

Confidential information and disclosure in English litigation (TQ Delta LLV v Zyxel Communications UK Ltd and others)

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Dispute Resolution analysis: How should practitioners deal with a situation where a client wishes to restrict disclosure? Jane Mutimear, partner at Bird & Bird, considers the case of TQ Delta LLC v Zyxel Communications UK Ltd and another, which concerned the way confidential information is handled in the course of English litigation.

TQ Delta LLV v Zyxel Communications UK Ltd and others [\[2018\] EWHC 1515 \(Ch\)](#), [\[2018\] All ER \(D\) 136 \(Jun\)](#)

What are the practical implications of this case?

It is important to remember that the starting position in English litigation is that documents used in the litigation will be shared with the other party. Rules on disclosure prevent documents from being used for any purpose other than the litigation, and it is not uncommon to restrict access to highly confidential material to named individuals who sign a confidentiality agreement. However, restricting access to just the opposing party's external team is an unusual step as it conflicts with the principles of open justice.

In the US system and in international arbitration, designations of 'attorney's eyes only' or 'highly confidential' are used to denote documents which can only be viewed by the other side's external lawyers and experts. This is a pretty standard regime, agreed or ordered at the start of the proceedings, and it is normally the disclosing party who elects which category a document falls within, leaving the other side to challenge whether it is appropriate for a document to be designated as such. Litigants more familiar with this system may seek to follow a similar approach in the UK, but without consent the English court will be very reluctant to agree such a scheme without compelling evidence to support it.

This is because the starting assumption in any English case is that documents or evidence submitted in the course of a case will be provided to the other side. Where confidential information is concerned, the parties will agree, or the court will impose, a confidentiality regime, restricting access to the instructing lawyers and experts and in almost all circumstances two or more representatives of the party itself, who will need to provide signed confidentiality undertakings restricting the use of the information for anything other than providing instructions in the case.

There are exceptions to this rule, but they are limited. Where the case concerns protection of confidential information and full disclosure would render the proceedings futile, or where at an interim stage the relevance to the issues in dispute of the confidential information is not clear, the court will entertain more limited restrictions. However, it is clearly only in exceptional circumstances that information can be kept confidential from all employees of the other party, and compelling reasons need to be given to support such an application.

Unless the parties can agree on a confidentiality regime which permits external eyes only, the English court's approach to dealing with highly confidential documents can cause difficulty for production of documents obtained via a US 1782 Order, or even an order under [Regulation \(EC\) No 1206/2001](#) on co-operation between courts of the member states on taking of evidence. A US court will invariably impose an 'external eyes only' regime, and if the resisting party under the EC Regulation objects on the basis that their confidential information will be disclosed to a competitor, it

is likely that the court of many Member States will reject the request if an external eyes only regime is not proposed.

When facing a situation where a client wishes to restrict disclosure to external eyes only, practitioners should consider:

- can this regime be agreed with the other side, which is most likely where they have similar documents they would like to protect?
- can specific evidence be provided as to the need to prevent anyone from the other side having access and why specific confidentiality terms will not be enough (eg where the other party is a licensing entity and there is no one who is not involved in negotiating licences who could have access)?
- where the documents to be protected are licences or other agreements, will the other party to the agreement be willing to make representations objecting? When third parties petition the court to restrict access to their confidential information the court may be more sympathetic to the application

What was the background?

TQ Delta is suing Zyxel Communications in relation to two patents which TQ Delta claims are essential to the DSL standard. In addition to questions of validity, infringement and essentiality, the case will concern what the terms of a reasonable and non-discriminatory (RAND) licence would be. Zyxel proposed a confidentiality regime under which they would designate documents as either 'confidential information' or 'highly confidential information'. In the case of the latter, the disclosure would be limited to 'external eyes only'. TQ Delta sought the court's blessing of its proposed confidentiality regime, and in the alternative for the court to permit it to restrict access to some of its licence agreements to external eyes only.

In addition to praying in aid the US and arbitral practice, TQ Delta relied on a judgment of Floyd J in *IPCom v HTC and Nokia* [2013] EWHC 52, [\[2013\] All ER \(D\) 202 \(Jan\)](#), where Floyd J had restricted access to HTC and Nokia's licences to externals, and the regime adopted in *Unwired Planet International Ltd v Huawei Technologies Co Ltd and another* [\[2017\] EWHC 2988 \(Pat\)](#), [\[2018\] All ER \(D\) 25 \(Jan\)](#), where a confidentiality regime for licences was to externals only.

What did the court decide?

Carr J rejected the 'external eyes only' tier and was not satisfied that the evidence established that the confidential information in the licence agreements would not be adequately protected by receipt of confidentiality undertakings from the two named individuals from Zyxel's ultimate parent.

The judge distinguished *IPCom* on the basis that it was at an interim stage (although in reality it was more advanced at the time of Floyd J's decision than the case here), but probably of more importance was the specific evidence which had led Floyd J to consider that *IPCom* may obtain an unfair advantage in its licensing negotiations if granted access to the licences. Such specific evidence was absent from this case.

Unwired Planet was described by the judge as not providing 'a ringing endorsement' of the external eyes only practice as it was agreed by the parties and commented upon by the Birss J as 'not a desirable state of affairs but it has allowed the case to proceed in a practical manner'. However, the judge did not mention (and it may not have been pointed out to him) that there had in fact been an application by Unwired Planet to permit two in house lawyers access to the licences that had been disclosed under the 'external eyes only' category. Unwired Planet only backed down after the intervention of many of the other parties to the licences who strongly objected to the provision of

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their licences to any Unwired Planet employee. As Unwired Planet's application was withdrawn late in the day after substantial evidence had been served, it faced significant costs consequences as a result.

However, even if the judge was not aware of the background which led to the agreed regime in *Unwired Planet*, he stayed his order for 14 days to enable third parties who claim confidentiality in the agreements in issue to apply to set aside or vary the order.

Interviewed by Alex Heshmaty.

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