

Group Briefing
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Members Only Club: Confidentiality Rings in Litigation

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The risk that confidential or commercially sensitive information might have to be disclosed to a competitor in litigation can be a real concern for commercial parties.

Where the disclosure of certain information might give a competitor an unfair commercial advantage, the courts may put in place what is known as a ‘confidentiality ring’ or ‘confidentiality club’. Although not yet a common feature of Irish litigation, two recent decisions, one in a competition dispute and the other in a procurement dispute, are welcome developments in this regard.

IN THE CLUB

Where the court sets up a confidentiality ring or club, certain restrictions are placed on access to and use of the information in question. Typically the court will direct that only the parties’ lawyers (and not the parties themselves) and their experts may inspect the documents. The lawyers and experts will also be required to undertake not to reveal the contents of the documents to their clients or other third parties.

The protection of confidential information through the use of confidentiality rings or clubs is well established in English law. They are

typically put in place in competition cases or cases involving trade secrets or intellectual property rights.

However, the Irish courts have historically been reluctant to curtail discovery rights in this way. One argument against their use is that they are not necessary as parties to litigation, as part of the discovery process, impliedly undertake to only use information exchanged on discovery for the proceedings at hand. However, the reality is that a party who sees commercially sensitive information cannot “unsee” it and may therefore gain a commercial advantage.

COMPETITION DISPUTES

In a recent judgment on an application for discovery in a competition dispute, *Goode Concrete v CRH plc*, the Irish High Court accepted that it has an inherent power to establish a confidentiality ring where appropriate. When deciding whether to do so, the Court must balance the interests of both parties to the litigation: the plaintiff’s right to have access to the information needed

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

to progress its claim and the defendant's right to protect its business interests from possible abuse of discovered materials.

A key factor in the decision to grant a confidentiality ring in *Goode Concrete* was that the dispute between the parties, competitors in the concrete sector, involved competition law. The Court noted that it is increasingly becoming standard practice in other jurisdictions to use confidentiality rings in competition proceedings to avoid discovery being used "*as a commercial weapon*". Also, the information sought on discovery from CRH plc concerned its commercial strategy, pricing strategy and cost base.

The Court said it could not encourage a situation where a defendant is pressured into allowing litigation against it to continue to trial, rather than disclosing information that might end the proceedings, out of a concern

that the disclosure of the information to a competitor could put its entire business at risk. The plaintiff in such a situation might suffer a legal loss, but a commercial win because it would have gained access to valuable commercial information from a competitor.

PROCUREMENT DISPUTES

Procurement disputes raise similar concerns as bidders often have to reveal their business plans, methods and pricing strategies as part of the tender process. In its recent judgment in *Word Perfect Translation Services Ltd v The Minister for Public Expenditure and Reform (No 2)*, the Court of Appeal commented that public policy would be impaired, perhaps even jeopardised, if a disappointed bidder could seek highly sensitive tender documentation relating to a competitor on discovery in a subsequent challenge to the tender process. This is particularly so in framework tendering where there are

only a small number of bidders who are likely to be business rivals in constant competition with each other for tender awards.

In that case three competitors tendered for a public procurement contract. A disappointed bidder later challenged the bidding process and sought discovery of particular sections of its rival's winning tender document. The Court granted the discovery request in part only, but directed that only named solicitors and counsel retained by the disappointed bidder would be permitted to see the material in question.

The decision in *Goode Concrete* is under appeal, but commercial entities can be reassured that the Irish courts are developing procedures to protect the disclosure of certain information which might give a competitor an unfair commercial advantage.

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