Bank Privatbank [v Kolomoisky* [\[2021\] EWHC 1910 \(Ch\)](#) at [41] Trower J said:

“the specific points considered by David Richards J [i.e. at [31]-[33]] are of general application, albeit tempered by a recognition that the balance may be struck differently depending on the stage of the proceedings at which the imposition or continuation of a confidentiality club order is sought. The reason for this is that David Richards J treated the continuation of a confidentiality club as an interference with the overarching principle of open justice, partly because the relief sought in those proceedings was concerned with the question of whether certain parts of the trial should be heard in private but also because it might involve a situation in which lawyers for one party would have access to the evidence but would not be able to have fully informed discussions with or take comprehensive instructions from their own client.”

33.

The section in *Hollander* concludes with the question being posed: ‘So where does this leave the position in civil litigation?’. In the current edition, this section ends abruptly with a reference to *Mears v Leeds CC*, but with no real answer being suggested to the question posed, unless the answer has already been given in the citations from *Infederation* and *Kolomoisky*. In the previous edition, that reference to *Mears* was followed by this passage and it is not clear to me why this passage has been excised from the current edition, since it seems to remain apposite:

“But the law badly needs to be clarified. Is the proper approach in civil cases that adopted in *BMI Healthcare*? Such an approach makes obvious sense, represents what most people have always thought to be the law, and enables a flexible approach to be adopted. The problems may be more acute in competition litigation, but it is hard to see how there could be a blanket rule in other litigation but not in competition litigation. And if there was a blanket rule applicable to competition litigation, how could that sort of litigation ever be conducted? If the law is as David Richards J indicated in *McKillen*, then the sooner everyone knows the better, because anyone agreeing a confidentiality club at an interlocutory stage will need to do so in full knowledge as to the position if the matter goes to trial. If the confidentiality club can in principle only last through the interlocutory period, then it may become a much less attractive vehicle than has previously been thought to be the case, and thought will need to be given in particular cases whether there should be, or needs to be disclosure of the confidential material at all.”

34.

In terms of the various intellectual property cases in which this issue has been discussed, two cases of particular relevance were discussed by Roth J in *Infederation*. Having cited from *Al Rawi* at [12] and [64], Roth J continued:

“29 The reference there [i.e. in *Al Rawi* [64]] to the special problems raised by intellectual property proceedings may, in my view, similarly apply to competition law proceedings where rival commercial interests are involved.

30 The application of such protection in intellectual property cases has subsequently been considered by judges of the Patents Court, both before and after the *Al Rawi* case. In *Roussel Uclaf v ICI* (No.2) [1990] R.P.C. 45, Aldous J explained, at 48:

“In patent actions it is not unusual that documents disclosed on discovery include matters which a party considers contain valuable confidential information. The procedure normally adopted is that disclosure is first made in confidence to counsel, solicitors, independent patent agents and independent experts. In many cases this enables the parties to prepare and argue their cases properly. Further, the parties can often agree that all that is necessary to preserve the confidential information is that certain parts of the documents are blanked out.”

31 However, in that case after disclosure had taken place the plaintiffs sought to have two patent attorneys working in their patent department admitted to the confidentiality ring, which the defendants strongly opposed. Aldous J stated (at 49):

“Each case has to be decided on its own facts and the broad principle must be that the court has the task of deciding how justice can be achieved taking into account the rights and needs of the parties. The object to be achieved is that the applicant should have as full a degree of disclosure as will be consistent with adequate protection of the secret. In so doing, the court will be careful not to expose a party to any unnecessary risk of its trade secrets leaking to or being used by competitors. What is necessary or unnecessary will depend upon the nature of the secret, the position of the parties and the extent of the disclosure ordered. However, it would be exceptional to prevent a party from access to information which would play a substantial part in the case as such would mean that the party would be unable to hear a substantial part of the case, would be unable to understand the reasons for the advice given to him and, in some cases, the reasons for the judgment. Thus what disclosure is necessary entails not only practical matters arising in the conduct of the case but also the general position that a party should know the case he has to meet, should hear matters given in evidence and understand the reasons for the judgment.”

32 After balancing the various considerations for and against admitting the two attorneys, Aldous J came down in favour of admitting them subject to strengthened undertakings. The appeal against his decision was dismissed by the Court of Appeal.

33 In *IPCom GmbH & Co KG v HTC Europe Co Ltd* [2013] EWHC 52 (Pat), Floyd J (as he then was) considered which persons should be entitled to see confidential documents being disclosed in two related proceedings concerning the determination of the appropriate royalty and other FRAND terms of licences under IPCom’s standard essential patent. A previous order of the court had provided for the establishment of a confidentiality club “to include as a minimum: external counsel, experts and one other person elected by each of the parties”. When the court ordered disclosure of some of the licences entered into by the defendants, HTC and Nokia, with third parties, which IPCom argued could serve as comparators, the defendants did not object to these documents being seen by external lawyers and experts but they objected to IPCom’s wish to disclose them to the two individuals who ran IPCom or to a Dr Roman Sedlmaier and Mr Philipp Kahlenberg.

34 It was not disputed that the licence agreements were regarded as highly confidential and that knowing the terms on which Nokia and HTC were prepared to grant such licences would be of

commercial value to IPCom. The judge quoted the above passage from Aldous J's judgment in *Roussel Uclaf* and observed, at the above passage from Aldous J's judgment in *Roussel Uclaf* and observed, at [21]:

"The court does not normally operate on the basis that a party will wilfully misuse information disclosed to it. But it is recognised that disclosure of information to a party who is or may become involved in collateral commercial activities may place that party in a difficult position where there was a risk of use or disclosure"

35 As regards the individuals, Mr Kahlenberg was said to be an external commercial adviser of IPCom who had been involved in developing IPCom's licensing strategy since 2003. Dr Sedlmaier was an external lawyer working for a German law firm of which the principal was also a member of IPCom, and he had been involved in coordinating IPCom's legal strategy since 2007. Floyd J stated, at [30]:

"It is clear that both individuals are close to IPCom in the sense that they form an important part of IPCom's licensing team."

36 Floyd J referred to the principles set out in *Al Rawi* and the need to strike a balance. He took account of the fact that although the material was confidential, it was "not at the high end of the scale represented by secret process cases". The extent to which it was relevant to the issues in the proceedings was at that stage unclear and the litigation was still at an interim stage. But Floyd J significantly added, at [31(iii)]:

"Nevertheless, points of a very broad brush nature have been made in the pleadings about the relevance or lack of it of Nokia's and HTC's licences, a matter on which IPCom have the right to respond."

37 Floyd J noted that the case was unusual in the field of patent litigation in that IPCom was a very small company in terms of personnel. He refused to permit inspection of the documents by the two members of IPCom or by Mr Kahlenberg, whom he regarded as being in a very similar position, since there would be real risk that the confidential information would prove of value to them in licensing IPCom's portfolio of patents. But by contrast he held that inspection by Dr Sedlmaier should be allowed, stating (at [32(v)]):

"Dr Sedlmaier, on the other hand is an external lawyer bound by a professional code of conduct. I accept that he is, as the evidence shows, extremely close to IPCom, and has been involved in commercial negotiations. Whilst that fact is relied on by HTC, Nokia and the interested parties to make a case for his exclusion, it shows also that, if he is included, the prejudice to IPCom is significantly mitigated. To the extent that he is involved in future negotiations he will have to shut out from his mind anything learned from the confidential documents."

35.

Roth J. then went on to discuss the judgment of Henry Carr J in *TQ Delta*, before moving onto to discuss *McKillen*. Whilst it will further lengthen this judgment, I think it right to have regard to the key points from *TQ Delta*, which were accurately summarised by Roth J. as follows and in which I have highlighted particular aspects relevant to the arguments before me:

38 The use of "legal eyes only" (LEO) confidentiality rings was addressed by Henry Carr J in *TQ Delta LLC v Zyxel Communications UK Ltd* [\[2018\] EWHC 1515 \(Ch\)](#); [\[2018\] Bus. L.R. 1544](#). The judge summarised previous decisions on confidentiality restrictions in the patents field, including in particular the IPCom judgment, and concluded as follows:

“21. In my judgment, the authorities discussed above establish that it is exceptional to limit access to documents in the case to external eyes only, so that no representative from the party which is subject to the restriction can see and understand those documents. An external eyes tier does not require justification for the restriction by reference to individual documents. It enables one party to decide to exclude all representatives of the opposite party from access to any document that it chooses, and places the onus on the party seeking access to apply to court to obtain it. That approach, in my judgment, is wrong in principle.

...

23. However, it is important to emphasise that:

i) parties may choose to agree an external eyes-only tier, as in the *Unwired Planet International* case [see below];

ii) confidentiality club agreements are often essential in intellectual property cases; which cases require disclosure of confidential information. In such cases, a regime for disclosure which limits access to sensitive documents to specific individuals within one of the parties, in order to protect confidentiality, is now commonplace;

iii) redactions to documents can be made to exclude material which is confidential and irrelevant to the dispute;

iv) external eyes-only access to individual documents of peripheral relevance, whose disclosure would be damaging, may be justified in specific cases; as in the *IPCom* case;

v) I do not exclude the possibility that in certain exceptional cases, external eyes-only access to specific documents of greater relevance might be justified, at least at an interim stage.

vi) however, in the absence of exceptional circumstances, each party must be able to see and discuss with its lawyers the relevant parts of the key documents in the case.

24. An external eyes-only tier enables a blanket exclusion of access by one of the parties to the relevant parts of key documents. This is incompatible with the right to a fair hearing under Article 6 of European Convention on Human Rights, and with the principles of natural justice. It is incompatible with the obligations of lawyers to their clients. The principles on which solicitors are obliged to act on behalf of clients instructing them require the sharing of all relevant information of which they are aware.”

36.

In the light of all these authorities I venture, with some diffidence, to make the following observations;

(a)

First, I accept the general point that technical secrets which have to be disclosed in intellectual property cases (particularly in patent cases) to a competitor may well be deserving of greater protection than commercial information, but it all depends on the character of the information in question.

(b)

Second, I am not at all surprised at David Richards J’s report in *McKillen* at [42] that none of the very experienced specialist patent Judges he consulted were able to remember any instance of a case where the trial had proceeded without any access by a party to the evidence. I have little doubt that

there were no such instances because in every case a pragmatic solution was found, either by agreement or by ruling of the Court to enable appropriate access to at least one suitable person. Floyd J's ruling in IPCom 1 (to adopt his abbreviation from Oneplus) is a good example of a pragmatic solution being applied in the case of a company with very few candidates who might be suitable to receive the confidential information in question.

(c)

Third, in a very real sense, all these cases turn on their own particular facts. I have little doubt that if the attention of the Supreme Court in Al Rawi had been drawn to the situations in the CAT in the PayTV case or in BMI Healthcare, they would have recognised those situations as exceptional and requiring the exceptional solutions which were adopted in those cases.

37.

Accordingly, for all these reasons I reject Neo's 'no jurisdiction' contention. In my view, the Court has jurisdiction to strike an appropriate balance between the requirement to enable a party to participate in a meaningful manner in the lead up to and during the trial, on the one hand, and, on the other, the requirement to give appropriate protection to confidential information.

38.

I turn to consider the facts relevant to the striking of a balance in this case.

The Facts

39.

As in my previous judgment, I propose to gather the various considerations under a series of headings, albeit in a different order to that I used in my previous judgment.

The issues in the inquiry, the information in question & assessment of its confidentiality

40.

For present purposes the following very broad outline of the issues should suffice.

41.

In his liability judgment, Mr Roger Wyand QC found that certain but not all of Neo's development samples for a particular HSA Cerium Oxide product which were delivered to Party B in the United Kingdom infringed Rhodia's patent. The infringing development samples are said by Rhodia to be the cause of later supplies of commercial quantities to Party B in countries outside the United Kingdom. Part of Rhodia's case is that, but for Neo's infringements, Rhodia would have made the sales of its product to Party B which were made by Neo and Rhodia claims the profits it would have made on such sales. To the extent that Rhodia would not have made such sales, a reasonable royalty is claimed. This very brief summary ignores some very important issues of law as to remoteness of damage, but those are not impacted by the detailed financial and other trading information with which I am principally concerned.

42.

Part of Neo's defence is that Rhodia had manufacturing and supply constraints and would not have been able to supply such additional quantities. To address this issue, Rhodia gave fairly extensive disclosure on 'Issue 4'. I described the material in my previous judgment at [34] and this continues to apply:

“Issue 4 is concerned with the chance that Rhodia would have had to sell and make profit on sales of HSA CeO had Neo not supplied HSA CeO products to Party B. Hence this issue concerns (at least) whether Rhodia had sufficient capacity to supply additional product and the associated delivery times. Mr Bennett says that over 2000 pages of disclosure have been produced. He says it is highly confidential since these materials address the commercial steps Rhodia took (in 2019) in relation to its manufacturing capabilities but they also reveal the nature of Rhodia’s commercial relationship with Party B, the persons involved, what was said in meetings between them, the commercial leverage used between them, as well as delivery times.”

43.

It is this aspect of the case which gives rise to the second limb of the undertaking already on offer from Mr Morris, namely exclusion from discussions regarding “(ii) the allocation of manufacturing capacity for such products, or the time within which such products are to be supplied from the date of the request for supply.”

44.

As to the claim for loss of profits, it is first pertinent to note something said by Mr Morris in his first witness statement. He said he is aware from proceedings between the parties in Germany in relation to mixed oxide products that Rhodia’s products are sold at a significant premium over Neo products and he says he has no reason to believe the same is not true of the HSA cerium oxide products the subject of this inquiry. This point is reinforced somewhat by the figures as to the range of margin achieved by Rhodia on the product in question. These figures are in a Confidential Annex to the Points of Claim but were disclosed to Mr Morris pursuant to the Order of Marcus Smith J of 16 September 2020.

45.

Second, although the damages claimed are, in one respect, directly dependent on the volume of relevant material sold by Neo to Party B, Rhodia’s fact witnesses do not know the volume because Party B has asserted that information is confidential. The volumes have been disclosed to Dr Wassmann (a European Patent Attorney) on the basis of her undertaking.

46.

Third, it is obvious that Rhodia’s price terms with Party B are central to its claim for loss of profits, but also highly confidential information which would not ordinarily be known by Rhodia’s arch competitor, Neo. (I will be corrected if I am wrong, but I anticipate that confidentiality is asserted over the prices at which Neo sold the relevant material to Party B, whether by Party B or Neo or both.) This point is the reason for the first limb of the additional confidentiality undertaking offered by Mr Morris, namely a promise not to be involved in ‘(i) the setting of the price of high surface area cerium oxide products or any substitute for such products for use in diesel catalyst engines either alone or as part of a portfolio of products’. However, the limitations inherent in this first limb are evident.

47.

Mackay III and its exhibits present very detailed information about the supplies made by Rhodia to Party B over a considerable number of years (from about 2010 through to 2020). It includes the pricing information relating to the HSA product on which Rhodia claims its lost profits, but it also includes price information on many other products (including, I infer, mixed oxide products), although these other products are anonymised in the data. This witness statement was produced in place of disclosure. As Mr Bennett said in his nineteenth statement, the primary purpose of this disclosure was

to allow Neo's accountants to verify the margins claimed by Rhodia. As I said in my previous judgment at [32]:

'Having reviewed Mackay III, it is clear, as Rhodia submitted, that it contains highly confidential information and in particular the pricing mechanisms which underlie the prices charged to Party B, plus granular detail on Rhodia's costs of e.g. the raw ingredients used in manufacture, plus the volumes of non-HSA CeO products sold by Rhodia to Party B and pricing information about those products.'

48.

The pricing mechanisms are now explained in further detail in the witness statements of Dr Rohe and Dr Richards, served by Rhodia for trial. Accordingly, their witness statements contain a considerable amount of highly confidential information, and the quantity is readily apparent when one compares the full versions against the redacted versions.

49.

Fourth, as important or nearly so are the non-price terms. On these, at [35] of my previous judgment I said this:

'In so far as a distinction has been drawn to date between price and 'non-price' terms of business, this was addressed by Dr Rohe for Rhodia. His evidence, which I accept, is that the setting of price and non-price terms in any commercial negotiation is inextricably linked such that, for example, knowledge of price or margin terms would incentivise a person to negotiate non-price terms that allowed the price terms to be set more favourably.'

50.

With my enhanced knowledge as a result of this application, that was, if anything, an understatement. It is clear to me that not only are price and non-price terms inextricably linked, it is very difficult indeed to separate aspects of the terms agreed between Rhodia and Party B into 'price' and 'non-price' categories. By way of example, there may be volume discounts which can apply across a group of products.

51.

Both price and non-price terms feed into a fifth point which concerns supplies of mixed oxide products. It became clear that Rhodia in particular are very concerned about the disclosure to Mr Morris of the terms on which they supply their mixed oxide products to Party B.

52.

Relevant to this are some observations made by Mr Morris (again in his first witness statement) where he contrasted the products at issue in the inquiry (i.e. HSA Cerium Oxide products) with products for other different markets, all said by him to be outside the sphere of diesel autocatalysts. He intimated or said that the HSA CeO products are mature, that the pricing strategy was set before he became COO, and that he does not have a role to play in price negotiations in the successive rounds of price negotiation. By contrast in these other markets, outside the sphere of diesel catalyts, Neo's participation is relatively new and pricing strategy is still evolving. Accordingly he is involved in price discussions. He explains that is why he feels unable to give any undertaking (even as to price) that would restrict his involvement in markets outside diesel automotive catalyts.

53.

At the conclusion of argument, when there was brief discussion about further undertakings, Mr Cuddigan QC batted away Mr Mitcheson QC's concern about information relating to mixed oxide products. He did so on the basis that Neo had applied for but failed to obtain disclosure of Rhodia's mixed oxide licences on the basis they were comparable, even if the products were not substitutable. Indeed I am reminded that Mr Justice Fancourt refused Neo's first attempt and then I refused the next attempt in my Judgment on disclosure [\[2021\] EWHC 1972 \(Pat\)](#) at [36]-[38]. Accordingly, so Mr Cuddigan argued, mixed oxide licences or prices do not help you in deciding what you pay for a cerium oxide licence. This argument misses the point entirely. Rhodia's concerns about the highly confidential information of the terms (price and non-price) on which they supply their mixed oxide products to Party B stems from the fact that such information would be of very considerable assistance to a direct competitor such as Neo in setting its terms of supply of its mixed oxide products to Party B and others in the market.

54.

I also bear in mind the dates when development samples were delivered by Neo to Party B which eventually led to the supply of commercial quantities. As I recorded at [17] of my judgment on the disclosure issues [\[2021\] EWHC 1972 \(Pat\)](#), the first development samples were delivered before the start of the limitation period on 13 April 2010. Further development samples were delivered (although not all infringed) and commercial supply by Neo began on 27 January 2014, with a specification being agreed between Neo and Party B on 8 September 2014. It seems to me therefore that the position of Rhodia at those early dates will be most material in setting the level of any lost profits. I acknowledge that the supplies continued, and also that Rhodia's terms of supply with Party B were re-negotiated in 2017. However, for present purposes, I consider it is reasonable to work on the basis that Rhodia's pricing, terms and deliveries with Party B in later years (i.e. 2018 through to 2020) become increasingly less relevant. This point applies with significantly greater force to the terms regarding Rhodia's supply of mixed oxide products to Party B.

55.

Stepping back slightly from the detail, I remind myself of what I said in my previous judgment at [37]:

"...it strikes me as the sort of information which if it was the subject of an information exchange between competitors (such as Rhodia and Neo) it would result in a breach of competition law. I recognise there is no full exchange here, because to the extent that Neo's pricing and other information have been disclosed to Rhodia, that disclosure has been, as I understand it, to Dr Wassmann and is subject to the Wassmann undertaking. However, Rhodia's material in issue is greater in volume and detail and third parties might well be surprised that it should be disclosed to the COO of Rhodia's arch competitor, even in the context of this litigation and the undertakings on offer."

56.

At [38] I cited some evidence from Party A, even though issues concerning Party A had been resolved, because I considered the points it made applied equally to the position of Party B and reflected the submissions made to me on behalf of Party B. The passages bear repetition here:

"7. Rhodia and Neo are in competition with each other. Party A has therefore agreed very strict confidentiality rules with both companies. The market for HSA Cerium Oxide, mixed oxides and other raw materials with suitable quality and properties is divided between a small number of producers, Neo and Rhodia are both key players in this market. Accordingly, price negotiations with each of Neo and Rhodia are highly sensitive to Party A. However, it is not only that the price negotiations with Neo

and Rhodia are of great importance for party A. It is also the case that any disclosure and any knowledge by Neo and [Rhodia] of each other's prices and quantities are of overall competition and antitrust concern and may have an impact on the market for those products. This may thus both directly and indirectly lead to damage to Party A as well as other purchasers of these products.

8. Given its independent relationship with both parties, Party A is extremely concerned about information regarding its commercial agreements and dealings with Rhodia, including its purchasing strategy, being shared with Neo (or any other competitor). The sharing of this information is likely to have a serious negative impact on Party A's existing and future arrangements, and negotiations with these companies. Therefore, Party A considers the disclosure sought by Neo would cause Party A significant, irreparable harm if ordered.

9. Further, given that Neo and Rhodia are competitors, Party A also considers that the sharing of information about commercial arrangements, particularly as to the products, volumes and prices, between Rhodia and Party A poses a significant risk to competition in the industry.

10. Were it not for these proceedings, to which Party A is not a party, the information contained in the documents sought would never be available to another business partner, like Neo, in such a competitive market. For example, Neo would learn from the documents information about the specific products that Rhodia supplies Party A, pricing structures and terms & conditions. Neo would otherwise not usually have access to such information as the products supplied are normally very client specific and pricing is strictly confidential."

57.

Finally on general points, at [36] I mentioned an important point made by Rhodia:

"In relation to all this material, Rhodia draw attention to an important point made by Counsel then appearing for Neo (Mr Gamsa) at the hearing before Marcus Smith J. where it was accepted that the information then in question (relating to price) was 'the sort of information which could.... seep ... inadvertently into one's conduct' 'if it was going to someone who was involved in price negotiations or signing-off of deals and that sort of thing'. That entirely realistic concession was made in the context of Neo's principal point then which was that Mr Morris did not have any involvement in 'those sorts of negotiations, discussions or decisions, namely negotiations involving price or supply contracts and so on.' To the same end, Mr Bennett for Rhodia says the information in dispute here once seen will be difficult to forget. In a sense, this point goes too far because there is a significant volume of material. However, the point remains good because there are bound to be significant pieces of information which someone like Mr Morris will spot - and then it will be very difficult for him to put those out of his mind, however diligently he tries to adhere to his undertakings."

58.

This point was echoed in some evidence provided in Bennett 21 shortly before the previous hearing in some paragraphs which also usefully highlight what the undertakings on offer from Neo do not cover:

'15. The revised undertakings offered by Mr Morris are designed to give Mr Morris the ability to negotiate and advise on deals and commercial arrangements involving: (i) non-price terms other than allocation of capacity and lead time in respect of HSA cerium oxide products; and (ii) all terms in respect of products other than the HSA cerium oxide products in dispute in this case for use in diesel applications. Point (ii) includes mixed oxide products which form the vast majority of Rhodia's business in ingredients for automotive exhaust catalysts. The information contained in Rhodia's confidential disclosure that Mr Morris wishes to see relates to HSA cerium oxide products. It also

discloses information directly about Rhodia's dealings with [PARTY B] in relation to mixed oxides and discloses information that is useful to a competitor in competing against Rhodia in relation to such products. There is also information on HSA cerium oxide products that can be used to deduce what Rhodia does in relation to mixed oxides because the issues are common between HSA cerium oxide products and mixed oxide production. These include lead-time, general conditions of supply and management of customer supplies.

16. Dr Rohe informs me that the information in the table at paragraph 39 of Mackay 3, for example, would tell Neo a lot about Rhodia's mixed oxide business. Dr Rohe believes that certain products, although their names are hidden, are identifiable by Neo based on other characteristics (such as place of manufacture) indicated in that table. It is also Dr Rohe's understanding that Neo competes with Rhodia in relation to those products. That table describes arrangements that are still applicable between Rhodia and [PARTY B] will also tell Mr Morris the volumes Rhodia supplies to Neo (by virtue of the pricing structure). Dr Rohe informs me that knowing the total volume of products is information that would be very useful to someone at Neo that was involved in agreeing pricing structures with [PARTY B] for Neo's portfolio competing products. Those products are predominantly mixed oxides in relation to which Neo and Rhodia compete. Although the market for HSA cerium oxide products may have peaked, as Mr Morris says, those products are only a small fraction of Rhodia's business with [PARTY B]. The remaining mixed oxide products remain a strong and ongoing business for Rhodia with [PARTY B]. They are and will continue to be the subject of commercial discussions between Rhodia and [PARTY B]. Dr Rohe informs me that he has reason to believe that Neo continues to compete with Rhodia for mixed oxide business from customers including [PARTY B] and others.

17. I have asked Dr Rohe to consider whether, if the roles were reversed, receiving Neo's information equivalent to the table at paragraph 39 of MacKay 3 would cause Dr Rohe difficulty. Dr Rohe informs me that if he had received that sort of information in relation to Neo's pricing structure it would be extremely difficult, if not impossible, for him to put it from his mind in carrying out his normal responsibilities. Dr Rohe is responsible for advising on and controlling Rhodia's arrangements with its customers. As such he has to review and provide input and advice on matters that Rhodia's key account managers report from their contact with customers (although the key account managers do not report directly to Dr Rohe). Dr Rohe, together with his boss, is responsible for giving feedback on and signing off on deals with Rhodia's customers, such as that reflected at paragraph 39 of MacKay 3.

18. Dr Rohe says he would find it pretty much impossible to do his job in providing that input and advice whilst at the same time complying with an obligation not to use the information disclosed in this hypothetical scenario. For example, knowing how the percentages in the table at paragraph 39 of MacKay 3 are applied, would allow Dr Rohe to know that the proposal brought to him by one of his reports was more generous than needed to beat Neo's terms. Knowing how Neo deals with the costs of the rare earth raw materials it uses would also be useful in a competitive situation and hard for Dr Rohe to put from his mind when considering a proposal for the pricing strategy with [PARTY B]. That information is revealed in the disclosure and witness statements in lieu of disclosure given by Rhodia.'

59.

Further examples are given in subsequent paragraphs, but what I have quoted is sufficient for present purposes.

60.

Although in the context of interim relief, it does not follow that someone threatens to do X if he refuses to give an undertaking not to do X, in this case I consider it is necessary to proceed on the

basis that there is a distinct risk that, in areas which Mr Morris's specific additional undertakings on offer do not cover, Mr Morris will not feel constrained, even though his more general undertakings would still apply.

Relevant characteristics of Mr Morris and possible other candidates

61.

This paragraph is based on [41], but updated. Neo submitted variously that Mr Morris is the only suitable candidate at Neo to receive the information and he represents the 'least worst' solution to the current impasse. Neo rely on the following:

(a)

Mr Morris is a lawyer by training, having practised for 17 years before joining Neo. This, I accept, is a significant consideration, since Mr Morris can be expected to have an enhanced understanding of the undertakings he offers or gives and the consequences of breach.

(b)

He is responsible for the conduct of the litigation between Rhodia and Neo in the UK and elsewhere, including the Netherlands, Germany and China. In this regard, I note that it is unlikely that such detailed disclosure is available in those other jurisdictions.

(c)

He does not deal directly with customers on prices (at least in relation to HSA CeO products)

(d)

There is no-one else at Neo who could step into his multi-jurisdictional role in relation to this litigation.

62.

These reasons are all valid (as I said before), but (save for one) they do not discriminate between possible different levels of information. As far as I could detect, there was no change on point (c) in particular, and no recognition of Rhodia's concerns about the information concerning mixed oxide products.

63.

In his second witness statement, Mr Morris described his responsibilities as a member of the senior management team within the Neo group. He says that since the departure of Neo's general counsel in 2016, he is the person charged by the Board with responsibility for overseeing the multi-jurisdictional litigation between the parties. He expresses his concerns that he was not able to meet his duties to the Board or Neo Canada because he is not able to see all the details of the case against Neo or provide input into responses to it. Mr Morris requested a memorandum from Neo's external Canadian lawyers of the duties of senior management and the Board in relation to litigation against Neo in order to meet their obligations to shareholders as a public company. He exhibited that memorandum as KM-2. His key paragraph is as follows:

9. It is my understanding from KM-2 that to allow the Board to make informed decisions regarding the Disputes I need to be acquainted with all the relevant facts and material information in order to advise them on any decisions relating to the Disputes. In turn, it is a legitimate expectation of the shareholders of Neo Canada that the Board will be reasonably informed in relation to material issues such as litigation. In addition, the disclosure obligations of Neo Canada as a company listed on the Toronto Stock Exchange and reporting issuer require prompt disclosure of all “material changes”. As set out in KM-2 on page 3 in relation to material changes:

“Being fully apprised of developments in on-going litigation and regulatory proceedings is essential in order to ensure that [Neo Canada] complies with these on-going requirements.”

64.

He concludes by saying there is a serious risk that he may be in breach of his duties to the Board and to Neo Canada in respect of the proceedings, if he is not able to see all of the evidence, including the documents on which such evidence is based, that is being referred to or relied upon for the purposes of the trial of these proceedings because he is not able to assess whether he has all the necessary information to reach informed decisions or give informed advice to the Board or to be able to assess whether any material changes have occurred for the purpose of Neo Canada’s disclosure obligations.

65.

These are all points worthy of serious consideration. However I note the slight mismatch between his paragraph 9 (which refers to ‘all relevant facts’ and the need for the Board to be ‘reasonably’ informed) and his insistence in his conclusions that he must be able to see all the evidence and all documents on which such evidence is based. Furthermore, if these points were valid, it would always be necessary for at least one senior manager or director to see all highly confidential information in any action. I do not consider this to be the case. It must be sufficient if those persons with fiduciary duties to the company are able to rely on reports to them from others, to whom the information has been disclosed.

66.

In its evidence for this hearing, Rhodia identified Mr Randall Reid as a possible candidate to receive the EEO information. Indeed Rhodia made it clear they were content for him to have all the EEO information precisely because he would be able to give a Wassmann undertaking. He is the General Counsel/Chief Legal Officer for Neo and, according to a profile page published on the internet, has been its Chief Legal Officer since 2011. Although the Court should be wary of allowing the opposing party to dictate how its opponent runs its side of the litigation, in these exceptional circumstances I consider it is right to consider that there must be other possible candidates who can assist, even if they are not suitable to undertake the full ambit of responsibilities which Mr Morris has. In addition to Mr Reid, I am sure there are other possible candidates as well, possibly persons who have recently retired from Neo but who are well-known and trusted by the organisation (cf the external representative in IPCom 1).

67.

Neo’s position as regards Mr Reid was that he ‘has little litigation experience; he has not been involved in this litigation (either here in the UK or in Germany or China) other than being given one or two specific tasks by Mr Morris over the years; he does not have an in depth knowledge of this

particular business; and his status within the company is such that it would be inappropriate to task him with handling a matter of this importance.'

68.

However, in my view, those considerations do not disqualify Mr Reid from being able to assess, with advice from Neo's legal team, the relevance of EEO materials particularly once the expert's reports have been exchanged, and to satisfy himself that some or much of the EEO materials have low, peripheral or even no relevance. The same point applies to other candidate(s) as well.

69.

Finally, I have also borne in mind the way in which Mr Morris' required involvement in various activities has changed over time, as summarised in Rhodia's evidence (Bennett 19, at [57]).

Reasons for access to the EEO materials

70.

I fully accept that Neo (via one or more representatives) must be able to see all the material deployed at trial (including as such materials are served) so as that it has the ability to participate in a meaningful way in the lead up to and during the trial.

71.

However, this principle does not necessarily mean that all the EEO material in this case must be disclosed to Mr Morris, whether on the terms which Neo are prepared to accept or some other terms.

72.

There is a non-sequitur in Neo's reasoning regarding Mr Morris. Just because he is the person charged by the Board with running and overseeing this litigation from a legal and business perspective, it does not necessarily follow that all the EEO materials must be disclosed to him. I say that for the following reasons, and on this point I start from a first perspective of the likely relevance of the information:

(a)

First, I accept that Mr Morris should have access to materials which will be of importance or relevance at the trial. If those materials are not already apparent, they will be by the time expert's reports have been exchanged.

(b)

However (and without being too prescriptive about these categories) from my perhaps less than fully educated review of the EEO materials, it is tolerably clear that there is a significant quantity of the EEO materials which can already be identified as being at best of peripheral relevance and perhaps more realistically as of no relevance, yet which remains highly confidential. It may be questioned why material of such low or no relevance has been served, but I am satisfied that Rhodia included such material to provide a full explanation of its complex pricing structure and terms of business with Party B. The presence of this material was necessary to resolve any questions which might otherwise have arisen.

(c)

Although not limited to this, as presently advised I am inclined to place the pricing (and other terms) relating to the mixed oxide products in this category. Of course, I may be wrong and Counsel may seek to make a point at trial based on mixed oxides, although that would not automatically elevate all the data about Rhodia's mixed oxide products to the status of important information at the trial.

(d)

I also have in mind the fact that the issues of importance at the trial will be focussing on Rhodia's internal costs, arrangements, pricing and other terms on which they conducted their HSA CeO business with Party B. Whilst Neo's equivalents may be in part similar and in part different, Mr Morris will be able to participate in a meaningful way by having EEO material disclosed to him relating to the HSA CeO business of Rhodia. I am not persuaded that disclosure of all the EEO material to Mr Morris is required to enable him and Neo to participate in a meaningful way, and in particular EEO information relating to the mixed oxide side of the business.

(e)

In relation to EEO material of lesser, peripheral or no relevance, I consider it ought to be sufficient if Neo's lawyers advise some other representative of Neo as to their views as to the relevance of this other category(ies) of material. They can do that by showing this other representative examples of the materials and explaining their views. In that way, a representative of Neo can satisfy him or herself that these other materials are not relevant, such that Mr Morris does not need to be troubled with them. I emphasise this does not need to be a one-off exercise.

(f)

I am not in a position, nor would I wish to prescribe precisely what EEO information Mr Morris should receive or what should be disclosed to the other representative. If a split is decided upon, I recognise that the perceived relevance of information may change as trial approaches and proceeds and if it is perceived that some information which has previously only been disclosed to this other representative and now needs to be disclosed to Mr Morris, that can be done on the basis of the undertakings which will be in place. If those undertakings present particular difficulties, then the issue can be raised with the trial judge.

(g)

Finally, on these points, I recognise that the evidence indicates there is no clean split to be made between the HSA CeO information and the mixed oxide information (see paragraph 15 of Bennett 21, cited in paragraph 58 above) and they may be inextricably intertwined, which is why I have built flexibility into my solution.

73.

The second and more important perspective to consider is that of Neo and Mr Morris. In addition to the points I have already made, I was somewhat surprised by certain notable omissions in the evidence served by Neo for this hearing (Jenkins 29 and Morris 2):

(a)

There was no response whatsoever to the detailed evidence from Dr Rohe (as relayed in Bennett 21), some of which I quoted in paragraph 58 above.

(b)

I was provided with no information at all about the utility (or lack of it) of the disclosure to Mr Morris of the impacts permitted in my previous judgment (see paragraphs 51(b) and (c)).

(c)

I was provided with no information from Neo as to whether any difficulties have been experienced in completing Neo's expert report in chief. I infer that it has been possible to complete that expert report (notwithstanding the points made by Mr Ryan which I considered in my previous judgment) because

the only obstacle to its service was said to be sign-off by Mr Morris. This accords with my understanding that the expert's report should be the independent and objective view of the expert.

(d)

Neo made no proposal at all to limit the quantity of information which they wished to be disclosed to Mr Morris, notwithstanding the fact that Neo's experienced legal advisers must already have made distinctions as to the relevance and importance of large swathes of the EEO materials, even if only provisional at this stage.

74.

These points serve to highlight the unyielding stance adopted by Neo and Mr Morris. Their evidence was single-mindedly focussed on securing access by Mr Morris to all the EEO material. Indeed, Rhodia characterised Neo's position as akin to holding a gun to the head and there is force in that submission.

75.

I was inclined to approach this dispute on the same basis as before, proceeding on the basis that Mr Morris would not wilfully misuse confidential information he has access to in this action. Notwithstanding his attributes (as set out above), I confess that Neo's unyielding stance did make me question that assumption. However I do proceed on that assumption. It is more likely that what I have characterised as Neo's unyielding stance is a product of the exigencies of the current dispute. Once this is resolved, I am sure that Mr Morris will reflect on the confidential information he is given access to and do his best to abide by the undertakings he has or will have given. I do consider, however, that there has been insufficient focus (on the part of Neo and Mr Morris in particular) as to the difficulties which disclosure to him of highly confidential material will entail in the future.

My decision

76.

Based on all the considerations set out above, I determined that a more nuanced solution was required than the unyielding position adopted by Neo. I was satisfied that Rhodia had discharged the burden on it that its EEO materials required more protection than Mr Morris was prepared to offer. I was satisfied that the circumstances in this case require an exceptional solution.

77.

I consider it right for Mr Morris to have access to the EEO material which I perceive to be of central importance at trial, namely that relating to the price and non-price terms on which Rhodia supplied its HSA CeO product to Party B. As indicated above, I am not persuaded that Mr Morris needs to have access to other EEO material which is at best of peripheral relevance and at worst of no relevance at all. That sort of EEO material will already be apparent to Neo's legal team and if not, it will become apparent very soon after exchange of expert's reports. I consider Neo will be able to participate in a meaningful way by having a representative other than Mr Morris consider the material of low or no relevance, in order to be able to report to Mr Morris to that effect.

78.

If, nonetheless, Mr Morris insists on having access to all the EEO material, then I am satisfied that the undertakings he currently offers are inadequate protection and that the mixed oxide data in particular requires a form of enhanced protection. I recognise the value of that data wanes with time, which is why I invite Neo to form a view (acting by its legal team with the other representative) as to whether the mixed oxide data from later years really needs to be considered by Mr Morris, and why I require

in effect a 5-year involvement bar from the date of the last mixed oxide data that Mr Morris receives. Neo have the choice as to how to proceed.

79.

What I have set out above in the whole of this judgment are the reasons which led me to the decision which I distributed shortly after completion of submissions. In that document I indicated I was minded to permit up to two representatives of the Defendants to have access to the following documents (with all redactions to protect relevant confidential information removed) namely, all witness statements, experts reports, documents exhibited to such statements and reports and documents included in the trial bundles on the following terms namely:

(a)

If the Defendants elect to nominate Mr Kevin Morris as such a representative, before he is given access to the aforesaid documents in their unredacted form, in addition to the undertakings he has already given (which, for the avoidance of doubt, includes the undertaking in KM-1, paragraph 1(v)) Mr Morris must further undertake not to play any part in discussions or decisions relating to the setting of the price of mixed oxide products for supply to Party B for a period of 5 years from the end of the calendar year in respect of which he receives details or data of Rhodia's pricing of such products (other than HSA Cerium Oxide products) which is designated EEO Highly Confidential to Rhodia.

(b)

If the Defendants elect to nominate a representative other than Mr Kevin Morris (whether Mr Randall Reid or someone else), he or she must give an undertaking in Wassmann form.

(c)

All these undertakings to be reviewed by the trial Judge in due course. The trial Judge will have to decide how much of the detail to include in a public judgment and that may require adjustment to these undertakings.

80.

The reason I indicated I was minded so to order was because this solution had not been discussed in submissions (although I did specifically raise the subject of some form of time bar). I invited the parties to identify any material problems with the additional undertaking that they might have wished to contend I may not have appreciated.

81.

I gave brief reasons in that document in an attempt to assist the parties. They read as follows:

(a)

By way of brief explanation, the reason for the further undertaking for Mr Morris being framed as it is, is to enable distinctions to be made based on relevance of certain categories of information. From their conduct of the inquiry to date and the content of the Defendants' own expert report, I anticipate that the Defendants' lawyers are able to form a view as to the relevance of, in particular, the Claimant's pricing and prices of mixed oxide products (other than HSA Cerium Oxide products) and thereby to decide that it is appropriate to limit the information disclosed to Mr Morris regarding the Claimant's pricing of mixed oxide products other than HSA Cerium Oxide products if it appears or is anticipated that such details or data will be of no or very little material relevance to the issues at trial.

(b)

To illustrate the working of the undertaking the spreadsheet exhibited by Mr Mackay includes such data from 2017 to 2020. If the last set of data disclosed to Mr Morris is from the 2017 calendar year, then the 5-year period ends at the end of 2022. Likewise, if the 2020 data is disclosed to Mr Morris, then the period runs out at the end of 2025. Equally, if the details of the 2017 pricing arrangement (but no data) are disclosed to Mr Morris, the undertaking will cease to have effect from the end of 2022.

(c)

If the Defendants' lawyers are able to decide to limit the information disclosed to Mr Morris, the parties must co-operate to agree a suitably redacted version of the data (whether contained in a witness statement, expert report or exhibit) for disclosure to Mr Morris. This must be done quickly.

(d)

If the Defendants' lawyers decide that it is not appropriate to make a decision on the point (whether in conjunction with the other representative or not), they can disclose the limited information (i.e. information other than that which would be caught by the additional undertaking) to Mr Morris and await service of the Claimants' Expert Report to determine whether any information caught by the additional undertaking will be of relevance at trial.

(e)

Ultimately, the Defendants can apply to the Court to resolve any difficulties.

82.

I also indicated that I wanted the parties to apply their minds to what information will really be important at trial and what can be left on one side as being of very limited or no relevance.

83.

In response to the draft Judgment, Mr Copeland for Rhodia asked for clarification on the distinction between the details of the 2017 pricing arrangement and data and provided me with some examples to highlight possible difficulties. Neo did not respond on these valid points. When formulating the additional undertaking, I was trying to fashion a reasonably straightforward distinction which balanced relevance of the information to the issues in the inquiry against the need for it to be protected. With that in mind, I clarify as follows:

(a)

By the 2017 pricing arrangement, I meant the agreement dating from November 2017, as referred to in Dr Richards' witness statement at paragraph 16.

(b)

By 'data' I meant specific figures e.g. (a) the figures set out in the spreadsheets exhibited to Mackay III and (b) the figures set out in Mackay III (e.g. at paragraph 38).

(c)

Where figures (i.e. data) represent the position in a number of different years, the 5 years runs from the last year in which the figures given represent the position, with the 5 year period ending at the latest in 2025. I recognise that certain figures are more significant than others, in terms of the protection required

(d)

Finally, I inserted the word 'relevant' at the start of the fifth line of paragraph 79 above. As Mr Copeland for Rhodia pointed out, this application was about Neo representatives' access to relevant information, not irrelevant and redacted information.

84.

In terms of directions, (and subject to any other dates which the parties are able to agree) I invited the parties to include the following in a draft Order:

(a)

A declaration that the Witness Statements of Dr Rohe and Dr Richards were served on 26 October 2021.

(b)

Resetting the date for exchange of fact evidence in reply to 4.30pm on Friday 3rd December 2021.

(c)

Resetting the date for exchange of expert's reports in chief to 4.30pm Tuesday 7th December 2021.

(d)

Resetting the date by which Rhodia is to serve list of documents for inclusion in the trial bundles to 9th December 2021

(e)

Resetting the date by which Neo is to serve list of any additional documents to be included in the trial bundles to 16 December 2021.

(f)

Resetting the date for exchange of expert's reports in reply and nomination of any further documents to be included in the trial bundles to 22 December 2021.

(g)

Resetting the date by which two sets of the trial bundles are to be served by Rhodia on Neo to the 4th January 2021.

85.

Since there had been lengthy delays on Rhodia's side in serving redacted versions of documents, I directed that the service of any witness statement or expert report in unredacted form but which requires redactions to remove any confidential information, must be followed, as soon as practicable but in any event within 3 working days, by service of a copy in its redacted form.

86.

Finally and notwithstanding the fact that the evidence rounds are not yet complete, I decided it was appropriate to make the PTR Order as requested by Rhodia. A provisional trial timetable was annexed and this may well require revision. I invite the parties to embody everything into a single Order.