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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**09/05/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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COMMERCIAL DIVISION

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Between:

EDUCATIONAL SOFTWARE SOLUTIONS LTD

Plaintiff

and

EDUCATION AUTHORITY NORTHERN IRELAND

Defendant

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Mr Coppel KC with Mr McCausland (instructed by A &L Goodbody, Solicitors) for the Applicant
Ms Hannaford KC with Ms Rowan (instructed by Carson McDowell, LLP Solicitors) for the Respondent
Mr Dunlop KC with Mr Brown (instructed by Arthur Cox, Solicitors) for the Notice Party, Bromcom Computers PLC

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McBRIDE J

Introduction

[1] At a pre-trial review the court was asked to rule on the following issues:

(i) The plaintiff's application for specific discovery.

(ii) The defendant's application for specific discovery.

(iii) The extent and continuation of a confidentiality ring order ("CRO").

(iv) Other pre-trial matters.

[2] Following discussions the parties reached an agreed position in respect of both specific discovery applications and trial directions. In respect of the extent and continuation of the CRO, the parties agreed as follows:

(i) Mr Wilson, a representative of the plaintiff, would be admitted to the confidentiality ring on the basis of certain undertakings given by him to the court, including an undertaking that he would not assist the plaintiff or any other company in participating in any public procurements regarding education technology in the United Kingdom for a period of three years from the date of his undertaking.

(ii) All the documentation presently in the CRO would not be subject to the CRO at the date of trial save for "pricing" and "solution" documentation. The pricing information related to the total price and the price for each milestone of the contract. The solution documentation set out the way Bromcom Computers PLC ("Bromcom"), the notice party, would practically implement the services it provided to the defendant.

[3] The parties were unable to agree whether Mr Wilson should have sight of "pricing" and "solution" documentation. The plaintiff submitted Mr Wilson should have sight of the pricing and solution documentation. Bromcom submitted it was so confidential it should not be provided and sought to redact this information. The defendant adopted a neutral position.

[4] Accordingly, the only matter the court had to determine was whether Mr Wilson should have sight of the pricing and solution documentation.

[5] Given the pending trial date, the court heard submissions from the parties on 7 and 8 May and gave an ex-tempore ruling on 9 May. As the relevant legal principles and practical provisions applicable to confidentiality ring orders are of wider interest to commercial practitioners the court agreed to provide a written ruling in this case as guidance for commercial practitioners.

Representation

[6] I am grateful to all counsel for their very detailed and comprehensive submissions enhanced by their insightful oral submissions. These were of much assistance to the court.

Background

[7] The present dispute arises in the context of a procurement action. In 2022, the defendant commenced a procurement process for IT specialist services for all schools in Northern Ireland for a period of 12 years. In December 2023, the contract was awarded to Fujitsu. Fujitsu had proposed it would provide the "management information system" part of the main procurement contract by entering into a subcontract with Bromcom.

[8] The plaintiff had a management information software system called SIMS which it had licensed to Capita Managed IT Solutions Ltd ("Capita"). Capita presently provides network services to the defendant pursuant to a contract dated 6 March 2012.

[9] Following litigation in England & Wales between the plaintiff and Capita it was agreed that the plaintiff would continue to licence its SIMS software to Capita until 31 March 2026.

[10] In November 2024, the contract between the defendant and Fujitsu was terminated. In or around that time the defendant agreed with Bromcom that Bromcom would continue to provide the management information services it originally agreed to provide to Fujitsu under the subcontract, directly to the plaintiff. This was to be achieved by way of a deed of novation.

[11] The plaintiff contends that the defendant could not do this without first holding a tender competition and further submits that even if the novation was lawful, it was not a novation but rather a new contract because it, the novated contract, was materially different from the subcontract entered into between Bromcom and Fujitsu.

The plaintiff's submissions regarding solution

Solution submissions

[12] The plaintiff initially submitted that Bromcom's "solution", which is set out in Schedule 4.1 of the novated contract between the defendant and Bromcom should be made available to Mr Wilson so that he can advise whether it contained "material" changes from the solution provided under the subcontract to Fujitsu.

[13] During the hearing, Mr McCausland indicated to the court that the plaintiff would, in a spirit of compromise accept a sworn affidavit from Bromcom averring that there were no changes in the "solution" between the subcontract and the novated contract. Following this proposal, Mr John Charles McMillan, Head of the Education Authority Northern Ireland Team at Bromcom, provided a draft affidavit, to be sworn, stating as follows:

> "3. I make this affidavit further to the plaintiff's request made during the review that took place on 7 May 2025 to provide sworn evidence in relation to the question of whether any changes were made to Schedule 4.1 of the subcontract between (i) Fujitsu Services Ltd and (ii) Bromcom dated 21 December 2023 (the "subcontract") as a result of the deed of novation between (i) Fujitsu Services

Ltd; (ii) EANI; and (iii) Bromcom dated 10 November 2024 (the novation).

4. Firstly, by way of contextualising the request Schedule 4.1 details the way in which Bromcom will practically implement the services it was subcontracted to provide to EANI by Fujitsu. Schedule 4.1 contains commercially sensitive technical information describing exactly how Bromcom will provide a fully cloud-based solution to over 1,000 schools controlled by EANI. The court has already been provided with an affidavit explaining exactly how sensitive this information is and how damaging it would be to Bromcom if such information was released and, in particular, was made available to one of its main competitors.

5. As the Head of the team delivering the solution contained within Schedule 4.1, I can confirm that there were no changes made to the content of Schedule 4.1 of the subcontract changing the "solution" which Bromcom was providing to Fujitsu as a consequence of the novation of the subcontract to the Education Authority, save for a change resulting from Clause 1.3 of the novation…

6. As a result of Clause 1.3 of the novation set out above, all references to Fujitsu in the subcontract, including those within Schedule 4.1, are now to be read as "the authority." I confirm that this is the only change to Schedule 4.1 arising out of the novation."

[14] Mr McCausland, submitted that the wording of this affidavit did not meet his proposal and accordingly the court was required to determine whether the solution documentation should be provided to Mr Wilson.

Plaintiff's submissions regarding pricing

[15] Bromcom agreed that Mr Wilson should have sight of the deed of novation which included Schedule 1 entitled "The Agreed Changes." This set out changes in respect of the milestones for the contract. Bromcom, however, submitted that the pricing information in respect of each milestone and the total price for the contract should be redacted.

[16] Mr Coppell, on behalf of the plaintiff, submitted that this pricing information may be relevant at the trial because the plaintiff's pleaded case included a claim that there were material changes relating to pricing between the original subcontract and the novated contract. In particular, para 35(b)(iii) of the statement of claim stated:

> "The novation agreement did not novate Fujitsu's rights and obligations under the Bromcom subcontract but transferred to the defendant, materially different rights and obligations."

[17] The material changes alleged by the plaintiff in respect of differences in milestones and milestone payments between the original subcontract and the novated contract are set out in para 4 of the confidential annex to the amended statement of claim.

[18] Mr Coppell submitted that Mr Wilson required sight of pricing in respect of each milestone to enable the plaintiff to properly understand whether there were any material changes. He further submitted that disclosure of this information on the basis of Mr Wilson's undertakings, did not adversely impact on Bromcom's business. He relied on the affidavit of Mr Weatherston, Group General Counsel of ParentPay Group, of which ESS is a part, in which he averred that it was not possible to make "like for like" comparisons between the two companies in terms of pricing. Secondly, he submitted that customers had already provided high level information on Bromcom's pricing information to ESS. Thirdly, due to the passage of time, pricing would become less sensitive. Fourthly, he averred that pricing information related to the Northern Ireland bid was of limited value as Northern Ireland was a unique procurement exercise unlike any other as it involved all the schools within Northern Ireland, rather than individual schools. Finally, he averred that Mr Wilson's three-year undertaking was sufficient to protect Bromcom's pricing information.

The defendant's submissions

[19] Mr Dunlop relied on the evidence set out in the affidavit of Ms Ozcelik, Legal and Commercial Manager of Bromcom, in support of Bromcom's submission that pricing and solution information should remain confidential as access to it would have a serious adverse impact on Bromcom's business. Ms Ozcelik referred to the investment Bromcom made in developing its cloud-based management information system. She outlined the limited market within which Bromcom operated, namely one limited to schools; most of whom were government funded and a market in which there were only three core competitors; one of whom was ESS. She averred that access to pricing and solution documentation even by Mr Wilson could potentially have a negative impact on Bromcom's business. She averred that Mr Wilson's undertaking did not provide sufficient protection as pricing was unlikely to change over the next three plus years due to budgetary constraints within government spending.

[20] Mr Dunlop, therefore, submitted the documentation was highly sensitive and confidential in nature. He agreed, however, to provide "a gist" of the changes to the milestones and pricing. The gist consisted of a spread sheet setting out the percentage price for each milestone, cross-referenced to how the new milestones related to the old milestones under the subcontract.

[21] In respect of the solution documentation Mr Dunlop again relied on the affidavit of Ms Ozcelik, who averred that Mr Wilson's undertaking was not sufficient to protect the confidentiality of the solution as all future contracts will be for the same "solution." He submitted that the draft affidavit provided by Mr McMillan was sufficient to comply with Mr McCausland's proposal regarding the solution documentation and in any event was sufficient to enable the plaintiff to decide whether the novated contract contained any material changes in respect of solution. Accordingly, the court should not include the solution documentation in the materials available to Mr Wilson.

Relevant legal principles

[22] Confidentiality clubs are common in commercial litigation and are used to protect against the misuse of confidential disclosed documents. Specifically, the provisions of confidentiality clubs in which the parties' lawyers only are admitted ("lawyer eyes only") is well recognised – *see Al Rawi v Security Service* [2012] AC 531 at [64].

[23] There are several first instance decisions relating to confidentiality clubs including *JSC Commercial Bank PrivatBank v Kolomoisky and others* [2021] EWHC 1910, *Cavallari v Mercedes-Benz Group AG* [2024] EWHC 190 and *McKillen v Misland (Cyprus) Investments & others* [2012] EWHC 1158. The only Court of Appeal authority is *Oneplus Technology (Shenzhen) Company Ltd v Mitsubishi Electric Corporation* [2021] FSR 13.

[24] In *Oneplus Technology* Floyd LJ gave a helpful summary of the law in respect of confidentiality clubs in the area of intellectual property litigation. At para [39] he set out the following principles:

> "[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.

(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.

(iii) There is no universal form of order suitable for use in every case, or even at every stage of the same case.

(iv) The court must be alert to the fact that restricting disclosure to external eyes only at any stage is exceptional.

(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.

(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.

(vii) Difficulties of policing misuse are also relevant.

(viii) The extent to which a party may be expected to contribute to the case based on a document is relevant.

(ix) The role which the documents will play in the action is also a material consideration.

(x) The structure and organisation of the receiving party is a factor which feeds into the way the confidential information has to be handled."

[25] I consider these principles are also of relevance in the field of commercial litigation more generally. Trower J endorsed their application in commercial cases in *JSC Commercial Bank* when he stated at para [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."

[26] He further stated that any restriction on disclosure was an infringement of the basic principles of fairness and, therefore, would only be permitted where it was necessary in the interests of justice and any departure from the principle must be supported by clear and cogent evidence which would be subject to careful scrutiny by the court.

Questions to be determined.

[27] The court must determine whether pricing and the solution documentation should be retained in a "lawyer eyes only" confidentiality ring. To determine this question, I consider, the following questions must be answered:

(i) Is the information covered by a duty of confidentiality?

(ii) If so, has the material ceased to be confidential, either due to the passage of time or progress or for some other reason including the public interest?

(iii) If not, should the court in the exercise of its discretion, when balancing the principle of open justice against the need for confidentiality order disclosure?

Discretionary factors

[28] In carrying out the discretionary balancing exercise set out at para (iii) above, the existing jurisprudence indicates that the following non-exhaustive list of factors should be considered:

(a) The principles of open justice and natural justice should be given great weight. They are principles which are fundamental to our law. The principle of open justice ensures that the public understand the issues in the case and how decisions are reached. The principle of natural justice ensures the parties are treated fairly. It, therefore, follows that each party should generally have unrestricted access to the other's disclosure – see *Libyan Investment Authority v Societe Generale SA* [2015] EWHC 550.

(b) In determining whether the need for confidentiality outweighs the principles of open justice and natural justice, the court should take the following factors into account:

    (i) Documents disclosed in the course of litigation are subject to the implied undertaking that the disclosure will not be used for a collateral

purpose – see *Church of Scientology of California v Dept of Health* [1979] 1 WLR 727-743F.

(ii) The nature of the confidential information. Is it of such a technical or complex nature that it requires consideration by a person with expert knowledge?

(iii) The degree of sensitivity of the confidential information.

(iv) The degree and severity of the risk that, if provided, the confidential information will be used for a collateral purpose.

(v) In assessing the risk the information will be used for a collateral purpose the court recognises that an entire document will rarely consist only of confidential information and therefore the parties and court should consider ways in which the identified risk can be mitigated, for example, by redaction or "gisting".

(vi) Lawyer eyes only clubs are exceptionally rare. It is desirable to include at least one duly appointed representative of each party to the confidentiality ring. This person may be an expert or an employee of the company. Such a person is generally admitted on the basis he or she gives undertakings not to disclose the information to any party who could use the information for a collateral purpose. Such a person is usually a retired employee or someone who works in a different department. Careful consideration needs to be given to the precise terms of the undertakings to ensure they are necessary and proportionate to protect against any identified risk.

(vii) The importance of the confidential information to the issues in the case. The more important the information is to the key issues in the case, the heavier the burden lies upon the person seeking to prevent disclosure.

(viii) Any difficulties in policing misuse.

(ix) The stage of the proceedings. At the initial stages of litigation, the burden of showing the need for confidentiality is generally less weighty than at the time of trial when confidentiality will have a more adverse impact on the overarching principles of open justice and natural justice including article 6 ECHR considerations. Accordingly, confidentiality rings need to be reviewed at pre-trial reviews especially in cases where a party seeks to restrict disclosure at trial thus requiring part of a trial to be held in private or seeks to restrict disclosure to lawyer eyes only in such a way that one party would have access to the evidence only through its lawyers and the lawyers could not discuss it with or take comprehensive instructions from their own client.

(c) The burden of proof lies on the person seeking the confidentiality ring and he must establish on the balance of probabilities a real risk, either deliberate or inadvertent, of a party using the documents for a collateral purpose.

(d) Such a person needs to provide clear and cogent evidence of this risk and such evidence will be the subject of careful scrutiny by the court.

(e) Any order for confidentiality must be set out in clear terms so that everyone understands any undertakings given and have a clear understanding of the sanctions which apply if undertakings are breached.

(f) The order must go no further than is necessary to protect the rights in question.

Overall summary of the principles

[29] The court will only restrict disclosure where it is necessary to do so in the interests of justice. Each case is necessarily fact specific and is ultimately decided on its own facts and circumstances as the court will only make a confidentiality ring order if it is satisfied the facts and circumstances are sufficiently strong to justify such an order.

[30] Any order made will be limited to the narrowest extent possible. Accordingly, exclusion of access by one of the parties to relevant key documents such as in a lawyer eye only order, is exceptionally rare.

Consideration

Question 1 – Are pricing and solution documents confidential?

[31] I am satisfied that pricing and "solution" are generally highly sensitive confidential information. This is especially so in a limited market where there are a limited number of competitors. My conclusion is fortified by the fact the plaintiff accepted that pricing and solution documentation should remain protected from public view at the trial on the basis they consisted of truly sensitive commercial information.

[32] I am further satisfied that there is a real risk that disclosure of pricing information and the solution "documentation" could be used for a collateral purpose as disclosure of these sensitive documents could give an advantage to ESS in any future procurement competitions, especially any future procurement competition in Northern Ireland.

[33] I am, therefore, satisfied that the pricing and solution information in Bromcom's documentation is sensitive and confidential for these reasons.

Question 2 – Have the documents lost their confidentiality?

[34] Notwithstanding the passage of time, I am satisfied that Bromcom's pricing information has not lost its confidential nature. This is especially so in a context where, depending on the decision in this case, there may be a future procurement exercise in Northern Ireland within a very short period of time and pricing will not have changed significantly given the limited period of time which will have elapsed and given budgetary constraints in government contracts. I also consider the solution documentation will not have lost its confidential nature because any new procurement exercise will relate to the same solution.

Question 3 – Where does the balance lie?

[35] In determining where the balance lies between open justice and protecting confidentiality, I take into account the following factors. Firstly, I consider that pricing information and solution documentation are highly sensitive. Secondly, I consider that the evidence of Ms Ozcelik establishes that there is a real risk that disclosure of pricing information and solution documentation could be used for a collateral purpose and could give an advantage to the plaintiff in any future procurement exercises. Thirdly, I accept that pricing information is relevant to the issues in the case as it is part of the pleaded case. Importantly, however, the pleaded case is limited to "material changes" between the subcontract and the novated contract.

[36] Accordingly, I consider that it is important that the plaintiff is given access to sensitive confidential information but only in a way which enables it to assess whether there have been material changes between the contracts under consideration. Accordingly, mitigation measures need to be put in place to reduce the risk of disclosure for a collateral purpose.

[37] I do not consider that the undertaking given by Mr Wilson, which is limited to a three-year period, is sufficient alone to remove this risk, as I consider the pricing information and solution information will remain commercially sensitive after the three-year period given in the undertaking. I consider however that the pricing information could be disclosed by way of gisting. I consider the gist provided by Bromcom protects Bromcom's pricing but also enables the plaintiff to determine whether the changes to pricing are material as the plaintiff can look at the percentage payment given for each milestone and can thereby assess whether the changes to the milestones are material by reference to the percentage payments. Accordingly, I consider the plaintiff is not disadvantaged in pursuing their case about material changes. In my view, the provision of the gist strikes a fair balance between the need for open justice and natural justice and the need to protect highly sensitive pricing information belonging to Bromcom.

[38] In respect of the solution document, I consider that this information amounts to a trade secret and is therefore highly commercially sensitive. The only basis on which it is relevant to the pleaded case is whether there have been material changes in the solution provided under the subcontract and the novated contract.

[39] I have carefully considered Mr McMillan's affidavit which states there have been no material changes. I consider this is sufficient to enable the plaintiff to pursue its case and I also consider it meets the proposal set out by Mr McCausland on behalf of the plaintiff. I, therefore, make no order for disclosure of Schedule 4.1 to Mr Wilson.

[40] The parties are to provide an agreed CRO, to the court for approval within seven days. Costs to be agreed, or in default, the court is to be asked to rule on costs.