SOLICITOR'S DUTY WHEN REDACTING DOCUMENTS
Infederation Ltd v Google LLC [2020] EWHC 657 (Ch)

Solicitors should not necessarily be satisfied by their client's view that open inspection of a document should be restricted on confidentiality grounds.

It is often the case that documents that must be disclosed in proceedings contain confidential information. Clients are understandably concerned to take all appropriate steps to safeguard the confidentiality of disclosed documents. This is particularly the case where the purpose of the proceedings is the protection of confidential information, such as the enforcement of a non-compete restrictive covenant or duty of confidence. The courts have recognised a number of legitimate techniques to limit the disclosure of confidential information in such circumstances. These include confidentiality rings and the redaction of documents. Both were considered in the recent case of *Infederation v Google* in which the High Court gave important guidance to solicitors in their approach to redaction of documents on grounds of confidentiality.

Confidentiality rings

A confidentiality ring (sometimes referred to as a confidentiality club) is an arrangement whereby disclosed documents may only be seen by a specific list of people (members of the ring or club). These might be lawyers only, or lawyers plus an expert, or lawyers plus named individuals or a similar combination. The idea is to strike a balance between (i) the right of one party to see the other party's relevant documents and (ii) the right of that other party to protect its confidential information in those documents by limiting their dissemination.

In *Infederation v Google*, a competition law case, three confidentiality rings had been established by orders of the court, giving effect to agreement between the parties: (i) a confidentiality ring, which included founding members of the claimant; (ii) an inner confidentiality ring, referred to as LEO (legal eyes only), which comprised external solicitors and counsel and (despite its name) economic experts; and (iii) a more restricted inner confidentiality ring (RLEO), which comprised 10 named external solicitors and counsel. The court was concerned with an application for admission of an independent expert to the LEO and RLEO rings.

At [27]-[42] of his judgment, Roth J undertook a review of the principles applicable to confidentiality rings and discussed some of the leading cases. These principles include the following:

- 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. This observation would seem to be equally applicable in cases involving non-compete covenants, where the justification for the covenant is the protection of confidential information, and pure breach of confidence cases.

- Redactions to documents can be made to exclude material which is confidential and irrelevant to the dispute.

Solicitor's duty when redacting documents

It is the second of these points – redacting documents to exclude confidential information – that the case is of particular interest to solicitors practising in this field. In a postscript to the judgment at [56]-59], the judge noted that counsel for the claimant made strong complaint about what she asserted were excessive and unreasonable claims of confidentiality made by Google, through its solicitors, which were then progressively reduced in response to requests and protests by the claimant.

The judge found that there is an increasing tendency for excessive confidentiality claims to be asserted over documents and information in competition law proceedings, only for those claims to be curtailed or renounced in response to protests from the other side or intervention by the court. This is wasteful of time and costs, and it is not the way modern litigation should be conducted.

He continued, that the parties and their advisors should appreciate that redactions from documents on confidentiality grounds prior to inspection and any restriction on inspection to a confidentiality ring are exceptions to the normal regime for disclosure and inspection of relevant documents.

Guidance for solicitors

The guidance in [59] is of critical importance for solicitors engaged in this kind of litigation:

> "The decision as to whether confidentiality should be claimed for a document ultimately rests with the client, subject of course to the potential for determination by the court. But just as solicitors will not unquestioningly accept their client's view as to which documents are relevant for disclosure, they should not necessarily be satisfied by their client's view that open inspection of a document should be restricted on confidentiality grounds. Solicitors should advise their client as to the proper limits of confidentiality, given the protection for all disclosed documents under CPR rule 31.22, and the guidance as to the likely extent of justifiable confidentiality given by the EU courts: e.g. see the judgment of the Grand Chamber of the Court of Justice in Case C-162/15P *Evonik Degussa v Commission*, at paras 64-66 (rebuttable presumption that documents at least five years old have lost their secret or confidential nature). If solicitors have reasonable grounds for supposing that their client has made excessive confidentiality claims, they should investigate the matter carefully and discuss it with their client. The obligations of solicitors in that regard are well summarised in Matthews and Malek, *Disclosure* (5th edn, 2017), chapter 18."

Conclusion

This case contains helpful and important guidance not only on the correct approach to confidentiality rings but also on the duty of solicitors when redacting documents on grounds of confidentiality.

The full judgment can be read here.

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