

EIP

Rhodia v Neo: An exceptional course for confidentiality

The UK High Court maintained “external eyes only” protection for a class of documents central to the Claimants’ loss of profits claim in an inquiry as to damages. External eyes only confidentiality clubs exclude any employees or officers of the clients and limit access to EEO information to external lawyers and experts. In making his judgment, Mr Justice Mellor recognised that this was an exceptional course of action in light of recent judgments on confidentiality in patent cases.

Background

Both the parties to this action are chemical companies and in particular are fierce competitors in the provision of raw materials used in catalytic converters. Rhodia, the claimants, started this action with a claim of patent infringement against Neo, the defendants. The patent in question related to a substance used in the manufacture of catalytic converters. That patent was found valid and infringed by certain Neo products in a judgment given in 2018.

Following the finding of patent infringement, the action has progressed to a damages inquiry in which Rhodia made a loss of profits claim. As part of this inquiry, Rhodia were ordered to disclose a Sales Report and documents which concern the margin that Rhodia would be entitled to recover if they, instead of Neo, had supplied the patented substance to a particular customer. The disclosed documents are very commercially sensitive, containing sales volumes, income and margins for each of Rhodia’s customers broken down by year, product and invoice.

Request for access

Mellor J's judgment concerned a request made by Neo to allow their Chief Operating Officer access to the confidential documents disclosed by Rhodia. This request for access was contested by Rhodia and a third party, one of Rhodia's customers, referred to as "Party B" in the judgment. Mellor J heard this issue on 8 October, alongside a smaller issue regarding access to other documents relating to another third party, Party A.

There was no dispute regarding the legal principles to be applied, namely those set out in paragraphs [19-41] and [39-40] of the Court of Appeal's judgment in *Oneplus v Mitsubishi Electric* [2020] EWCA Civ 1562. One key point from the *Oneplus* judgment is that it should be exceptionally rare for access to documents of importance to be denied from an employee or officer of the relevant party. However, the parties applied those principles very differently to the facts concerning these confidential documents.

Party positions

Neo had identified their COO, Mr Morris, as the only suitable candidate for access to the confidential documents. He was an experienced lawyer, responsible for the conduct of the multi-jurisdictional litigation between Rhodia and Neo, and he did not deal directly with Neo's customers on prices. Neo submitted that Mr Morris needed access to the confidential documents so that he could assist with preparation of expert evidence, consider settlement agreements and generally give instructions.

Neo were also prepared for Mr Morris to give an enhanced undertaking confirming that he would not play any part in discussions or decisions relating to price setting for relevant products, the allocation of manufacturing capacity or timings within which such products are to be supplied.

Rhodia and Party B opposed this undertaking and Neo's submissions on Mr Morris' need for access to the confidential information. One crucial issue they raised, which was later relied upon by the Judge, was that Neo and Rhodia were arch-rivals in this industry and that sharing of this highly sensitive commercial information by competitors in the same market, could give rise to a competition law concern.

In addressing Neo's case, Rhodia did make a counterproposal regarding Mr Morris' access. Although Rhodia were not prepared to grant Mr Morris access to their confidential documents, they accepted that Mr Morris could be "informed of the impact" which the documents might have on sales margins and Rhodia's case on those margins.

Rhodia suggested that this information would be sufficient for Mr Morris to assess the margins claimed and make any settlement offer.

Exceptional outcome

Rhodia's counterproposal solution was favoured by the Judge and he rejected Neo's request for Mr Morris' access to the confidential documents on the terms they offered. This maintenance of EEO protection over the confidential documents was justified by Mellor J as he found this circumstance to be an exceptional situation. Mellor J stated that:

[T]he materials in dispute there are bound to be key pieces of information which, once seen, will be very difficult if not impossible to forget.

Mellor J noted that even a man of Mr Morris' standing and character would have difficulty putting the commercial information in the documents out of his mind, however diligently he may try to adhere to his undertakings:

The solution I adopt at this juncture is primarily to protect the information but also to relieve Mr Morris of having to struggle to leave such pieces of information out of consideration in circumstances where they may be highly relevant.

This maintenance of an EEO protection is, however, an interim measure which Mellor J invited the parties to revisit at the upcoming PTR hearing, where he hoped that the information which Mr Morris may require access to could be considerably reduced.

Contrast to IP Bridge

On the same date, another Mellor J judgment in the matter of IP Bridge v Huawei was handed down. This judgment arose from a case management hearing between those parties, in which an issue regarding access to IP Bridge's confidential licence agreements by employees at Huawei was addressed.

In contrast to the Rhodia judgment, Mellor J's finding in this IP Bridge judgment was that two Huawei employees should be granted access to a particular licence agreement. However, there are some key differences between the facts in these two cases which explain why differing orders were made.

First, in IPB, Huawei client access was being debated in relation to two licence agreements, on which significant weight was likely to be placed. In contrast, in Rhodia v Neo, the access was concerning vast numbers of documents (over 2000 pages worth) and

it was not clear at that stage in the action which of these documents truly needed to be seen by Neo's COO.

Second, unlike Neo, Huawei were able to identify at least two employed legal counsel who were able to give instructions on the litigation but who are not involved in licensing discussions. The judge was prepared to allow access on the basis that these individuals give an undertaking that they would not for five years be involved with any licensing discussions with the counterparty to the licence in question.

Take home points

Three points of importance from these cases were:

1. Identifying the individual at the client who is least likely to have difficulty in adhering to their undertakings not to work in the relevant commercial area.
2. Clearly defining the scope of the material requested to be accessed by the client.
3. Mellor J suggested that providing concrete reasons of the difficulties experienced by the clients not having access to confidential information may be helpful in justifying access for clients.

Anan Kasei & Rhodia Operations v Neo Chemicals & Oxides & Ors [2021] EWHC 2825 (Pat)

Godo Kaisha IP Bridge 1 v Huawei Technologies Co. Ltd & Ors [2021] EWHC 2826 (Pat)

Written by Catherine Howell.