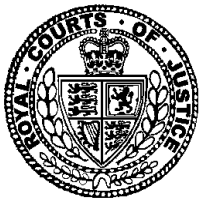

Neutral Citation Number: [2021] EWHC 2825 (Pat)

Case No: HP-2016-000018

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

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

Date: 22nd October 2021

Before :

THE HON MR JUSTICE MELLOR

- -

Between :

(1) ANAN KASEI CO. LTD **(2) RHODIA OPERATIONS S.A.S**	**Claimants**
- and -	
(1) NEO CHEMICALS & OXIDES (EUROPE) LTD **(2) NEO PERFORMANCE MATERIALS, INC.** **(3) NEO CAYMAN HOLDINGS LTD**	**Defendants**

- -
- -

Tom Mitcheson QC and **Miles Copeland** (instructed by **Hogan Lovells International LLP**) for the **Claimants**
Hugo Cuddigan QC (instructed by **Bird & Bird LLP**) for the **Defendants**
Party A, represented by **Bristows LLP**, submitted a witness statement
Party B appeared by **Stuart Baran (**instructed by **Baker & Mackenzie LLP)**

Hearing date: 8th October 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be Friday 22nd October 2021 at 10am.

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THE HON MR JUSTICE MELLOR

Mr Justice Mellor:

Introduction

1. This is a dispute about the terms as to confidentiality which should attach to certain documents which are key to the Claimants' (Rhodia) loss of profits claim in this inquiry as to damages. The applicable legal principles are not in dispute, but their application in the present circumstances is a matter of hot dispute.

2. In the action for infringement of EP 1 435 338 (the Patent), Rhodia have already established that the Patent is valid and was infringed by certain acts carried out by the First Defendant, in the judgment of Roger Wyand QC in April 2018. Mr Wyand QC found that various products infringed, including Neo's Commercial Products (called C100N, C100 and C201) and various (but not all) Development Samples, R & D Samples and Other Samples. In October 2019 the Court of Appeal upheld his findings and added the Second Defendant pursuant to a successful procedural appeal by Rhodia. The Third Defendant was added by consent in the course of this inquiry as to damages. I will refer to the Defendants as 'Neo'.

3. The Patent claims essentially pure High Surface Area (HSA) cerium oxide (CeO), a substance used in the manufacture of catalytic converters for diesel powered vehicles. Rhodia and Neo are fierce competitors in the provision of raw materials which are used in such catalytic converters. They compete to supply raw materials (which include grades of HSA CeO and mixed oxides) to a small number of customers. It comes as no surprise that the conditions and prices under which each supplies their products are commercially very sensitive and highly confidential and the terms negotiated with each customer are also highly confidential between the supplier and the customer.

4. Accordingly, the dispute I have to resolve concerns information which is said to be and I accept is highly commercially confidential to Rhodia and to external parties, Party A and Party B. To understand the detail of Rhodia's claim and so that at least one person from Neo can give meaningful instructions in relation to it (including providing necessary assistance to Neo's expert accountant), Neo submit that the information in question must be disclosed to their Chief Operating Officer, Mr Kevin Morris. On top of what I might call a fairly standard confidentiality undertaking, Mr Morris offers an additional undertaking which I detail below.

5. Neo submit there is no other suitable person, not least because Neo are a relatively small organisation with very few in the management structure. By contrast, Rhodia has been able to satisfy the confidentiality concerns of Party B by appointing a particular person (Dr Wassmann) to see its confidential information and for that person to give a wide-ranging additional confidentiality undertaking in this form (the so-called Wassmann undertaking):

> "not to have any involvement (either directly or indirectly) in current, pending or future commercial negotiations and/or discussions with Party B relating to rare earth oxides, including without limitation high surface area cerium oxide products or any substitute for such products."

6. Party B says that the information in question should only be disclosed to Mr Morris on provision of the Wassmann undertaking and says that the additional undertaking offered by Mr Morris is not acceptable. Neo say that Mr Morris could not give the Wassmann form of undertaking and still be able to do his job.

7. In a recent judgment in this case, Fancourt J. correctly described this case as being 'hard fought'. Neither part of this case has been the subject of costs budgeting, and it appears the damages claimed are well above the limit below which costs budgeting would be required. Furthermore, the costs expended on both sides in recent applications indicate that this is an action in which every possible point is being or will be taken.

8. In that vein, the hearing before me was also 'hard fought'. Disputes over confidentiality ought to be capable of resolution in relatively short hearings, especially since the principles have recently been reviewed and summarised by the Court of Appeal in *Oneplus v Mitsubishi Electric* [2020] EWCA Civ 1562.

9. Disputes over confidentiality of particular documents and information appear to have been live throughout this inquiry. Rhodia served their Points of Claim on 26 June 2020. Neo served its Points of Defence on 11 September 2020 and shortly afterwards, in his judgment and Order dated 16 September 2020 Marcus Smith J. ruled on whether a confidential witness statement (Mackay I) and the confidential annex to the Points of Claim should be disclosed to Mr Kevin Morris, the Chief Operating Officer of the Second Defendant (Neo Canada).

10. Despite fierce resistance from Rhodia, who at that point were contending for an external eyes only confidentiality arrangement for these documents designated 'Highly Confidential Documents', Marcus Smith J. ruled that, on the provision of an enhanced confidentiality undertaking from Mr Morris, he should be permitted to have controlled access to the documents in question. For present purposes I draw attention to the following features and conditions of his Order:

    (a) First, the evidence before the Judge at that point was that Mr Morris '*does not deal directly with customers',* that his involvement with them '*is limited to corporate or strategic matters such as patent litigation'* and that he *'is not involved in any supply or price negotiations.'*

    (b) Second, the key confidential information in dispute at that point was whether Mr Morris should have access to Rhodia's aggregate margins (i.e. not broken down by customer).

    (c) Third, Mr Morris was required to give this additional undertaking:

    > "For the avoidance of doubt, I confirm that I will not be involved in the negotiation of or sign off on any agreements with customers concerning the price of high surface area cerium oxide products or any substitute for such products for use in diesel catalyst engines, either alone or as part of a portfolio of products."

    (d) Fourth, Mr Morris would only have access to the 'Highly Confidential Documents' online via the 'Access' platform and was not permitted to copy or

record any of the information in the documents save in communications sent by him on the 'Access' platform.

11. On the application before me, a significant part of Neo's argument was that, in effect, the position had been determined by Marcus Smith J. For their part, Rhodia contended that was not so. Rhodia submitted that the evidence as to Mr Morris' role and responsibilities had changed and in any event that there had been a material change in circumstance since the Order of Marcus Smith J.

12. Whilst of course I have regard to what Marcus Smith J. decided and am not in any event going to reverse the effects of his Order (not least because there was no application to do so), Neo's intense focus on his Order did not assist the resolution of the current dispute. It is necessary to focus on what is now in issue.

13. I record that, in July this year, I determined various disclosure issues between the parties in my judgment at [2021] EWHC 1972 (Pat). I refer to paragraphs 2-18 of that judgment in which I outlined the progress of the inquiry and the issues in the inquiry. The concluding section of that judgment was headed 'the Party A documents' (which I described in outline in [53]) and I recorded that Neo had an outstanding application for disclosure of these documents to Mr Morris. I recorded a difficulty created by Party A having its solicitors send a letter to me on condition that its contents were not revealed to Neo. I directed that a hearing take place (reasonably urgently) at which Party A could be represented or have its position considered by the Court (and both parties). This hearing is, finally, the determination of Neo's application, outstanding since first raised by application notice dated 20th November 2020 (albeit that it now concerns different documents).

14. Such is the sensitivity surrounding the materials in issue that I have, on this application, to take into account the interests of four entities. First, the parties to this litigation, Rhodia and Neo. Second the interests of Party A and Party B, each of whom has a significant interest in the information contained in the materials in question. Party A submitted a detailed witness statement to me, which I have considered. As regards Party B, I received helpful written and oral submissions from Mr Stuart Baran. In his submissions, Mr Baran was at pains to emphasise two particular points: first, that Party B was independent and was not taking sides in this dispute and second, that Party B made its submissions in circumstances where it had not seen or received copies of all of the evidence served by Rhodia and Neo. For this reason the arguments made by Party A and B ranged more widely.

15. Finally, the resolution of this dispute was not made any easier by (a) the raft of material put before me or (b) the rather unstructured way in which the evidence was prepared and served. As to the first point, to a large extent, this was the result of the perceived need (on each side) to address all the history and every changed circumstance. It also reflects the strong feelings engendered by the claim and the confidentiality of the materials in issue. As to the second, I appreciate that both parties faced something of a moving target. Neo resurrected their original application notice from December 2020 with Jenkins 25 in support dated 7th September 2021. Extended Disclosure was exchanged on 10th September (including Mackay 3). For Rhodia, Bennett 19 was dated 22nd September, responding to Jenkins 25. Mr Ryan's report (dated 22nd September) with Jenkins 26 dated 24th September were served to address the materials produced on disclosure. Finally, for Neo there was Mr Morris' witness statement dated 28th

September. The hearing was originally set for 28 September 2021 but had to be adjourned because the Deputy Judge assigned to hear the application, Mr Alexander QC, was conflicted. The final witness statement on confidentiality was Bennett 21 dated 6th October 2021.

The materials in issue

16. The materials in issue are as follows, labelled for reference below:

    I. a single (electronic) document called the corrected Sales CM Report. So far, this has been provided to Neo on an External Eyes Only (EEO) basis. Neo seek read-only access for Mr Morris.

    II. a category of documents comprising Rhodia's extended disclosure on Issues 3 and 4. Again, supplied so far to Neo on an EEO basis. Again, Neo seek read-only access for Mr Morris.

    III. a Supply & Purchase Agreement made between Rhodia and Party A

    IV. the Party A Licence Agreement, Amendment #1 to the Supply & Purchase Agreement.

17. III and IV concern Rhodia and Party A. On these documents, the issues are short and I can resolve them now.

18. Rhodia contends that the Supply & Purchase Agreement is irrelevant. Rhodia agrees that this document should be disclosed to Neo's external lawyers only in the hope that they can satisfy themselves of that point. Party A resists such an Order on the basis that the risk of disclosure of the document to Neo is too high. I understand Party A's concerns, but I consider the risk is fanciful. Therefore, I will order disclosure of this document to Neo's external lawyers only, on the basis of the existing terms as to confidentiality.

19. As for IV, Rhodia and Neo have agreed that redacted versions can be disclosed to Mr Morris on the basis of the existing confidentiality terms plus the additional undertakings now offered by Mr Morris, which are as follows:

> For the avoidance of doubt, I confirm I will not play any part in discussions or decisions relating to: (i) the setting of the price of high surface area cerium oxide products or any substitute for such products for use in diesel catalyst engines either alone or as part of a portfolio of products; (ii) the allocation of manufacturing capacity for such products, or the time within which such products are to be supplied from the date of the request for supply.

20. As can be seen, Mr Morris has added to the undertaking relating to price, given to Mr Justice Marcus Smith, the additional limb to protect information relating to capacity allocation and delivery times.

21. In respect of the documents I listed as I and II above, Rhodia resists any disclosure to Mr Morris; as indicated above, Party B resists disclosure to Mr Morris unless he

provides the so-called Wassmann undertaking. It is on these documents that the main and substantial dispute arises.

Applicable principles

22. As I have mentioned, the Court of Appeal reviewed the authorities and laid down an authoritative set of principles in *Oneplus v Mitsubishi Electric* [2020] EWCA Civ 1562. I have had regard to the whole section in the judgment of Floyd LJ from [19]-[41], which lead to his [39]-[40], which I quote here:

> 39. Drawing all this together, I would identify the following non-exhaustive list of points of importance from the authorities:
>
> i) In managing the disclosure of highly confidential information in intellectual property litigation, the court must balance the interests of the receiving party in having the fullest possible access to relevant documents against the interests of the disclosing party, or third parties, in the preservation of their confidential commercial and technical information: *Warner Lambert* at page 356; *Roussel* at page 49.
>
> ii) An arrangement under which an officer or employee of the receiving party gains no access at all to documents of importance at trial will be exceptionally rare, if indeed it can happen at all: *Warner Lambert* at page 360: *Al Rawi* at [64].
>
> iii) There is no universal form of order suitable for use in every case, or even at every stage of the same case: Warner Lambert at page 358; *Al-Rawi* at [64]; *IPCom 1* at [31(ii)].
>
> iv) The court must be alert to the fact that restricting disclosure to external eyes only at any stage is exceptional: *Roussel* at [49]; *Infederation* at [42].
>
> v) If an external eyes only tier is created for initial disclosure, the court should remember that the onus remains on the disclosing party throughout to justify that designation for the documents so designated: *TQ Delta* at [21] and [23];
>
> vi) Different types of information may require different degrees of protection, according to their value and potential for misuse. The protection to be afforded to a secret process may be greater than the protection to be afforded to commercial licences where the potential for misuse is less obvious: compare *Warner Lambert* and *IPCom 1*; see *IPCom 2* at [47].
>
> vii) Difficulties of policing misuse are also relevant: *Warner Lambert* at 360; *Roussel* at pages 51-2.

> viii) The extent to which a party may be expected to contribute to the case based on a document is relevant: *Warner Lambert* at page 360.
>
> ix) The role which the documents will play in the action is also a material consideration: *Roussel* at page 49; *IPCom 1* at [31(ii)];
>
> x) The structure and organisation of the receiving party is a factor which feeds into the way the confidential information has to be handled: *IPCom 1* at [33].
>
> 40. To this I would add that the court must be alert to the misuse of the opportunity to designate documents as confidential. It remains the case that parties should not designate such material as AEO, even initially, unless they have satisfied themselves that there are solid grounds for establishing that restricting them in that way is necessary to protect their confidential content.

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

The main dispute

24. Neo and Rhodia took entrenched positions and there was little or no attempt to try to find ways to resolve the impasse, other than Rhodia's suggestion that disclosure to Mr Morris was not needed yet. Since the evidence now needs to be prepared and exchanged (see the timetable below) and the trial is fast approaching, Neo submitted that the nettle needed to be grasped now. This is a point I must consider further.

25. I propose to analyse the various considerations under the following sub-headings: First, identification of the information in question and assessment of its confidentiality; Second, relevant characteristics of the proposed recipient, Mr Morris, and the risk of misuse; Third, the arguments for and against disclosure to Mr Morris.

The information in question & assessment of its confidentiality

26. I need to explain more about the documents in categories I and II above.

27. The Sales CM Report is an Excel spreadsheet of data extracted from Rhodia's central accounting system and sets out the volumes of HSA CeO product sold to various of Rhodia's customers on an annualised basis from 2010-2019 and the sales income and margin for each customer in each year. For each customer the volumes, sales and margins are broken down by product and invoice. The original Sales CM Report was subject to a correction explained in Mr Mackay's second witness statement. Mr Morris has seen Mackay II but not the Corrected Sales CM Report.

28. In relation to the documents in IV, it is helpful to understand how the disclosure came about.

29. Issue 3 concerns the margin which Rhodia is entitled to recover in its proposed counterfactual i.e. had Rhodia supplied the product to Party B instead of Neo (making

Rhodia the sole supplier to Party B). On issue 3, Neo's accountants BRG reviewed the Sales CM Report and raised various issues where further information was required to enable them to verify the data contained in the Report and the contribution margins calculated from the data. In due course, the parties managed to agree a scheme whereby the relevant information would be supplied in the form of a witness statement together with sample documentation that could be used to verify the figures.

30. The disclosure took the form of a third witness statement from Mr Mackay (Mackay III) plus a schedule containing Excel spreadsheets generated to track the profitability of sales to customers and sample invoices. It also included a Revised Sales CM Report which is essentially the Corrected Sales CM Report but with sales to customers other than Party B removed.

31. As Mr Bennett said in his nineteenth statement, the primary purpose of this disclosure was to allow Neo's accountants to verify the margins claimed by Rhodia. He points out that Mr Morris is not an accountant and is not in a position to judge the accuracy of the figures. On that basis, Mr Bennett suggests it is not necessary for Mr Morris to see all this material.

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

33. Rhodia submit there is a material difference between the material already seen by Mr Morris (pursuant to the Order of Marcus Smith J) and the additional materials now in dispute, in that the latter are highly specific to Party B and therefore even more sensitive.

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

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

36. In relation to all this material, Rhodia draw attention to an important point made by Counsel then appearing for Neo (Mr Gamsa) at the hearing before Marcus Smith J. where it was accepted that the information then in question (relating to price) was '*the sort of information which could…. seep …inadvertently into one's conduct' 'if it was*

going to someone who was involved in price negotiations or signing-off of deals and that sort of thing'. That entirely realistic concession was made in the context of Neo's principal point then which was that Mr Morris did not have any involvement in '*those sorts of negotiations, discussions or decisions, namely negotiations involving price or supply contracts and so on*.' To the same end, Mr Bennett for Rhodia says the information in dispute here once seen will be difficult to forget. In a sense, this point goes too far because there is a significant volume of material. However, the point remains good because there are bound to be significant pieces of information which someone like Mr Morris will spot – and then it will be very difficult for him to put those out of his mind, however diligently he tries to adhere to his undertakings.

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

38. This point is adverted to in the evidence provided on behalf of Party A. Despite the fact that the issues involving Party A have been resolved, there are some passages in the witness statement filed by Party A which have general application to the outstanding issues and which I consider I should take into account, not least because I consider the points made apply with equal force to the position of Party B, and because they reflect the submissions made to me by Mr Baran on behalf of Party B. To date, these paragraphs have only been seen by the lawyers on Neo's side, but I am satisfied these paragraphs do not disclose any confidential information belonging to Party A or Rhodia:

> 7. Rhodia and Neo are in competition with each other. Party A has therefore agreed very strict confidentiality rules with both companies. The market for HSA Cerium Oxide, mixed oxides and other raw materials with suitable quality and properties is divided between a small number of producers, Neo and Rhodia are both key players in this market. Accordingly, price negotiations with each of Neo and Rhodia are highly sensitive to Party A. However, it is not only that the price negotiations with Neo and Rhodia are of great importance for party A. It is also the case that any disclosure and any knowledge by Neo and [Rhodia] of each other's prices and quantities are of overall competition and antitrust concern and may have an impact on the market for those products. This may thus both directly and indirectly lead to damage to Party A as well as other purchasers of these products.
>
> 8. Given its independent relationship with both parties, Party A is extremely concerned about information regarding its commercial agreements and dealings with Rhodia, including its purchasing strategy, being shared with Neo (or any other

> competitor). The sharing of this information is likely to have a serious negative impact on Party A's existing and future arrangements, and negotiations with these companies. Therefore, Party A considers the disclosure sought by Neo would cause Party A significant, irreparable harm if ordered.
>
> 9. Further, given that Neo and Rhodia are competitors, Party A also considers that the sharing of information about commercial arrangements, particularly as to the products, volumes and prices, between Rhodia and Party A poses a significant risk to competition in the industry.
>
> 10. Were it not for these proceedings, to which Party A is not a party, the information contained in the documents sought would never be available to another business partner, like Neo, in such a competitive market. For example, Neo would learn from the documents information about the specific products that Rhodia supplies Party A, pricing structures and terms & conditions. Neo would otherwise not usually have access to such information as the products supplied are normally very client specific and pricing is strictly confidential.

39. It is worth recording at this point that I did not detect that Neo contested what was said on behalf of Rhodia about the confidentiality of the materials in issue, save in these respects. First, Mr Cuddigan QC made the point that the information in question is commercially confidential i.e. we are not concerned with technical secrets. Although there is that difference, that does not mean that one must automatically downgrade the confidentiality of commercial information or its protection. Second, Neo pointed out that the materials relate to the situation in 2019. Mr Cuddigan QC submitted there was evidence from Rhodia in a different context which indicated that information of this type lost its value after 2 years. I do not consider that was a fair conclusion. Furthermore, Mr Morris made the point that this market is mature. This point cuts both ways. On the one hand it suggests that information as to the position in 2019 remains significant and valuable. On the other hand, it does work in Neo's favour in this sense: if, in its relations with Party B, Neo suddenly suggested new terms (e.g. non-price terms) akin to those existing between Rhodia and Party B, Party B would detect that. In practice however, life would not be so simple. I proceed on the basis that the materials in issue contain highly confidential information.

40. Neo's primary response is, instead, to point to Mr Morris and the undertakings on offer, and to submit they afford sufficient protection. Neo also point out that Rhodia brought the claim and elected for an inquiry as to damages which was based primarily on Rhodia's own alleged loss of profits. Thus, for Rhodia to pursue such a claim, it was always going to be necessary for Rhodia to disclose information about their profits. That is true, but it does not necessarily mean that everything must be disclosed to Mr Morris.

Relevant characteristics of Mr Morris

41. Neo submitted variously that Mr Morris is the only suitable candidate at Neo to receive the information and he represents the 'least worst' solution to the current impasse. Neo rely on the following:

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

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

    (c) He does not deal directly with customers on prices.

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

The reasons put forward as to why it is said Mr Morris must have access to the information.

42. In summary, Neo submit it is necessary for Mr Morris to see the materials in question for the following reasons:

    (a) In the immediate term, to assist in the preparation of Neo's expert evidence. See further below.

    (b) More generally, to be involved in matters concerning settlement. Neo point out that when the price information, as permitted by Marcus Smith J., was disclosed to Mr Morris, a settlement offer was put forward which resulted in a settlement of one of Rhodia's main heads of damage. Mr Jenkins (of Neo's solicitors) explains in his twenty-fifth witness statement that his firm will need to be able to advise Mr Morris of the impact of the disclosed information on the claimed margins, and for Mr Morris to provide them with instructions, including as regards possible settlement.

    (c) Even more generally, to provide appropriate instructions to Neo's solicitors, to be able to make suitably informed decisions as this inquiry proceeds to trial and to be able to understand the case being made against Neo and to be able to explain, as necessary, the state of play and the outcome to his superiors and/or shareholders in the business.

43. These reasons are all valid, but (save for one) they do not discriminate between possible different levels of information. One of the points I return to below is to consider whether some lesser level of information would still enable Mr Morris to carry out those functions.

44. In support of their application, Neo filed an expert report from Mr Daniel Ryan (for which I gave permission at the hearing) who is heading a team at Berkeley Research Group which is assisting Neo's expert witness, Mr Richard Boulton. Mr Ryan has

reviewed the documents at I and II. His short report addresses three issues: Rhodia's pricing mechanisms; Rhodia's cost structure and Rhodia's capacity to supply. It is perhaps not surprising, as he points out, that there are differences between Rhodia and Neo in their pricing, but also in the direct costs included in the contribution margin. The key passages in his report under the three headings are as follows (amended to remove confidential information):

(a) Rhodia's pricing mechanisms

> 'in my opinion, it is critical to understand how prices are negotiated within the industry to assess the quantum of Rhodia's damages claim. This is because it is necessary to establish the price that Rhodia would have charged [Party B] in its proposed counterfactual case (a scenario in which it is claimed that Rhodia would have been the sole supplier of HSA cerium oxide to Party B).'

> 'Kevin Morris and other personnel at Neo have specialist industry knowledge that I believe will help analyse and evaluate this pricing information.'

Mr Ryan then compares the prices of Rhodia and Neo and says he does not understand the reasons for the differences. He goes on to say;

> 'In my opinion, it will be of great assistance to Mr Boulton in arriving at the quantum of Rhodia's damages claim if he is able to discuss the reasons for the differences in price with Neo. I anticipate that witness evidence from Neo will also be required in this regard.'

(b) Rhodia's cost structure

> 'Mr Mackay has provided an updated Sales CM Report and a breakdown of direct costs included in the contribution margin for a sample of sales made to [Party B]. Mr Mackay explains that Rhodia's contribution margin excludes [various] costs on the basis they are fixed costs. He has not provided a breakdown of these costs.'

> 'Kevin Morris and other personnel at Neo have specialist industry knowledge as to the manufacture and supply of these products what will help analyse and evaluate Rhodia's evidence on costs, and whether certain costs should be considered incremental or not and therefore how they should be factored into an assessment of damages.'

He notes by way of example that Neo includes labour costs in its margin, but Rhodia does not.

(c) Rhodia's capacity to supply additional product to Party B.

> Mr Ryan identifies this as an important issue 'as it might restrict the volume of additional sales Rhodia could have made to [Party B], or change Rhodia's costs, in a counterfactual scenario.' He goes on:
>
> > 'Kevin Morris and other personnel at Neo have specialist industry knowledge that I believe will help analyse and evaluate Rhodia's evidence on its capacity to produce additional product. For example, [they] may be able to provide comments on how additional capacity might have been achieved and the costs associated with that.'

45. In Jenkins 26, Mr Morris is reported as saying that his knowledge of Neo's Chemicals & Oxides business is such that he would anticipate being able to provide BRG with the input they need regarding prices, costs and ability to supply. However, one oddity about Mr Ryan's report which struck me is that nowhere did Mr Ryan indicate that he had *already* asked Mr Morris for assistance based simply on Mr Morris' knowledge of Neo's pricing, costs structure and constraints on supply nor whether that information is or has been sufficient to enable him to do his work.

46. After I had raised that point, Mr Cuddigan QC responded after the short adjournment on instructions that Mr Ryan had indeed discussed these points with Mr Morris based on his Neo knowledge. It was not clear whether that discussion took place before or after Mr Ryan's report. If before, it is very odd he did not mention it. If after, I would have expected an update to say, if it was the case, that Mr Ryan still needed to discuss the Rhodia data with Mr Morris for reasons x, y and z.

47. Notwithstanding that, in his comments, it strikes me that Mr Ryan somewhat overstates the role of the expert accountancy evidence in this inquiry. The directions Order of Zacaroli J. does not specify the topics to be considered by the expert accountants, but it seems to me that the expert accountants are involved (a) to crunch the numbers, as it were, and (b) to provide expert accountancy evidence e.g. whether a particular cost ought to be considered incremental or a fixed cost (see under 'costs structure' above). However, I consider it is not Mr Boulton's role (or that of Mr Ryan) to identify every reason why there may be a price difference between Rhodia and Neo, nor do I consider it is necessary for either man to discuss with Neo *all* the possible reasons for any differences in price, margin, costs structure etc. Ultimately, the conclusion is likely to be: the prices, margins and costs are just different to differing degrees. Messrs Boulton and Ryan are not experts in the business field inhabited by Rhodia and Neo. Furthermore, Rhodia and Neo are different companies. There is no reason to think they would have identical approaches to pricing or costs etc. Rhodia owns the Patent and it is a reasonable working assumption that this provides some form of exclusivity to Rhodia, in terms of ingredients, costs, manufacturing, price and margin. Accordingly, I am not persuaded by Mr Ryan's report of the necessity of disclosure to Mr Morris. On the current information, Mr Morris's current industry knowledge and experience ought to provide sufficient assistance to Mr Ryan and his team.

What are the possible ways forward?

48. As indicated above, Neo's position was that all the materials in question should be disclosed to Mr Morris on a read-only basis subject to the undertakings he has offered.

49. As an aside, I record that in Jenkins 26, Mr Jenkins did not anticipate that Mr Morris would need to see all the documents produced on disclosure issue 4 (which he describes as 3 lever arch files mainly of emails and presentations), but that his firm and/or BRG would need to bring to his attention information contained in those materials, both for instructions and his input on the issues raised.

50. Rhodia's positions were somewhat more nuanced:

    (a) Rhodia submitted that if Mr Morris was to have access to the information in dispute, he must give a Wassmann undertaking. Neo's response, as indicated, is that this would prevent Mr Morris doing his job.

    (b) Rhodia submitted that disclosure to Mr Morris had not been demonstrated to be necessary yet. This submission requires a rejection of Mr Ryan's reasons and perhaps contemplates a further review of the situation in the lead up to trial.

    (c) Rhodia also picked up on a point made in Jenkins 25, where Mr Jenkins said that his firm would need to be able to advise Mr Morris on the *impact* of the disclosed information on the claimed margins.

51. Mr Bennett addressed this point and made the following counter-proposal:

    (a) First, he recognised that Mr Morris is aware of the volumes of material Neo supplied to Party B, which Rhodia claims it would have supplied in the counterfactual. Mr Morris is also aware of the range of margins claimed by Rhodia (from what has previously been disclosed to him).

    (b) Then, Mr Bennett indicated that Rhodia would be prepared to allow Mr Morris to be informed of the *impact* on the margins claimed by Rhodia of the fact that the margin information has now been calculated on the basis only of sales to Party B. Mr Bennett says to be informed of that impact, Mr Morris does not need to see all of the materials in dispute.

    (c) Furthermore, Mr Bennett says that Rhodia is also prepared to allow Mr Morris to be informed of the *impact*:

        (i) on the claimed margins of the volume-based adjustment to the price charged to Party B, a point explained in Mackay 3; and

        (ii) of Rhodia's case on what the volume-based adjustment in the counterfactual would have been on the claimed margins in due course.

    (d) Overall, Mr Bennett suggests that this information should allow Mr Morris to assess the margins claimed and to make any settlement offer which Neo may be considering.

52. Other than a mention of this counter-proposal in Neo's skeleton argument, I did not detect any response to it, positive or negative, either in written or oral submissions, other than the general point being made by Neo that Mr Morris would have to be allowed access to the material in dispute by the time of trial.

53. Taking account of all the arguments put to me, I favour the solution proposed by Mr Bennett on behalf of Rhodia. I recognise that maintaining EEO protection for the documents and information in dispute is an exceptional course, but that consideration is balanced by what I consider to be the exceptional nature of the documents and information in question, in terms of whether they should be made accessible to an arch competitor even under the undertakings on offer, and even to a man of Mr Morris's standing and character.

54. The specific additional undertakings which Mr Morris offers will apply to the impacts of which he can be advised. However, those undertakings demarcate the activities in which he feels able to promise not to be involved. They also indicate the areas in which he will or may continue to be involved. Furthermore, as Chief Operating Officer, he is bound to have an overview of all the key interactions between his company and Party B, even if he is not directly involved in matters of price, delivery times and manufacturing capacity. I recognise that, in addition to those specific undertakings, he has given more general confidentiality undertakings and I accept he will strive to abide by them. However, in the materials in dispute there are bound to be key pieces of information which, once seen, will be very difficult if not impossible to forget. 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.

55. Based on the information which Mr Morris already has, the ability to advise him of the three impacts, each on critical points in the inquiry, in my view on the current information, will provide him with sufficient information at this stage of the inquiry to be able to provide instructions to Neo's solicitors and to Neo's expert team.

56. I realise this is an interim solution and the position will need to be re-evaluated before the trial of this inquiry. This can conveniently be done at the PTR which should be heard shortly before Christmas or at an earlier hearing before me. However, I envisage that by that point (and certainly for the purposes of the actual trial of the inquiry), the information required to be disclosed to Mr Morris so that he can provide appropriate instructions and then follow the progress of the trial will be considerably less than that which is currently in dispute.

57. I also acknowledge that Neo's team of advisers may consider that this current solution still places unmanageable burdens on their conduct of the case. This will have to be evaluated in the light of experience in trying to work with the current solution. Of course, Neo has the ability to bring this issue back before the Court on relatively short notice. If that happens, although I cannot and have no wish to bind the Court (whether it is me or another Judge) on any subsequent occasion, based on my experience with this application, I anticipate that Neo's team would be well advised to bring concrete examples of the difficulties being experienced and proposals to limit the quantity of information which they wish to be disclosed to Mr Morris (or possibly some other representative of Neo), and not to dwell on the history of this inquiry.

58. I invite the parties to seek to agree wording to reflect Mr Bennett's proposal and an agreed Order.

Other matters

59. Over recent months, various amendments in draft have been put forward to both the Points of Claim and the Points of Defence. For various reasons, the final form of the amendments was not resolved. At this hearing, I was invited to determine the final obstacles.

60. So far as the amendments to the Points of Claim are concerned, the only outstanding issue was as to the precise terms of the costs order. After each side had made their position clear on the transcript, I determined the wording of the costs order which will be incorporated into the Order resulting from this hearing.

61. So far as the amendments to the Points of Defence are concerned, again the only outstanding issue was a very short but highly charged point which was concerned with whether Neo accepted the status of a particular consignment of product which was held by Roger Wyand QC to be infringing. Again, the discussion recorded on the transcript is there if any issue arises in the future. Neo made it very clear to me that they could not resile or attempt to resile from the finding made by Mr Wyand QC and on that basis I gave permission to Neo to make the amendments to the Points of Defence in the form shown to me.

62. With the amendments finalised, I was asked to reset the timetable for evidence down to trial. I direct:

    (a) Exchange of witness statements: 22nd October 2021.

    (b) Exchange of expert reports in chief: 12th November 2021.

    (c) Exchange of witness statements in reply (if any): 3rd December 2021.

    (d) Exchange of expert reports in reply: 10th December 2021.

63. The directions order in this case requires an application to be made for a PTR by 13 December 2021. The reset timetable will allow the PTR to take place before Christmas and in good time before the trial window opens on 24 January 2022.

64. Part of Rhodia's resistance to permission being given to amend the Points of Defence was based on their complaints about Neo's disclosure. Mr Mitcheson QC submitted there were deficiencies in the disclosure already given by Neo and, furthermore, that, bearing in mind the additional pleas which Neo wish to add, there should have been a host of documents produced by Neo already. These complaints over disclosure were only raised recently and Neo had not yet responded to them. If they are valid and Neo does not respond adequately or with sufficient alacrity (bearing in mind time is now short before trial), no doubt Rhodia will make a suitable application. Furthermore, if the trial of this inquiry takes place against the backdrop of significant holes in Neo's disclosure, I am sure the trial judge will be invited to make appropriate inferences adverse to Neo. Suffice to say these complaints did not persuade me to withhold permission to Neo to make the amendments they sought.