

Neutral Citation Number: [2022] EWHC 2637 (Ch)

Claim No.IL-2020-000040

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

Competition Appeal Tribunal
8 Salisbury Square
London
EC4Y 8AP

Date: 19 October 2022

Before:

MR JUSTICE MARCUS SMITH

Between:

(1) GENIUS SPORTS TECHNOLOGIES LIMITED **Claimants**
(2)-(15) OTHERS
- and -

(1) SOFT CONSTRUCT (MALTA) LIMITED **Defendants**
(2)-(12) OTHERS

MR IAN MILL KC, MS JESSIE BOWHILL and MR CHRISTOPHER HALL
(instructed by **Fieldfisher LLP**) appeared for the **Claimants**.

MR PHILIP ROBERTS KC, MR CONALL PATTON KC and MS ALAINA NEWNES
(instructed by **Reynolds Porter Chamberlain LLP**) appeared for the **First to Sixth Defendants**.

MR HENRY EDWARDS (instructed by **DLA Piper UK LLP**) appeared for the **Ninth Defendant**.

Approved Ruling

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MR JUSTICE MARCUS SMITH:

1. At a case management conference that took place on 26 and 27 July 2022,¹ I resolved a number of issues that had arisen between the parties in these proceedings. However, a number of other issues – mainly but not exclusively relating to disclosure – were left unresolved as there was insufficient time to deal with them. Accordingly, I listed this, second, case management conference for 28 September 2022. My commitments during the Michaelmas Term were such that a listing in vacation was necessary in order to resolve these unresolved issues promptly. Prompt resolution was necessary because the parties need to have a disclosure regime in place to work to if the trial – which I had previously fixed for early in 2024 – was not to be put at risk. I was (and am) satisfied that unless a disclosure regime is put in place quickly, there is a probability of adjournment. An adjournment is something the parties and I very much want to avoid, for reasons that are obvious.
2. I had, by previous orders in these proceedings, directed that disclosure be conducted in accordance with the “standard” Civil Procedure Rules (CPR) Part 31 / PD 51U² disclosure model. Pursuant to that regime, the parties had done significant work in compiling two disclosure review documents (DRDs), one considering the list of issues for disclosure and proposed disclosure models in relation to the intellectual property claims and one considering the list of issues for disclosure and proposed disclosure models in relation to the competition claims. Both DRDs are substantial and although much in each of them is agreed, there remain significant issues between the parties in relation to the issues for disclosure and the proposed disclosure models.
3. These issues were sufficiently substantial that there was not time to resolve them even at the case management conference listed for 28 September 2022. For reasons that I will come to, I consider that an effective disclosure regime can be put in place without resolving these disputes concerning the DRDs, whilst taking advantage of the hard work that has gone into framing them.
4. These proceedings are closely related to proceedings presently jointly before the High Court and the Competition Appeal Tribunal.³ I shall refer to these other proceedings as the **October Proceedings**. The disclosure regime in the October Proceedings followed the “standard” CPR Part 31 / PD 51U disclosure model. Although the parties in the October Proceedings devoted considerable time and effort in framing issues for disclosure and the disclosure models that should apply to those issues – which involved not infrequent recourse to the Court – a series of specific disclosure applications were nevertheless launched at the pre-trial review in the October Proceedings, which the Court also had to resolve.⁴ I will not go into the detail, but it is evident (at least to me) that this disclosure regime has not worked satisfactorily.
5. It may be that the drafters of CPR 51U were wise when they carved competition claims out of the automatic application of this regime.⁵ This appears to be a recognition that there is something different about disclosure in competition claims, in

¹ See my decision under Neutral Citation Number [2022] EWHC 2308 (Ch).

² CPR PD 51U has now become, with effect from 1 October 2022, CPR 57AD.

³ These proceedings concern competition claims – being heard before a tribunal over which I preside – and intellectual property claims – being heard by me as a Justice of the High Court.

⁴ [2022] CAT 37.

⁵ See paragraph 1.4(1).

that issues for disclosure are more diffuse. It is difficult to craft disclosure regimes (whether by keywords or other technology) that can robustly identify relevant documents responsive to the issues for disclosure. Certainly, that has been my experience generally in competition cases, and has been borne out specifically in the disclosure in the October Proceedings – which are, of course, closely related to these proceedings.

6. Accordingly, at the July case management conference in these proceedings, I raised with the parties the suggestion of a different disclosure regime, one based on what might tentatively be called an over-provision of documentation by the party producing the disclosure (the **Producing Party**) to the party receiving it (the **Receiving Party**). I will describe, more closely, the nature of this proposed regime in due course. Essentially, the proposal involves less the attempt to identify and produce relevant documents to the Receiving Party, and more a process of excluding unequivocally irrelevant and privileged documents from production, whilst providing the rest to the Receiving Party for the Receiving Party itself to review.
7. Whereas the Defendants⁶ reacted to my proposal cautiously and sceptically, and ultimately did not oppose it (instead making a series of constructive suggestions), the Claimants reacted with forceful opposition, going so far as to suggest that I had no jurisdiction even to make such an order. Of course, they have every right to do so. I will come to this jurisdictional question in due course. For the moment, I will focus on the reasons advanced by the Claimants in opposing a “bespoke” disclosure regime and in advocating for the retention of the “standard” regime hitherto ordered.
8. The essence of the Claimants’ opposition is clearly articulated in a decision of the Court of Appeal in *Nichia Corporation v. Argos Limited*, [2007] EWCA Civ 741 (which was cited to me by the Claimants in their written submissions):⁷

“42. Even before the Woolf reforms, there was concern at the costs of this discovery. Hence the introduction in 1995, following consultation with the Patents Court Users Committee, of the “two-year” window, see RSC 104 r.11(1)(b). I do not need to set it out. Its substance was carried into the new CPR by the Practice Direction to Part 63, the relevant part of which I set out above. All this achieved, however, was a partial, and, I would say from my experience, minor, reduction in the vast amount of work involved.

43. So it was that even with the window the concern about the cost continued. Laddie J adverted to it in *Hoechst Celanese v BP*, [1997] RPC 547 at 565:

“The other piece of historical evidence relied on by the defendants consisted of the steps taken by Dr Hilton, the inventor, to reach the invention. Dr Hilton was called by the plaintiff and was cross-examined. From time to time the courts have said that the way in which the inventor reached his invention is immaterial. He may think that he has made a marvellous invention or he may have worked out his development by a process which, to him, was entirely logical. But to use what he did and thought he had achieved as evidence for or against obviousness is to put the cart before the horse. Once the court has decided whether the step was obvious it can then assess whether what the inventor did was what the notional man in the

⁶ For the purposes of this Ruling, “Defendants” refers only to the First to Sixth Defendants. The Seventh to Twelfth Defendants are joined as representative defendants, and the disclosure regime here under consideration will not apply to them. There may, in due course, be disclosure from these defendants, but it will be a specific regime intended to keep the time and cost spent on disclosure to a minimum.

⁷ My emphasis.

art would have done from the pleaded art or not. Evidence from the inventor that he took a long time to make the invention and thought he was very clever is no evidence that he was. Similarly, analysis after the event of the logical steps he took to arrive at the invention is no evidence that it is obvious. If he is an inventive man he will no doubt see things more clearly than his notional non-inventive colleague. It would be strange if the fact that the inventor got to the invention was used as evidence that others would also. These propositions seem to me to be supported by cases such as *Re IG Farbenindustrie AG's Patent*, (1930) 47 RPC 289 and *Allmanna Svenska Elektriska A/B v. The Burntisland Shipbuilding Co. Ltd*, (1952) 69 RPC 63. In addition to this, for the same reasons as are set out above, the evidence of what the inventor did or thought is even more irrelevant if he never had before him the prior art on which the defendant is relying. In this case, it is quite clear that Dr Hilton did not have the Hingorani document at the time he made his development. It appears that he did have the results of a literature search which included a number of documents, including the Hingorani abstract, none of which is relied on by the defendants for the purpose of their obviousness attack.

In the light of these considerations, I have come to the conclusion that all the historical evidence of what individuals did or are thought to have done at or about the priority date is of no assistance in determining whether or not Dr Hilton's development was obvious. Furthermore, although there was extensive discovery, including discovery of Dr Hilton's research work, very little of it was referred to in court and even the small number of documents which were taken into the case no further. This is a great pity because it has meant that the parties have spent much more on this litigation than was necessary and the trial lasted longer than it ought. In saying this, I do not mean to direct any criticism at the lawyers involved. In the absence of clear guidance from the court as to what is or is not admissible or of probative value, the parties and their advisers cannot be blamed for covering all the possibilities. Furthermore, in view of what was said by the Court of Appeal in *SKM*, the fact that the plaintiff felt obliged to give discovery of its research and development leading to the making of the invention cannot be faulted.

However, there is much pressure now to reduce the cost of litigation in general and patent litigation in particular. Parties and the court must be astute to prevent the expenditure of time, effort and money on the filing and challenging of unnecessary evidence and discovery. As the Vice Chancellor said in *Mölnlycke*, secondary evidence on the issue of obviousness must be kept firmly in its place. If the evidence is of no weight it should be excluded from the outset. Evidence that others in the art did or did not make essentially the same development at or before the priority date of the patent should not be given unless it can be shown that those others were starting from or had brought to their attention all or some of the prior art pleaded in the case or the evidence is in some other way really relevant to the issues in dispute."

44. Following the Woolf reforms, and notwithstanding its changes, practitioners (and I think not just in patent actions) carried on much as they did before. The cost of patent and large commercial actions did not reduce: if anything it went up. This was despite two important changes: the very important introduction into our scheme of civil procedure of the notion of proportionality, and a change in the nature of what documents are to be disclosed on a normal order for disclosure (formerly called discovery).
45. I start with the latter – the introduction of “standard disclosure”. Prior to the CPR the test under the rules was that any document “relating to any matter in question” was discoverable. The courts took a very wide view of what was covered by this. The test

was laid down a long time ago when no-one had the quantities of paper they have now. In the very well-known *Peruvian Guano* case, (1882) 11 QBD 55, Brett LJ said:

“We desire to make the rule as large as we can with due regard to propriety; and therefore I desire to give as large an interpretation as I can to the words of the rule, “a document relating to any matter in question in the action.” I think it obvious from the use of these terms that the documents to be produced are not confined to those, which would be evidence either to prove or to disprove any matter in question in the action;

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words “either directly or indirectly”, because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.”

46. It is manifest that this is a much wider test than that for “standard disclosure”. I have a feeling that the legal profession has been slow to appreciate this. What is now required is that, following only a “reasonable search” (CPR 31.7(1)), **the disclosing party should, before making disclosure, consider each document to see whether it adversely affects his own or another party’s case or supports another party’s case. It is wrong just to disclose a mass of background documents which do not really take the case one way or another. And there is a real vice in doing so: it compels the mass reading by the lawyers on the other side, and is followed usually by the importation of the documents into the whole case thereafter – hence trial bundles most of which are never looked at.**
47. **Now it might be suggested that it is cheaper to make this sort of mass disclosure than to consider the documents with some care to decide whether they should be disclosed. And at that stage it might be cheaper – just run it all through the photocopier or CD maker – especially since doing so is an allowable cost. But that is not the point. For it is the downstream costs caused by overdisclosure which so often are so substantial and so pointless. It can even be said, in cases of massive overdisclosure, that there is a real risk that the really important documents will get overlooked – where does a wise man hide a leaf?”**
9. This decision shows that concerns about disclosure and its cost have been prevalent for many years and that those concerns – despite many reforms and attempts to control cost – continue unabated. To that extent, *Nichia Corporation* is as relevant today as it was in 2007. But, in another sense, *Nichia Corporation* is a case of its time, as the reference to “photocopier” and “CD maker” (in [47]) and the reference to “eyeball” reviews (my term for what is described in [46] and [47]) show. As I stated in one of my decisions in the October Proceedings ([2022] CAT 37 at [4] to [8]), disclosure processes today are entirely different to those described in *Nichia Corporation*:

- i) Most documents are electronic and – to the extent they are not – they are rendered so by scanning (generally including use of OCR⁸). Such documents are generally searchable by means of basic software that is available to all, although there are sophisticated disclosure platforms (used by most solicitors) capable of searches and sifts of enormous complexity and sophistication. Searches will not just be confined to the words used on the face of these electronic documents, but will extend to the “meta-data” inherent in those documents. When such processes were in their infancy, searches were based around lists of “key words” that produced multiple “hits” of responsive documents, but these days “key words” are almost as passé as CD makers. Concept grouping, predictive coding and other searches based on AI are widely prevalent.
- ii) The existence of these functionalities, combined with the undoubted fact that, as electronic documents (particularly, email) have become more prevalent, so that their volume has increased in the ordinary case, means that “eyeball” reviews of documents (by which I mean a “page-turning” exercise of documents by a qualified individual able to differentiate the relevant from the irrelevant) have become marginalised. Certainly, no-one with an understanding of electronic processes and a grasp of what “proportionality” means would contemplate an “eyeball” review of a large corpus of electronic documentation without first reducing the size of the document universe by means of an electronic filter intended to produce a limited corpus of relevant documents, which can then be manually reviewed by a qualified individual.
- iii) It is here that a real problem arises. The electronic filter used to reduce a large body of electronic documents to a manageable body of electronic documents (whether it does so in a binary relevant/irrelevant way or iteratively) inevitably causes a large number of documents to be discarded as not responsive to the disclosure process without ever being reviewed by a qualified individual. Where one can be confident that the electronic filter will not discard relevant material, no issue arises. But where (as is the case here) that confidence does not exist, the use of lists of issues and of disclosure models intended to find documents relevant to those issues is a fatally flawed process. What is more, whereas a Receiving Party will rightly rely on (and be obliged to rely on) the professional integrity of the Producing Party’s qualified individuals,⁹ a Receiving Party would rightly be sceptical and want to understand precisely how an electronic filter has been used to reduce a mass of electronic documentation to manageable proportions. The Receiving Party would – rightly – want to be assured that material documentation has not been excluded by a computerised process selected by the Producing Party.

⁸ Optical Character Recognition. Of course, there will be some cases where OCR is either not possible, or produces unacceptably unreliable outcomes. In such cases, without being prescriptive, “workarounds” will have to be developed, which will likely involve either deeming these documents relevant (because they cannot be excluded as irrelevant) or adopting a process of transcription, followed by OCR of the transcription.

⁹ In times of “eyeball” review by qualified persons, Courts would be slow to look behind disclosure statements of solicitors, and rightly so. The importance of the disclosure regime is embedded in the professional ethos of the lawyers who serve these Courts. Unfortunately, that professional ethos is not (yet) embedded in the software driving electronic reviews of documentation. Computers will – without exercising value judgements – simply do as they are told. That is so, even in the case of AI driven systems.

- iv) What is more, there is real mischief in aiming to use a computer filter to reduce the electronic documentation to a manageable size, so as to enable an “eyeball” review. What if the corpus of filtered documentation remains so large as to render an “eyeball” review impracticable or disproportionate? The temptation will be to make the electronic filter more aggressive – to filter out more – thus increasing the risk that relevant material will be filtered out. I do not consider that to be an acceptable solution to the problem.
 - v) Furthermore, the mischief of “dumping” enormous volumes of electronic documentation on the Receiving Party – described by the Court of Appeal at [46] and [47] of *Nichia* – no longer arises. “Dumping” no longer “compels the mass reading by the lawyers on the other side” of disclosed material. The Receiving Party’s lawyers will have their own processes of electronic review, which can be used in a much more targeted way. Instead of a broad-brush process of trying to separate the relevant from the irrelevant, the Receiving Party’s lawyers can conduct targeted searches for “key” documents and then widen the search from such “key” documents (in a manner decided by the Receiving Party) throughout the life of the case, as it progresses from disclosure to trial.
10. In short, “massive overdisclosure” no longer gives rise to the “real risk that the really important documents will get overlooked” (to quote from the Court of Appeal); rather, the electronic filtering of documents gives rise to the real risk that really important documents are not looked at by any human agent – whether on the part of the Producing Party or the Receiving Party.
11. I conclude that a process of “massive overdisclosure” (to put it tententiously, ungenerously and wrongly) ought to be adopted provided the following conditions are satisfied:
- i) There is a real risk that if a standard process of disclosure is adopted, using disclosure models to identify documents responsive to particular issues, relevant documents will be missed.
 - ii) There is no danger of the process being used to oppress any of the parties to the litigation. There will be cases where the Receiving Party is not in a position to review significant electronic disclosure in the manner I have described.
 - iii) The risk of disclosing privileged material is contained to the levels of any “standard” process of disclosure. Inadvertent disclosure of privileged material is a risk whatever process of disclosure is adopted. The risk cannot be eliminated, it can only be contained.
 - iv) Confidential material – whether relevant or irrelevant – is appropriately protected.
12. I turn, then, to consider: (i) these four factors; (ii) how the process I have described in general terms might work in the present case; and (iii) whether I should order it in these proceedings, in place of the “standard” regime.

13. The first two factors identified in paragraph 11 can be dealt with relatively quickly. For the reasons I have set out in this Ruling, I consider there to be a real risk in this case of a standard disclosure process missing relevant documents, with the result that relevant material will not be produced to the Receiving Party by the Producing Party. I am also satisfied – turning to the second of the factors I have identified – that there is no risk of a process of over-inclusive disclosure being used in oppression of any of the parties.
14. I therefore turn to the detail of how such a process might work. The first step is for each party to identify to the other party precisely what documents are going to be subject to an electronic search. I consider – in this case at least – that each Producing Party should swear an affidavit (or a witness statement with a statement of truth) identifying custodians, repositories and collections of documents that will be searched, together with any date ranges that will be applied to exclude or include material. At the case management conference, I indicated that the parties should begin preparation of this affidavit forthwith, because something along these lines will be required whatever disclosure process is ordered. The parties are, therefore, to file and serve an affidavit providing this information by no later than 4:00pm on 12 October 2022. The parties will have 14 days to probe and discuss this evidence, so as to satisfy themselves that it is suitably inclusive. In defining the universe of documents to be searched, each Producing Party should err on the side of over-inclusion. If there is an issue that cannot be resolved in discussion between the parties, then it should be referred to me to resolve on the papers. I have in mind that – in this case at least – such an affidavit be produced in substitution of the other forms of documentation that would ordinarily be produced, and that the affidavit may need to be updated as circumstances change (if they do). What the Receiving Party is entitled to is total clarity as to what is being reviewed. There is, of course, an informational imbalance here (the Producing Party holds all the cards, as it were) and so there will be a duty of full and frank disclosure on the part of the Producing Party to be clear about what is going to be searched and what is not going to be searched.
15. By the end of October 2022, each Producing Party will know the universe of documents that will have to be electronically reviewed. Precisely how that universe of documents is then electronically reviewed by each Producing Party is a matter for that Producing Party. However:
 - i) The object of the electronic review is to filter out documents that are irrelevant on the *Peruvian Guano* test, not to identify relevant documents. In conducting this process, the parties will be informed by the pleadings and by the DRDs that I referenced in paragraph 2 above. There is no need for the DRDs to be finalised, since they will not constitute hard-edged limits to the disclosure process, but rather will act as valuable, but informal, guides to that process. Accordingly, where there is a dispute between the parties about the framing of the DRDs – and, as I have noted, many such disputes exist – the wider formulation should be adopted.
 - ii) Although the Receiving Party has no entitlement to see the Producing Party’s documents before they are produced at the end of the disclosure process, each Receiving Party should be fully informed as to the nature of the electronic review that is being conducted, so as to be able to satisfy itself that the process is being conducted in a manner consistent with the objective stated in

paragraph 15(i) above. Again, if there is an issue that cannot be resolved in discussions between the parties, then it should be referred to me to resolve on the papers.

16. I shall leave it to the parties to consider when this process of review can be completed, so that it can be embodied in an order. As I indicated to the parties, I want this disclosure process done by the end of February next year, at the latest.
17. At the conclusion of the review, there will be a corpus of electronic documents that exclude the unequivocally irrelevant. I anticipate that the volume of documentation will be too large for an “eyeball” review, but (in any event) I consider that such a review – even if feasible – should not take place simply to filter the documents further on grounds of relevance. Equally, I am concerned to avoid a lengthy process of redaction of irrelevant parts of relevant documents. The process here being described is robust enough to render such a process of review both unnecessary and excessively costly.¹⁰
18. I am going to proceed on the basis that this corpus of documents will include (i) privileged material and (ii) confidential material. Privileged material clearly needs to be protected from disclosure to the Receiving Party, and each Producing Party will have to put in place a robust process – as a separate stage in the disclosure process – specifically and solely intended to identify and remove privileged material. I say nothing about the nature of the process: clearly, an “eyeball” review would be best but (as I have indicated) that is unlikely to be feasible. Rather, what is likely to be appropriate is an electronic search, targeted specifically at the identification of privileged material, which is then reviewed by a human agent to check that this material is, indeed, privileged and so protected from disclosure. Each Producing Party should provide a statement setting out exactly what has been done to exclude disclosure of privileged material.
19. There should be no filtering of the material to be disclosed on grounds of confidentiality. Put another way, confidential material must be produced to the Receiving Party. It goes without saying that all material produced by the Producing Party to the Receiving Party on disclosure will be subject to the obligation – contained in CPR 31.22 – to use such material only for the purpose of the proceedings in which it is disclosed, i.e. these proceedings. However, I am going to reinforce the CPR 31.22 regime in the following ways:
 - i) The material produced on disclosure will be held on whatever disclosure platform the Receiving Party chooses to use. Access to that material must be auditable. Each Receiving Party will be obliged to keep a record of who accesses what document and when. At the CMC, I explored the feasibility of this with the parties, and no objection on grounds of technical possibility was raised. To the contrary, the parties indicated that this part of the process, at least, caused them no difficulties.
 - ii) I stress that I am only directing that a record be kept. It will not – without order of the Court – be disclosed either to the Producing Party or to the Court.

¹⁰ I doubt whether this can be done robustly by electronic review; and if such a process is a “back door” to an “eyeball” review, then it is to be deprecated as disproportionate in cost and unnecessary for the protection of the Producing Party.

The record is intended to exist as a safeguard, so that if there is a concern about improper use of disclosed material, that concern can be investigated. That is what I mean by “auditable”. It may be appropriate – at the conclusion of the proceedings – to direct that the record be disclosed in any event, but that is not a direction I am making at this stage.

- iii) External counsel and experts subject to professional obligations regarding disclosure will know of their duties under CPR 31.22 and can be expected to comply with those duties without more. All other persons, however, including in-house counsel, will be subject to a special regime (which I describe below) intended to reflect the fact that competition cases unsurprisingly involve competitors who ought not to see each other’s confidential material. The disclosure process should not become an inadvertent form of illicit information exchange between competitors, nor should it be a device enabling one competitor to learn more about the business of another competitor.
 - iv) The process that governs access to the disclosed material on the Receiving Party’s disclosure platform on the part of all persons other than external counsel and experts is to operate as follows:
 - a) Each such person must be identified in writing to the Producing Party before access is given and there must be a short period of time (say 5 days) in which the Producing Party can object to a particular individual. If there is an issue that cannot be resolved in discussion between the parties, then it should be referred to me to resolve on the papers.
 - b) Each such person must sign an undertaking (which I will leave to the parties to settle) promising to comply with the CPR 31.22 obligation and this procedure. Where such a person is employed, an undertaking from that person’s employer should also be obtained.
 - c) Access to specific documents on the disclosure platform emanating from the Producing Party must be approved by a KC retained by the Receiving Party. This is quite an intrusive and possibly expensive obligation. I am ordering it because of the concerns expressed by the Claimants in respect of their confidential information. Neither the Claimants nor the Defendants opposed an order along these lines. Nevertheless, I consider that an order like this needs to be carefully considered before it is made, and should be regarded as somewhat exceptional. I stress I am not laying down guidance as to what the KC in question may or may not approve. The question will, in essence, be whether the undertaking not to use for collateral purposes will be upheld. This is an extremely serious undertaking, and I have no doubt that the judgement of the KC’s involved will be carefully engaged.
20. The effect of this reinforcement of the CPR 31.22 regime is to subject each and every document produced on disclosure to what is in substance a confidentiality ring. I have in mind that the regime will be buttressed by a penal notice. Those persons signing the undertaking I have described should be under no illusions as to the onerous obligations they are assuming.

21. The Claimants suggested that this regime was insufficient to protect them because the Defendants (and their employees) are largely based outside this jurisdiction. I reject that suggestion. International litigation – with parties beyond the immediate jurisdiction of the Court – is commonplace in these Courts, and I consider that such parties generally comply with Court orders. I consider that to be so here.
22. It follows that there ought to be limited need for any further confidentiality ring. I do not go so far as to say that I will refuse any application for an “inner” confidentiality ring, but such an application will have to be clearly justified. I make clear now that only documents which – if to be referred to in Court, would require the Court to sit in private – could properly find a place in such an “inner” confidentiality ring.
23. The October Proceedings have – as I have described – resulted in significant disclosure, and the parties to both sets of proceedings are agreed that the disclosure in the October Proceedings should form part of the disclosure in these proceedings. It is obvious that the disclosure regime in these proceedings, described in this Ruling, should apply, *mutatis mutandis*, to the disclosure out of the October Proceedings. In communications received after a draft of this Ruling was circulated, I understand that this may not be straightforward as regards non-parties to these proceedings are concerned. If there are such issues, and they cannot be resolved by agreement, this matter will have to be restored to me so that the October Proceedings disclosure (and I mean all of it) can form part of the disclosure in these proceedings. I did not understand – at the hearing before me – that redaction of this disclosure would be an issue. If necessary, I will deal with this at a hearing: but I was clear in the October Proceedings themselves that the excessive redaction in those proceedings was unhelpful.
24. Having unpacked the manner in which this “bespoke” disclosure regime should operate, I turn to consider whether it should be imposed. I am in no doubt that it should be, for the following reasons (which consider the Claimants’ jurisdictional objections also):
 - i) I am satisfied that this is a case where the “standard” regime will either not work satisfactorily or will only do so at excessive and disproportionate cost. The Claimants’ suggestions regarding disclosure placed excessive reliance on “eyeball” review, which no doubt goes some way to explaining the very high costs predicted by them in making proper disclosure.
 - ii) I am satisfied that the process properly protects both privileged and confidential material, but does so at proportionate cost.
 - iii) If this were a case where a “standard” process of disclosure were well underway, I would not interfere with it. My concerns about disclosure in the October Proceedings increased as that process proceeded, but I did not think it justifiable to “change horses in mid-stream”. That concern does not arise here: there are a number of disputes regarding the DRDs which remain outstanding, and which would need to be resolved in order for the “standard” process to continue.
 - iv) I am satisfied that I have jurisdiction to make an order along these lines. The PD 51U disclosure model did not apply automatically, and I consider (where

there have been material developments, as here) that I can re-visit my decision to apply it. I have done so – and I consider that it is right that I impose on the parties a different regime. Absent any special case, standard disclosure (as defined in CPR 31.6) is the order of the day: see CPR 31.5(1)(a). But the Court can “direct otherwise”, and that is what I am doing.

- v) The process I am ordering might – wrongly – be described as over-inclusive. I hope that the foregoing paragraphs of this Ruling make clear that it is not. The process I have described recognises the risk of an over-inclusive exclusion of documents from the production of each Producing Party, and avoids that risk by focussing on the electronic elimination of only clearly irrelevant material, whilst filtering out privileged material and subjecting the material that is disclosed to an appropriate protective regime.

25. I shall leave it to the parties to draw up an order that appropriately reflects this Ruling.