Neutral Citation Number: [2024] EWHC 2474 (Ch)

Claim No. BL-2021-002179

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Wednesday, 18th September 2024

Before:

MRS. JUSTICE JOANNA SMITH

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Between:

ELI LILLY & CO **(a company incorporated and existing under the laws of the State of Indiana, USA**	**Claimant / Respondent**
- and -	
TEVA PHARMACEUTICAL INDUSTRIES LIMITED **(a company organised and incorporated under the laws of the State of Israel)**	**Defendant / Applicant**

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MR. MICHAEL BLOCH KC and **MR. STUART BARAN** (instructed by **Hogan Lovells International LLP**) appeared for the **Claimant/Respondent.**

MR. JAMES KNOTT (instructed by **Bird & Bird LLP**) appeared for the **Defendant/Applicant.**

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Approved Judgment

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MRS. JUSTICE JOANNA SMITH:

1. This is an application by the defendant ("**Teva**") to vary a Confidentiality Order so that two of its in-house lawyers, Dr. Wright and Mrs Indraccolo (to whom I shall refer together in this Judgment as "**the Teva Lawyers**") may be added to the Teva AEO club that was created by that order. There is also an application by Teva to add a different senior in-house lawyer, Ms. Staci Julie, to the Confidential club, also created by that order. Both applications are resisted by the claimant ("**Lilly**").

2. This application has been certified as urgent, and I heard argument over the best part of yesterday. With a view to ensuring that the parties would have an answer as swiftly as possible, I informed them at the end of the hearing that I would give an *ex tempore* judgment this afternoon. That I now do.

3. The underlying proceedings, issued in December 2021, concern the nature and quantum of damages due to Lilly from Teva under a settlement agreement arising from the marketing and sale by Teva of a patented drug combination in the German market between January 2019 and July 2020. Liability under the settlement agreement is not disputed, but the issue of quantum remains. Quantum is said by Lilly to be a very substantial figure, which I cannot identify in this public judgment because that information is currently restricted by the Confidentiality Order. The parties each advance various cases as to the approach to be taken to the calculation of damages, but, at its heart, the issue for the court will be how to determine what Lilly would have made from sales of the drug combination in the relevant counterfactual, i.e. if Teva had not entered the market between January 2019 and July 2020.

The Confidentiality Order

4. The Confidentiality Order was made by Deputy Master Linwood on 18th November 2022, some six months after service of Teva's defence in the proceedings, and in advance of disclosure being given. It defines "*Confidential Information*" as material held by the "*Disclosing Party*", which is not in the public domain, and which falls into one of four categories, including "(i) …business, commercial, financial or technical information, the disclosure of which could harm the legitimate business interests of the undertaking(s) to which it relates or prejudice fair competition between economic operators"; and, "(ii) ... technical or trade secrets of the Disclosing Party".

5. Two categories of Confidential Information are identified in the order, namely Confidential Material and Attorney's Eyes Only ("**AEO**") Material. Confidential Material is material designated as such by a Disclosing Party, provided that it is designated as such with "a bona fide belief that the information is and continues to be confidential and requires the protection of this Order". AEO Material is material designated as such by a Disclosing Party, provided that it is designated as such with "a bona fide belief that the information is and continues to require higher levels of protection afforded by disclosure to a restricted set of individuals and more stringent processes under this Order" (see paragraph 2 of the order).

6. Confidential Material and AEO Material, together defined as "Material", is afforded significant protection by paragraphs 14-17 and 20-30 of the Confidentiality Order, including restrictions on its use outside of these proceedings, terms as to its

safekeeping, terms as to its return and/or destruction at the end of the proceedings, and provisions concerning breach. None of the protections concerning the use of Material contained within the Confidentiality Order turn on whether the Material is Confidential or AEO. It is all afforded the same level of protection.

7. The only difference in treatment between Confidential and AEO Materials under the Confidentiality Order is the identity of the persons entitled to see them and/or be provided with information emanating from them. Thus:

   i) Confidential Material may only be seen by the persons listed in paragraph 18 of the order, including "the Court" and any person agreed by the Disclosing Party, or "approved on an application to the Court" (see paragraph 18(f)); and

   ii) AEO Material may only be seen by the persons listed in paragraph 19 of the order, including "the Court" and any person agreed by the Disclosing Party or "approved on an application to the Court" (see paragraph 19(f)).

8. As presently constituted, the Teva Confidential ring, created under paragraph 18 of the order, includes *inter alia* Teva's external legal team and the two Teva Lawyers. In fact, as I understand it however, none of Lilly's disclosure has been designated as Confidential. The Teva AEO ring, created under paragraph 19 of the order, includes *inter alia* Teva's external lawyers (its solicitors and counsel in these proceedings) and its expert witnesses/consultants. The same applies equally to Lilly. The Teva AEO ring does not include the Teva Lawyers (save in relation to a small number of AEO Materials which it was agreed in January 2023 could be seen by them). The Lilly AEO ring does not include any of Lilly's in-house lawyers (save in relation to Mr Markus Felton, a Lilly in-house lawyer, whose addition to the AEO ring was agreed in March 2023 for a purpose described by Lilly in correspondence at that time).

9. In resisting this application, Lilly places significant emphasis on paragraphs 8 and 9 of the Confidentiality Order, which provide a mechanism for the resolution of disputes over designation, and which read as follows:

> "8. Where a Receiving Party considers that a document designated as 'Confidential' or 'Attorney's Eyes Only' by a Disclosing Party should not be treated as 'Confidential' or 'Attorney's Eyes Only' (in whole or in part) it shall be entitled to apply to the Court for a declaration that such document (or relevant part of that document) shall not be treated as 'Confidential' or 'Attorney's Eyes Only' (or that the designation should be changed).
>
> 9. Without prejudice to paragraph 8, before making any application to the Court for a declaration that a document (or relevant part of that document) shall not be treated as Confidential or Attorney's Eyes Only, the Receiving Party shall set out in writing to the solicitors of the Disclosing Party its reason[s] for objecting to the designation and may seek to resolve the dispute without recourse to the Court."

10. Pursuant to paragraph 10 of the order, any document classified as Confidential Material or AEO Material will be treated as such until the parties agree expressly in writing, or the court orders otherwise.

11. Paragraph 29 of the Confidentiality Order provides a liberty to apply.

The Context of the Application to Vary the Confidentiality Order

12. The proceedings are now well advanced. The first case management conference took place in January 2023. Disclosure was then given respectively by the parties in February and April 2023. Lilly served its expert evidence on quantum on the 2nd September 2024, first in AEO form, and then redacted for provision to those within the Confidential ring. Witness statements were served two days ago on 16th September 2024. Lilly served five statements which were AEO designated and has since supplied redacted versions into the Confidential ring. It has also served one witness statement designated as Confidential. Teva served one witness statement, also AEO designated. Teva's expert report on quantum is due to be served on 14th October 2024 and the experts are required to meet in December 2024. A PTR is listed in a three-day window in early December 2024, and the trial is due to commence in approximately four months' time, in January 2025.

13. Both parties designated material within their disclosure as AEO Material. In Lilly's case, of the 350 documents originally disclosed, running to some 1,925 pages, 344 (comprising some 1,920 pages) were designated AEO. All subsequent disclosure from Lilly has also been designated as AEO Material.

14. The result of this designation is that (although Lilly submits that it has made offers designed to alleviate the situation, to which Teva has not responded) no one at Teva, including the Teva Lawyers, has seen the vast majority (around 99%) of Lilly's disclosure and Teva's external legal team is prohibited from discussing the AEO designated materials with, or communicating their content to, anyone in-house at Teva, including the Teva Lawyers who are dealing with this litigation.

15. From a date shortly after disclosure was given by Lilly, Teva took issue with, what it describes as, the blanket approach taken by Lilly to AEO designation and made various proposals in correspondence with a view to addressing its concerns. It did not, however, make any application pursuant to the provisions of the Confidentiality Order for wider access to documents or categories of documents.

16. The application that is now made to vary the Confidentiality Order does not seek re-designation of any AEO designated documents pursuant to paragraphs 8 and 9 of that order. Instead, it seeks to add the Teva Lawyers into the AEO ring.

The Law

17. There is very little between the parties on the law, although I detected a slight difference of focus.

18. The Court of Appeal summarised the correct approach to confidentiality in *OnePlus v Mitsubishi* [2020] EWCA Civ 1562. At [34], Floyd LJ observed that "an external eyes only tier is exceptional" and at [35] he said that the exclusion of access by one of

the parties to the relevant parts of key documents "should not be the result of the establishment of an external eyes only tier". At [39] he identified 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* [1975] R.P.C. 354 at p.356; Roussel [1990] R.P.C. 45 at p.49.
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> (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* [1975] R.P.C. 354 at p.360; *Al-Rawi* [2011] UKSC 34 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* [1975] R.P.C. 354 at p.358; *Al-Rawi* [2011] UKSC 34 at [64]; IPCom 1 at [31(ii)].
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> (iv) The court must be alert to the fact that restricting disclosure to external eyes only at any stage is exceptional: *Roussel* [1990] R.P.C. 45, p.49; *Infederation* at [42].
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> (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* [2018] EWHC 1515 (Ch) at [21] and [23];
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> (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* [1975] R.P.C. 354 and *IPCom 1*; see *IPCom 2* at [47].
>
> (vii) Difficulties of policing misuse are also relevant: *Warner-Lambert* [1975] R.P.C. 354 at p.360; *Roussel* [1990] R.P.C. 45 at pp.51–52.
>
> (viii) The extent to which a party may be expected to contribute to the case based on a document is relevant: *Warner-Lambert* [1975] R.P.C. 354 at p.360.

> (ix) The role which the documents will play in the action is also a material consideration: *Roussel* [1990] R.P.C. 45 at p.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]".

19. Trower J also carried out a recent review and summary of the relevant authority in *JSC Commercial Bank Privatbank v Kolomoisky* [2021] EWHC 1910 (Ch), at [32]-[44]. These paragraphs bear reading in their entirety but, for present purposes, I pick out only those most relevant to the application before me.

20. At [35], Trower J referred to the decision of Hamblen J in *The Libyan Investment Authority v. Société Générale SA* [2015] EWHC 550 (QB), where he said this:

> "20. The starting point is that each party should be allowed unrestricted access to inspect the other party's disclosure subject to the implied undertaking that the disclosure will not be used for collateral purpose - see CPR 31.22; *Church of Scientology of California the Department of Health* [1979] 1 WLR 723 per Brandon LJ at 743F.
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> 21. It is for the person seeking the imposition of a confidentiality club to justify any departure from the norm. In order to do so, the proponent of the confidentiality club must establish that there is a real risk, either deliberate or inadvertent of a party using his right of inspection for a collateral purpose - see the *Church of Scientology* case at 743G.
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> 22. Where it is demonstrated that there is such a risk, any restriction imposed should go no further than is necessary for the protection of the right in question. As the Court of Appeal stated in *Roussel UCLAF v ICI* [1990] RPC 45 at 54:
>
> 'the object to be achieved is that the applicant should have as full a degree of disclosure as will be consistent with the adequate protection of the (right).'
>
> 23. The provision of protection by the use of confidentiality rings or clubs in appropriate cases, including confidentiality clubs to which the parties' lawyers alone are admitted at least during the interlocutory stage of litigation, is well recognised: See, for example, *Al Rawi v The Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [64] per Lord Dyson."

21. At [37] and [38] of *Privatbank*, Trower J went on to say this about the use of confidentiality clubs:

> "37. … it is clear from the authorities that real caution is needed in their use, because of the obvious potential for an

> interference with the principles of both open justice and natural justice. The way in which this was put in *Al Rawi* (see Lord Dyson at paragraph [64]) was that, 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.
>
> 38. In my view, Hamblen J's reference to 'at least during the interlocutory stage of litigation' is also important. As Lord Dyson made clear in the paragraph of his judgment in *Al Rawi* referred to by Hamblen J, the nature of intellectual property proceedings is that they raise special problems which require (and he emphasise the word 'require') exceptional solutions, but even in that context those exceptional solutions may only be appropriate in the initial stages of the litigation. Lord Dyson said that he was aware of no case in which the court had 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".

22. At [39] and [40], Trower J then cited *McKillen v Misland (Cyprus) Investments Limited* [2012] EWCH 1158 (Ch) as providing a reason why there appeared to be no cases in which the court had approved a trial proceeding in circumstances where one party was denied access to evidence which was being relied upon at the trial, namely that, as David Richards J (as he then was) explained in that case, a confidentiality regime would interfere with the conduct of the trial itself and would thus have a "more direct impact on the overarching principles of open justice and natural justice" than would occur at an earlier stage in the proceedings.

23. Trower J went on at [41] to observe that specific points made by David Richards J at [31]-[33] of the judgment in *McKillen* were nevertheless "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".

24. For completeness, [31]-[33] of the judgment in *McKillen* to which Trower J was there referring emphasised, first, "[t]he nature and importance of the principle of open justice", second, that, "[a]ny departure from the principle of open justice is permitted only if it is necessary in the interests of justice and the administration of justice", and third, that, "[t]he burden of establishing that it is necessary to depart from the principle of open justice rests firmly on the party seeking it". To my mind, there is similarly no reason why paragraph [34] of the judgment in that case (which observes, as a fourth point, that "[a]ny departure must be supported by clear and cogent evidence which will be subjected to careful scrutiny by the court") is not also to be seen as having general application. This, in fact, appears to be accepted by Trower J in [44] of *Privatbank*, which I set out below.

25. At [42] of *Privatbank*, Trower J said this:

> "42. Where, as in the present case, a blanket approach is taken to the exclusion of access by one of the parties to the relevant

> parts of key documents there are real dangers that this will be incompatible with article 6 of ECHR and with basic principles of natural justice at common law. As Henry Carr J explained in *TQ Delta LLC v Zyxel Communications UK Ltd* [2018] Bus LR 1544 at [24], such an exclusion will also cut across the obligations of lawyers to their clients, obliged as they are to share with them all relevant information of which they are aware. Although Floyd LJ in *One Plus* at [34] and [35] qualified this statement of principle by explaining that staged or progressive disclosure of confidential information is permissible and agreed that the position may be different with documents of peripheral relevance, he agreed that exclusion of access by one of the parties to the relevant parts of key documents should not be the result of an external eyes-only confidentiality club".

26. After setting out in full the summary of the law provided at [39] in *OnePlus*, Trower J concluded his analysis in [44] as follows:

> "44. It seems to me that many of the same factors will apply in any other context in which a confidentiality club is sought to be introduced or maintained. In particular, it is clear that a restriction on disclosure to external eyes only at any stage of the litigation is exceptional and the burden remains on the disclosing party throughout to justify the continuation of any such restrictions for each document or class of documents so designated. Restrictions are capable of being an infringement of basic principles of fairness, including a level playing field, and will therefore only be permitted where necessary in the interests of justice. Any departure from the principle must be supported by clear and cogent evidence which will be subject to careful scrutiny by the court".

27. Lilly points out in this case that a crucial part of the court's assessment must involve considering whether a party's representatives are hampered in preparing the case on behalf of their clients, citing *Roussel Uclaf v ICI (No. 2)* [1990] RPC 45 at page 50, where Aldous J expressed the view that:

> "... the difficulties of the plaintiffs' advisers are real and…they are at the moment hampered in the preparation of their case by the restrictions imposed by the defendants. The documents and process description are at the root of an important part of the whole case and the plaintiffs are severely hampered in the preparation and understanding of the case by the defendants preventing anybody in the plaintiffs seeing the documents and the process description."

28. I did not understand Teva to dissent from this proposition, and I note that these observations were subsequently upheld by the Court of Appeal in that case. Prejudice to the receiving party is quite obviously an important factor to be taken into

consideration in the balancing exercise that must be undertaken by the court on an application of this nature.

29. I reject Lilly's submission, however, that its frequent reference in evidence and in its written submissions to an alleged failure on the part of Teva to evidence a "need" for the Teva Lawyers to gain access to the AEO ring is really just intended as a shorthand for discussing the balancing exercise to be undertaken by the court. The primary focus given by Lilly to whether Teva's in-house lawyers "need" to access the AEO ring is, in my judgment, inconsistent with the authorities and involves looking at the question from the wrong end of the telescope.

30. As Mr. Knott, acting on behalf of Teva, correctly submits, and Lilly appears to accept, it is clear from the authorities to which I have referred that the onus is very firmly on Lilly to justify the exclusion of the Teva Lawyers from the AEO ring. It is for Lilly to establish that there is a real risk, whether deliberate or inadvertent, of the Teva Lawyers using enhanced rights of access to documents for a collateral purpose, i.e. a real risk of genuine prejudice to Lilly. Put another way, it is for Lilly to establish that the restriction that is currently imposed by the Confidentiality Order is necessary for the protection of their confidential material. It is in that context that the balancing exercise, designed to ensure that any restriction imposed goes no further than is necessary for the protection of the right in question, is to be undertaken.

31. In addition to the authorities to which I have already referred, Mr. Knott took me in detail through *Dyson Limited v Hoover Limited (No. 3)* [2002] RPC 42. At [35] Laddie J said this:

> "... the onus must be on the party seeking to show that the case is sufficiently exceptional that significant restrictions on disclosure must be maintained. That must mean that it is on the party trying to restrict disclosure to justify it and to show why, in all the circumstances, notwithstanding onerous undertakings as to confidentiality and the like, nevertheless documents should not be shown to the litigant on the other side."

32. Laddie J went on in that case to observe, at [39], that not only is the onus on the disclosing party to justify a departure from the norm but, in fact:

> "There is a necessity for disclosure to [the receiving party] which can only be displaced for good cause".

33. In light of the observations in the authorities to the effect that it will be "exceptionally rare" for officers or employees of the receiving party to gain no access at all to documents of importance at trial, Mr. Knott submits that, at some stage prior to the trial in these proceedings, the Teva Lawyers must inevitably have the opportunity to see the AEO Material and that, therefore, the right time to make an order to that effect is now. He pointed out that Lilly concedes that this material is relevant to the proceedings.

34. In response to this submission, Mr. Bloch KC, for Lilly, handed up a judgment of Meade J in *Nokia Technologies v OnePlus Limited Technology (Shenzhen) Co., Ltd.* [2022] EWHC 2814 (Pat), and a Consent Order dated 13th September, 2024, made by

Leech J in *Lufthansa Technik AG v. Astronics Advanced Electronic Systems*, on which he relied in support of the proposition that, notwithstanding observations made in some of the authorities to which I refer above, there are now examples of cases in which the court has been prepared to deprive one or more of the parties of access to relevant documents at trial. He therefore submits that it is very far from inevitable that full access to the AEO Material will be given to the Teva Lawyers in advance of trial.

35. Unsurprisingly, owing to their late introduction into the argument, Mr. Knott was able to provide little assistance on these cases, including whether there were any underlying judgments on the confidentiality issues arising in each case which might be of relevance. Mr. Bloch was equally unable to assist on this question and did not take me through either of these documents in any detail.

36. Doing the best I can, it appears to be the case that, in *Nokia*, highly confidential materials, relevant to the question of infringement of Nokia's patent, had been obtained from a third party, Qualcomm, in the US courts, using the procedure under 28 USC § 1782. In these circumstances, Meade J was persuaded of a need for confidentiality and originally restricted access by the parties in the action to the confidential material at a stage when it was not apparent whether these materials would be relevant and actually used by the court (see [12] of the judgment). It is also clear from the judgment, however, that, at trial, there turned out to be very little in the material that was relevant and the judgment was handed down as an open judgment. I cannot take from this decision a general proposition that the court has previously been persuaded to restrict access at trial to relevant (albeit confidential) documents by parties to the proceedings.

37. In *Lufthansa*, I am in the unsatisfactory position of having only an order and no underlying judgment to explain the rationale for that order. It is clear from the face of the order that a confidentiality regime, including an External Eyes Only club (excluding in-house representatives) is in place shortly before trial and that, at least in relation to some extremely sensitive documents, even inclusion within the trial bundle will not enable relevant in-house representatives of the parties to gain access to those documents. However, absent details in respect of the underlying rationale for the making of this order, it is very difficult for me to extract any relevant principles or useful assistance from it. I do not know, for example, the extent to which it was considered likely that the restricted documents would be relevant to issues arising at the trial.

38. I turn now to consider the key issues that arise in connection with the application.

Do the terms of the Confidentiality Order preclude Teva's application, absent compliance with the mechanisms agreed by the parties for re-designation?

39. In his oral submissions, Mr. Bloch advanced the primary contention on behalf of Lilly that the failure on the part of Teva to seek a targeted re-designation in accordance with the mechanism set out in the Confidentiality Order effectively sounds the death knell for the application.

40. By way of context, Mr. Bloch points out that the Confidentiality Order was entered into many months ago with the agreement of the parties who have continued to

comply with it ever since. Its purpose, he says, is twofold: first, to protect the confidentiality of disclosure materials and, second, to provide a mechanism to resolve disputes as to the degree of protection. He points to the fact that, at least for the purposes of this application (and although Teva's rights in this regard are reserved) there is no challenge to the AEO status of any of Lilly's documents or, therefore, to the proposition that they have been correctly designated in accordance with the order.

41. Mr. Bloch then focuses on the construction of paragraphs 8 and 9 of the Confidentiality Order, to which I have already referred, and contends that the procedure there set out for re-designation is the procedure which should have been followed here. While he accepts that, on its face, the application is not one for re-designation, he contends that, as a matter of substance, the practical effect of the application, if granted, would be to re-designate the entirety of the documents which are currently marked AEO. He says that this is not "merely" an application to add two individuals to the AEO ring, as suggested by Teva, but rather is to be seen as seeking to make a profound change to the structure and protections agreed by the parties.

42. Mr Bloch rejects Teva's evidence to the effect that a targeted application for re-designation is not possible, owing to an inability to take instructions on specific documents, and that the time and cost of such an application render it undesirable. He says that there would have been nothing to stop Teva from obtaining instructions on specific categories of documents and making an application in respect of those categories.

43. In circumstances where he submits that Teva has failed to follow the required mechanism, and thus failed to comply with the agreed order, Mr. Bloch goes on to say that the court should refuse to consider the application, or at least that it should refuse to consider the application unless Teva can establish that the mechanism for dispute resolution in the Confidentiality Order is "not fit for purpose". He did not really explain what he meant by this, and it was not referred to in his written submissions. However, essentially, I understood him to be saying that it is only if Teva can satisfy the court that it was, in fact, impossible to make an application under paragraph 8 of the order that it is entitled to make an application in a different form. Mr. Bloch says that the court cannot be so satisfied and that, accordingly, Lilly remains entitled to require compliance with paragraphs 8 and 9 of the order.

44. Mr. Bloch acknowledges the existence of the liberty to apply provision in paragraph 29 of the order and accepts that the application notice relies upon that provision. However, he says that paragraph 29 must be read in the light of the express procedures agreed upon by the parties in paragraphs 8 and 9.

45. In response to a question from me as to whether he is saying that the court has no jurisdiction to make the order sought, Mr Bloch confirmed that he did not go that far. He accepts that the court has power to make the order, but contends that it should not do so, having regard to a correct construction of the order, which he contends should be read as requiring the parties to resolve any disputes over designation by reference to paragraphs 8 and 9. He submits that the burden of showing that those paragraphs have been complied with rests with Teva, and that it is unable to discharge that burden.

46. Mr Bloch also submits that it is contrary to natural justice for Teva to invite the court to "tear up" the mechanism provided for in the order and deprive Lilly of the benefit of that order. In all the circumstances, Mr. Bloch says that I should not consider the application on its merits.

47. I reject these submissions, many of which were not foreshadowed in the written skeleton argument. My reasons are as follows.

48. The fact that the order was made by agreement and may have been heavily negotiated neither prevents the court from varying it nor overrides the legal principles to which I have referred: *Bombardier Transportation UK Limited v Merseytravel* [2017] EWHC 726 TCC, per Coulson J (as he then was), at [17]-[18]. In paragraph [18], Coulson J said this:

> "Of course, parties in cases of this sort need to co-operate as far as they possibly can, in order to minimise the procedural disputes between them ... But that does not, and cannot, prevent Bombardier from seeking to vary the terms of the consent orders if practical difficulties in complying with them subsequently became apparent. Any party who agrees this kind of detailed provision relating to its future conduct is entitled to say: 'Well, I thought that I would be able to understand the material through my lawyers, but in fact this has not proved possible'".

49. There is no doubt that the court has jurisdiction to admit further individuals to the AEO club, both under the terms of the Confidentiality Order itself and under paragraph 15 of Practice Direction 57AD. That paragraph provides as follows:

> "If there are material concerns over the confidentiality of a document (whether the confidentiality benefits a party to the proceedings or a third party), the court may order disclosure to a limited class of persons, upon such terms and subject to such conditions as it thinks fit. The court may make further orders upon the request of a party, or on its own initiative, varying the class of persons, or varying the terms and conditions previously ordered, or removing any limitation on disclosure."

50. As for the Confidentiality Order, paragraph 19(f) expressly envisages an application to the court to add to the categories of individual identified in paragraph 19 for the purposes of disclosure of AEO Material. There is no cross-reference in paragraph 19(f) to paragraphs 8 and 9, and so no obvious inference to be drawn that the application to which 19(f) refers can only be an application under those paragraphs. Furthermore, the description of the application to re-designate documents or categories of documents under paragraphs 8 and 9 does not comfortably encompass an application to disclose AEO Material to a party not already identified in paragraph 19. In the circumstances, I infer that the order intended to make provision for different types of application.

51. In addition, of course, paragraph 29 of the order provides for a general liberty to apply. Aside from the fact that that paragraph is in the broadest of terms, it must

certainly, amongst other things, encompass liberty to apply to add another party under paragraph 19(f), exactly what Teva is seeking to do in its application.

52. On their express wording, I reject the submission that paragraphs 8 and 9 of the order mandate a particular approach. Paragraph 8 is permissive only, providing that a party "shall be entitled to apply" and, thereafter, paragraph 9 makes provision for the steps that must be undertaken in the event of such an application being made. In my judgment, it does not restrict an alternative form of application from being made, and nor does it require a party to establish an inability to make an application under paragraphs 8 and 9 before it can make such an alternative form of application. In any event, there is always the free-standing power of the court pursuant to paragraph 15 of PD57AD.

53. Against that background, I do not consider the question of whether Teva could have made an application under paragraphs 8 and 9 of the order to be relevant to my determination of the application that it has, in fact, made. It is not necessary for me to consider whether those paragraphs are, in Mr Bloch's words, "fit for purpose".

54. Mr. Bloch accepts that the relevant legal principles to which I have already referred remain relevant, notwithstanding the terms of the order. For the reasons I have given, it would be contrary to the interests of justice and inconsistent with the requirements of the overriding objective for me to ignore those principles and decide this application simply by reference to the terms of the Confidentiality Order. Teva has come before the court with evidence to the effect that the terms of that order as they exist are unworkable and unfair. In my judgment, I must determine that complaint on its merits and having regard to the relevant case law.

Should the court accede to Teva's application to admit the Teva Lawyers to the AEO club?

55. Having close regard to the principles of law to which I have already referred, and in particular the burden that lies firmly at Lilly's door to justify its position on confidentiality, together with the importance of the balancing exercise, I have arrived at the view that it is in the interests of justice for the Teva Lawyers to be added to Teva's AEO club, with only a couple of caveats. My reasons are as follows.

56. I begin by saying that, while there is no attack for present purposes on Lilly's designation of disclosure material as AEO Material, it seems to me that I must start from the premise that all the materials that have been designated AEO are commercially sensitive, fall within the categories of commercially sensitive documents identified in the Confidentiality Order and have been correctly so designated. Although, as I have said, Teva reserves its position on this for the future, it accepts that this is the only approach that can be taken to this application. I bear this firmly in mind in conducting the relevant balancing exercise.

57. I also make the preliminary observation that Teva accepts that, if its application is successful, then what is sauce for the goose is also sauce for the gander, and Lilly's in-house lawyer must be permitted access to Teva AEO designated Material. It was suggested in Lilly's written submissions that there is an asymmetry in the potential for Teva to gain access to AEO Material prior to service of its expert report, in circumstances where Lilly has not had the same advantage. However, I do not

consider there to be anything in this complaint. Unsurprisingly as the claimant, Lilly's expert report is largely based on Lilly's own disclosure, to which it has full access. In any event, it could, at any time, have made its own application to re-designate documents, or to include its in-house lawyer in the Lilly AEO club if it considered it to be necessary to do so in advance of service of its expert evidence. It has made no such application.

58. The key question arising on the application is whether all of the AEO Material should now be made available to the Teva Lawyers by increasing the membership of the Teva AEO club. There is no application for only some of the AEO Material to be made available and, when I explored with Mr. Knott the possibility that his client may be satisfied with access to some but not all, I understood him to make it clear that his application was for access to all AEO designated Material. It is for this reason, he explained, that Teva has not responded to offers from Lilly to make available certain limited AEO Material, including some dealing with matters referred to in the Lilly expert report. Limited access is not sufficient, says Mr. Knott, to overcome the serious disadvantages that Teva faces without the ability for its in-house personnel to see these documents.

59. I have already explained that it is not for Teva to justify its need to see the AEO Material. They have been provided by Lilly on disclosure, redacted to remove irrelevant material and can, therefore, be assumed to be relevant to the issues arising in the proceedings. I understand that many of them have been referred to by Lilly's accounting expert in the preparation of her report, and by Lilly's witnesses in their recently served witness statements. The starting point in such circumstances is that Teva is entitled to know the case that is put against it and is entitled to see the AEO Material as a matter of natural justice. That is a necessity which can only be displaced for good cause.

60. As for the timing of, and reasons for, the application, Teva has served evidence from Ms. Eyre, a partner at Bird & Bird with conduct of Teva's case, which confirms that the conduct of Teva's case and its preparations for the fast-approaching trial are now being seriously impeded by the inability of Teva's external lawyers and experts to discuss with anyone at Teva the AEO Material or content deriving from it, including the majority of the correspondence in the case. She says, and I accept, that no one at Teva has been able to obtain a complete or anything approaching a complete picture of the correspondence, documentation and disclosure exchanged between the parties in the litigation.

61. Ms. Eyre points out the difficulties that this creates as the parties now enter the final stages of the litigation, including the service of evidence. Amongst other things, she says that:

    i) the external team are unable to seek instructions on documents or give full strategic advice in respect of the proceedings;

    ii) Teva has been unable to understand fully the loss claimed, how it is calculated or the composition of the loss since the outset of the claim, putting it in a "fundamentally prejudicial position", including in respect of seeking to negotiate a settlement;

iii) Teva is unable to agree a total revenue figure with Lilly, together with the methodology for the calculation, without sight of the material underlying it, and without Teva's external advisers discussing with Teva what assumptions underpin the calculations and Teva's expert view on those;

iv) Teva has been unable to plead fully to Lilly's Amended Particulars of Claim; and

v) Teva's legal team have been unable to provide a complete picture to their client of matters raised in correspondence.

62. I do not consider that I can properly do anything other than accept this evidence from an experienced litigation solicitor. To my mind, it is entirely unsurprising that in a substantial, complex damages claim, only a few months from trial, the defendant is being prejudiced owing to an inability, caused by the lack of access to disclosure documents, fully to understand and take advice on the case that is being advanced against it. I have no difficulty in accepting that Teva's preparations for trial are being seriously hampered, and that, as Ms. Eyre says, it is "in a position of significant disadvantage and on unequal footing, rather than on an 'equal playing field'."

63. It is easy to see, in my judgment, why an inadequate grasp of the full picture leaves Teva in a position where it cannot sensibly engage with settlement discussions or other attempts to narrow the issues before trial.

64. Lilly has not sought directly to challenge Ms. Eyre's evidence, but has instead sought to suggest that she is mistaken about what Teva really "needs" to see in order to understand the case that is advanced against it. Mr. Brook, a partner at Hogan Lovells with conduct of the case on behalf of Lilly, suggests in his evidence that there is no reason for Teva to see underlying documents concerning quantum. All it needs to see, he says, is the product of the calculations carried out by the experts. He contends that the assumptions underpinning Lilly's expert's financial calculations have been made available to Teva, together with her methodology, and that nothing more is needed. He says in terms in his statement that:

> "in all cases where Lilly's claim is quantified, Lilly's offer to treat the numbers in the summary table as confidential, not AEO confidential, in combination with knowing the methodology used to arrive at them, provides all the information Teva needs. There is no need for Teva in-house personnel to see the underlying confidential information to in some way check the work of its advisors."

65. I reject this evidence. As Mr. Knott submits, and as Mr. Brook himself also appears to acknowledge, it is not for one party to litigation to dictate what another party does or does not need to see in order to understand the case advanced against it, obtain advice on that case and provide instructions. In her second statement, responding to Mr. Brook, Ms. Eyre maintains her position, and (without waiving privilege) confirms in paragraph 8 that there have been a wide variety of occasions when the conduct of the litigation has been seriously hampered. She goes on to say, and I accept, that it is unusual for even a party's own solicitor to choose what their client needs to know for the purposes of participating in proceedings and giving instructions. She also

confirms that she would ordinarily expect to advise a client on the most relevant helpful or damaging documents, but that she cannot give that advice here owing to the current restrictions. Further, she says that it is not unusual for a client to take a different view to the legal team, or at least to challenge them on it and/or suggest other avenues of approach. However, there is no scope for that to happen as things stand in this case. I did not understand Lilly to gainsay any of this evidence.

66. In so far as Lilly criticises Ms. Eyre's evidence as being overly general in nature, I also bear in mind Mr. Knott's submission that it would be extremely difficult for Teva's external legal team to explain to the court in more detail why instructions are needed on specific documents or what advice needs to be given, not least because of the privileged nature of their own instructions. Further, I accept that to do so would or might reveal their strategic or tactical thinking, their evaluation of the strengths and weaknesses of the case and their views as to potential avenues of inquiry.

67. In my judgment, the features to which I have already referred must weigh heavily in the multifactorial assessment to be undertaken by the court. That the case is approaching trial (and as is clear from the authorities) only serves to add to that weight. It seems to me to be proper to infer that documents that are attached to or relied upon by experts and documents relied upon by witnesses are obviously relevant to the case, such that the starting point can only be that access must be given, absent proper justification to the contrary, supported by clear and cogent evidence. Even assuming that there may be some cases where it is appropriate for representatives of the receiving party to be deprived of access at trial to documents of importance or relevance to the case, as might perhaps be envisaged by the Order made in *Lufthansa*, it is very clear that those cases will be exceptionally rare. Indeed, I have been shown no judgment addressing the circumstances in which this would be appropriate. In any event, Lilly has not begun to satisfy me that this is one of those exceptional cases.

68. Indeed, it is clear that Lilly has, for some time, taken the view that it is very likely that representatives of both parties will need to have access to certain of the AEO Material before the trial in any event. This much is clear from its observations in letters of 12th June 2023 and 27th September 2023. The former said this:

> "we believe we should work toward a mutually acceptable solution which means that both sets of clients can, with suitable confidentiality protections, see the expert reports (if not necessarily all the annexes…)".

69. Importantly to my mind, during his submissions Mr. Bloch conceded that "it may well be that a substantial amount of this material will, in due course, need to be made available" whether by agreement or following an appropriate order, albeit that he said that he did not accept that it would be "necessary" for all of the AEO Material to be made available. Aside from the fact that the question is not one of necessity, in common with Mr. Knott I ask rhetorically in response to this concession, when is it proposed that this should happen, if not now?

70. Mr. Bloch also conceded that the balance of interests may well be much more weighted in favour of Teva having access to the AEO Material at this stage in the proceedings than at an earlier stage, and that the closer to trial the case gets, the stronger Teva's case for access becomes. I consider that for all practical purposes the

parties are already extremely close to trial. I agree with Mr. Knott that the PTR at the beginning of December is really too late for this issue to be addressed, not least because of the difficulties that Teva is quite obviously already experiencing in its conduct of the litigation.

71. Against the background of Mr. Bloch's concession, it seems to me to be all the more important that, in opposing the application, Lilly is able to satisfy what Mr. Bloch accepted at one point in his submissions was the "heavy burden" that lies on its shoulders, given the principles of natural justice, to justify the continued refusal to allow access to AEO Material at this stage in the proceedings by the Teva Lawyers. This would necessitate the service of cogent evidence explaining the dangers involved in the provision of that access, and the reasons why the scales should weigh more heavily in favour of maintaining the existing restrictions on access. Such evidence might, for example, identify documents which are not likely to be referred to at trial or included in the trial bundles in support of the proposition that the sensitivity of such documents should trump access being given (at least pending further clarity on their relevance to the trial). Alternatively, it might identify various categories of document and explain the specific risks attached to providing access to those categories of document to the Teva Lawyers.

72. However, as Mr. Bloch accepted in his submissions, Lilly has not approached the application in that way. With only a couple of exceptions, to which I shall return, it has not sought to identify in detail specific categories of highly sensitive AEO Material which, for example, it contends could never be provided to Teva's in-house lawyers, even at trial, owing to the real risk of, say, inadvertent disclosure. Equally, beyond a general assertion that some issues between the parties may in due course fall away, it has not sought to suggest that some of the documents in the AEO Material are unlikely to be relevant at trial.

73. Mr. Bloch sought to explain Lilly's failure to adopt a more detailed and forensic approach by saying that this would have involved an enormous amount of work and that the hearing of this application would inevitably have expanded to cover a number of days. However, I do not accept that Lilly can so readily be absolved of the responsibility properly to address the onus that it accepts lies with it. This application was issued on 24th July and there has been ample time since then for the preparation of Lilly's evidence. Mr Brook does not suggest in his statement that, given more time, he would have wished to serve more detailed evidence.

74. In similar vein, Lilly has not sought to identify the categories of document that it must accept in light of Mr. Bloch's concession will have to be provided to representatives of both parties in due course prior to trial, on the basis that they are important or relevant documents, just as it does not try to explain why it resists carrying out that exercise now. It has certainly not sought to suggest that, for example, specific categories of document within the AEO Material are unlikely to play any real part in the case. Mr Brook’s evidence that some of the AEO Material is challenging to interpret is not, to my mind, a justification for the continuing restrictions.

75. Turning to the question of whether there can be any objections arising by reason of the identity of the two Teva Lawyers, there is very little to be said. Dr. Wright is Associate General Counsel, European IP and Regulatory Litigation at Teva. Mrs. Indraccolo is VP and General Counsel, European IP and Regulatory Litigation. They

are both SRA regulated and based in the UK. Ms. Eyre confirms that their roles are strictly legal, rather than commercial. Both have signed confidentiality undertakings and both are professionals who are fully aware of their obligations to keep material and information confidential, if it is provided pursuant to such an undertaking. I raised the question of whether it was necessary to include both of them, or whether only one could be involved in the AEO club, but received a clear answer from Mr. Knott, justifying their joint involvement, by reference to the size of the Teva team and their differing roles within that team. I did not understand Lilly to raise any issue merely by reason of the proposal for two, rather than one, Teva Lawyer to be given access.

76. As for the risks involved in making the order sought, i.e. the other side of the balance, Lilly does not suggest that either individual will deliberately seek to disclose confidential information in breach of their undertakings, or that they have acted in breach of the undertakings given to date. Rather, in a couple of short paragraphs of Mr. Brook's statement, he deals with the danger of possible inadvertent disclosure. Looking closely at those paragraphs, Mr. Brook refers at paragraph 6, first, to "over 450 highly confidential internal Lilly documents produced on disclosure", which appear to make up the vast majority of its disclosure. These are said by him to relate to quantum issues, such as pricing, discounting arrangements, costs of production, internal transfer pricing arrangements, dividends and tax. I do not for one moment forget that these documents are all designated AEO and that, as such, they are to be regarded as highly confidential and sensitive. However, the fact of confidentiality and sensitivity is of course not a bar to disclosure, and there is no attempt whatsoever by Mr. Brook in his statement to suggest that knowledge of the content of these documents on the part of the Teva Lawyers will create any real risks of inadvertent disclosure by Teva, or that this information could be used inadvertently by either of the Teva Lawyers to inform their approach in a different commercial context. There is certainly no hint of a suggestion in his evidence that the provision of access to these documents will “render the proceedings futile”.

77. Mr. Brook goes on in paragraph 6 to refer to the AEO documents produced by Lilly in the litigation (such as the expert report and witness statements), which he acknowledges refer to “numerous” of the AEO disclosure documents. But again, he makes no attempt to suggest that knowledge of these documents will create any real risks for Lilly around inadvertent disclosure by the Teva Lawyers or improper, albeit inadvertent, use. On careful scrutiny, there is simply no credible evidence or even concern expressed that the provision of access to these documents, subject to the existing confidentiality undertakings, would create significant prejudice to Lilly.

78. In paragraphs 7 and 8 of his statement, Mr. Brook identifies only two categories of document to which he does appear to attach risk, relating to the possibility of inadvertent disclosure. First, a disclosure document which he describes as relating to the considerations that Lilly takes into account in deciding, upon entry of generic competitors into the market, how to react commercially. Mr. Brook says this:

> "Lilly fairly expects Dr. Wright and Ms. Indraccolo could be involved in advising Teva business on how Lilly might react to Teva entering the market with a generic rival product [of its own]."

79. Mr. Bloch pointed out in his submissions, correctly, that no attempt had been made by Ms. Eyre in her reply statement to gainsay this expectation in the evidence. He also pointed to the fact that Teva has rejected the possibility raised by the court of its representatives entering into an undertaking that they would not be involved in the provision of any such strategic advice for a period of time.

80. Second, Mr. Brook refers to settlement agreements with five generic competitors of Teva, which he says are "potentially of commercial usefulness and value to Teva, at a much more general level than this specific action". He goes on to say: "[n]aturally, Dr Wright and Ms Indraccolo would be expected to be involved in the negotiation of such documents and Lilly is concerned about the competition / antitrust law implications of sharing settlement agreements with Teva personnel ..." Again, Ms. Eyre does not gainsay in her evidence the suggestion that the Teva Lawyers would be expected to be involved in the negotiation of such documents.

81. Mr. Brook goes on to say that concerns around these settlement agreements do not just arise from Teva, but that three of the five third parties involved in these agreements have expressly requested that they be designated as AEO. There is no suggestion that Lilly has contacted any of these third parties for their view on the application, but Mr. Brook says that "[i]t seems reasonable that such generic competitors of Teva's may wish to make their own submissions about whether Teva in-house personnel could see these agreements."

82. Notwithstanding Mr. Bloch's submissions, and in the absence of the clear and cogent evidence from Lilly that would be required to resist this application, I can see no basis on which these two examples should preclude the making of the order sought by Teva. However, on careful reflection, I can very well see that there is an argument for carving these specific categories of document out of the AEO Material to which the Teva Lawyers are given access by virtue of their admission to the AEO club. I suggested this to Mr. Knott, who rejected any such solution on the basis that Lilly's evidence does not begin to get over the first hurdle of satisfying the court that there is a need to enhanced protection of these documents in an AEO ring which does not include in-house representatives.

83. Having considered the matter further, however, I disagree with Mr. Knott in the following respects. As for the first document referred to by Mr. Brook in paragraph 7 of his statement, in the absence of evidence disavowing Mr. Brook's assertion that the Teva Lawyers could be involved in providing advice to Teva on how Lilly might react if Teva enters the market, I consider that, as things stand, the evidence suggests that there is a potential risk of harm to Lilly of the provision of access to this document. I reject Mr. Knott's submission that this is no more than a theoretical danger of misuse. Teva had an opportunity directly to engage with this evidence in Ms. Eyre's second statement but, tellingly, it did not do so.

84. Furthermore, looking at the other side of the equation, it is not presently clear that the maintenance of restrictions on this document alone will have any material impact on Teva's ability to conduct the litigation. Certainly, none was suggested. Furthermore, I do not know whether the document is referred to in the experts' reports or the witness evidence, and there is no evidence one way or the other, and thus I do not know whether it is a document that will be important in the context of the trial. Whilst the court may ultimately take the view that all AEO Material will have to be

made available to representatives of the parties at trial, in the case of this one document I am sufficiently concerned at the potential risk of harm to Lilly that I intend to carve it out of the order for the time being. I cannot say that it is inevitable that an order will be made for disclosure of this document before the trial. I note that there is precedent for in-house lawyers on each side to be given limited, as opposed to wholesale, access to AEO Material. If Teva considers that the designation of this specific document is inappropriate, or it wishes the Teva Lawyers to have access to it within the AEO ring, it must make a specific and separate application to that effect.

85. Turning to the second category of document identified by Mr. Brook. I consider that Mr. Knott is right to say that Mr. Brook's expression (without more) of a "concern" about competition/antitrust law implications is plainly insufficient to get over the necessary hurdle, not least because there is no explanation as to what is meant by this, or what the implications might be. Similarly, I consider Mr Brook's reference to this category of document being "potentially" of commercial usefulness to Teva to be weak and this appears to me to undermine his concern that the Teva Lawyers would be expected to be involved in the negotiation of similar documents. Nevertheless, I can see an argument for permitting any third parties who may have something relevant to say on the subject at least to have an opportunity to do so. Indeed, I would have expected Lilly to contact them before now to obtain their views, so that the court could be properly informed. It would appear that Lilly has not taken such a step.

86. It was suggested during the hearing by Mr. Knott that if I was concerned about these third parties, the order might provide a short period during which any third parties involved in these settlement agreements might have an opportunity to object to Teva's application.

87. I invite the parties to make appropriate provision for this in the order, including providing that any objections from third parties should be responded to in a short timescale and then dealt with by the court on the papers. That matter should, I think, be reserved to me. In the event of no objections being provided by the third parties within the relevant time period, these documents are to be included in the AEO Material to which the Teva Lawyers should be given access, owing to the absence of any other clear and cogent reason why they should not be so included.

88. Finally, Lilly has raised a number of additional factors which it says are to be added to the balance in favour of rejecting the application, although I do not consider any of these factors to shift the dial. Dealing with them in turn, Lilly contends:

    i) first, that the position in which Teva finds itself is of its own making. It says it has refused to agree to reasonable proposals from Lilly to reveal limited information to its in-house lawyers. I have largely already dealt with this. I accept Mr. Knott's submission that the proffered information is wholly insufficient to address the significant prejudice to which Teva is subject, and that it is not for Lilly to second-guess what Teva might need to see.

    ii) Second, that Teva already has access to sufficient information by reason of the information that has been disclosed in connection with the expert's approach to methodology and assumptions. I reject this submission, which in any event focuses on Teva's need for information, rather than the correct test. I have dealt already with the total lack of any cogent evidence to suggest that giving

access to the Teva Lawyers to the quantum information underlying the expert report would lead to a serious risk to Lilly of inadvertent disclosure of its confidential information or inadvertent misuse of that information, given the confidentiality undertakings that would be in place. I am satisfied from the submissions made to me by Mr Knott that there are important aspects of the Lilly expert report, including underlying assumptions, which have not already been made available to Teva.

iii) Third, Lilly says that there is a danger in making this order that it will not involve a detailed consideration of the merits of individual categories of documents, many of which will involve inevitably differing considerations. However, Lilly has only itself to blame for choosing to respond to the application in the way that it has. Where Lilly has raised cogent and detailed points on categories of documents, I have addressed them in detail. The court could only deal with the application on the evidence that it has before it. Lilly has chosen not to address, by way of example, how it considers that various categories of documents might be used at trial.

iv) Fourth, Lilly says that neither Teva Lawyers have special commercial or accounting knowledge or expertise, and that therefore it cannot be assumed that they will have anything useful to contribute in relation to the underlying data. I reject this submission, which is tantamount to saying that a lay client will never have anything useful to offer in connection with the conduct of its own litigation. Any litigation lawyer knows this is simply erroneous. Lay clients are perfectly capable of critically analysing information and providing instructions, including instructions which raise issues not previously identified by their external lawyers; all the more so here where the individuals concerned are, in fact, in-house lawyers at Teva.

89. For all these reasons, I consider that Lilly has failed to satisfy the onus of justifying the continued exclusion of the Teva Lawyers from the AEO club. The balancing exercise weighs in favour of granting the application. Accordingly, I will make an order in Teva's favour, subject to the two specific points I have raised, which will need to be addressed in the order.

90. Although I considered the possibility of requiring additional undertakings from the Teva Lawyers, specifically that they would not involve themselves in commercial decisions for a period of time, I have decided that I will not require any additional undertakings, primarily because I accept that the sort of undertaking I had in mind, and floated with the parties, is likely to be highly uncertain and impossible to police in the circumstances of this case. Furthermore, there is nothing in Lilly's evidence, as I have already explained, to support the imposition of such an undertaking. Mr. Bloch did not appear to consider that it would be of any real assistance in any event.

91. I will, however, require that the Teva Lawyers should be admitted to the AEO club on condition that they receive read-only access to documents at the database stored at Bird & Bird. They should not be provided with any hard or electronic copies of the documents and they should not be able to print any of those documents. This will ensure that copies of the documents cannot be stored in the internal Teva document storage system.

Should the Court permit Ms. Julie to join the Confidential Ring?

92. As for the second part of the application, I can deal with this quite shortly. Teva wishes to admit one of its senior in-house lawyers, Ms. Staci Julie, who is Senior Vice President and Chief IP Counsel at Teva Pharmaceuticals, to the Confidential ring so as to ensure that approval to any possible settlement can be given. This is objected to by Lilly on the basis that the order provides for a specific number of individuals in the Confidential ring, up to three in-house personnel, and that Ms. Julie's addition would exceed that number. Lilly submits that the more people admitted to the ring, the more the scope for compromise of Confidential information.

93. I reject Lilly's opposition to this application. Although I wonder at the reason why the individual at Teva with authority to settle the proceedings was not previously identified and included in the Confidential ring, it makes obvious sense, and is plainly consistent with the overriding objective, to include her now. There is no reasoned basis for the suggestion that the danger of disclosure of information will be any greater once she becomes involved, or that the undertaking that she has agreed to give will be any weaker than the undertakings given by others.

94. Mr. Brook's evidence does not suggest as much. His main complaint is that Teva has taken a somewhat cavalier approach to the identification of its personnel. I do not need to decide whether this criticism is merited. It is insufficient, in my judgment, to outweigh the obvious good sense in including Ms. Julie at this stage. Parties in a claim of this sort are to be encouraged to take all reasonable steps to narrow the issues, and, if possible, to negotiate a settlement. It is not consistent with the overriding objective for one party to be in a position where it cannot agree to do either, or both, of these things because the individual with power to approve such steps is unable to gain even a high-level understanding of the case.

95. I invite the parties, in due course, to prepare an order reflecting my judgment.

[Further Argument]

96. Further to the judgment that I have just given, Lilly now seeks permission to appeal. Mr. Bloch raises three points. First, he identifies the importance of the relationship between the Confidentiality Order and the principles of natural justice as discussed in the cases to which I have referred, saying that that is a matter that the Court of Appeal should have an opportunity to consider. Second, he identifies the issues of principle raised in the authorities and says that this is an important case, both for his clients and more generally, and that Lilly is entitled to have my judgment reviewed by the Court of Appeal. Third, Mr Bloch raises an issue around the construction of the Confidentiality Order, in respect of which I have made certain findings.

97. I am not going to grant permission to appeal.

98. In so far as the construction of the order is concerned, I consider that to have been a very straightforward point. Lilly has no prospect of success in relation to that question. Furthermore, Mr. Knott is right that the court has, on a number of previous occasions, considered the relationship between an existing confidentiality order and the relevant principles of law. There is no good reason for that to be reviewed by the Court of Appeal.

99. In so far as the exercise of my discretion is concerned on the legal principles, that exercise involved a balancing exercise, having regard to the evidence and the principles established by the cases, which I have undertaken. In so doing, I have taken into account all of the submissions made on both sides by the parties.

100. Importantly, a major reason for the decision I have arrived at is the absence of evidence on the part of Lilly which might have enabled it to establish that there was a serious risk of prejudice by reason of access being given to in-house personnel at Teva to the AEO ring, a risk which outweighed the risk of prejudice to Teva of a continuation of the existing arrangements. Lilly did not focus its evidence on what was required in order to satisfy the burden that rested squarely on its shoulders. I also note that Mr. Bloch has not identified any manifest error of law in my judgment, although, of course, I accept that he has only just heard it.

101. Mr. Bloch invites me to stay this matter, pending an application that he will now need to make for permission to appeal to the Court of Appeal. Given the sensitivity of the documents concerned and the importance of this matter to the parties, together with the potential for damage to be done which cannot later be undone, I am prepared to stay the matter but only pending a determination by the Court of Appeal as to the question of permission to appeal. In the event that permission is granted, Lilly will have to seek a further stay from the Court of Appeal.

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