



Neutral Citation Number: [2019] EWHC 79 (Pat)

Case No: HP-2017-000075

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST
PATENTS COURT

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

Date: 22/01/2019

Before :

MR JUSTICE MANN

Between :

(1) ILLUMINA, INC.
(2) SEQUENOM, INC.

Claimants

- and -

(1) TDL GENETICS LIMITED
(2) THE DOCTORS LABORATORY LIMITED
(3) ARIOSIA DIAGNOSTICS, INC.

Defendants

Mr James Abrahams QC (instructed by **Powell Gilbert LLP**) for the **Claimants**
Mr Joe Delaney instructed by **Clyde & Co LLP** for the **First and Second Defendants** and by
Herbert Smith Freehills LLP for the **Third Defendant**

Hearing date: 18th December 2018

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.

.....
MR JUSTICE MANN

Mr Justice Mann:

1. This is in form an application by the claimants for an order that they are entitled to receive confidential information via an already constituted confidentiality club of 3 representatives of the claimants without having to submit to, or engraft, further restrictions on the use that the club members can make of the information. The information is provided in a patent action in the circumstances referred to below. The defendants say that the information should be provided to only one of those members, and subject to an undertaking that he will not be involved in any parallel non-English proceedings, or alternatively that all three members should receive it subject to the same undertaking. In so submitting the defendants are proposing a narrower club, with additional restrictions, than is already provided for by a consent order between the parties. Although this is the claimants' application, it is in fact the defendants who are making the running because of that departure. A similar question also arises in relation to an expert whom the claimants wish to instruct in this action.

2. The second claimant (Sequenom) is the registered proprietor of European Patent 1 524 321 B2; the first claimant (Illumina) claims to be an exclusive licensee under that patent. I say "claims to be" because there is a dispute in these proceedings as to whether they have that entitlement. The patent concerns an invention for detecting genetic abnormalities in a foetus by sampling the blood of the mother. The mother's blood contains extracellular DNA of both the mother and the baby, though the baby's is a much lower proportion of the total. The patent states baby's DNA tends to be shorter, and that feature is used in the invention to enrich the baby's fragments and to test them. Claim 1 of the patent reads:

"a fraction of a sample of the blood plasma or serum of a pregnant woman in which, as a result of the said sample having been submitted to a DNA extraction, followed by a size separation, of the extracellular DNA, the extracellular DNA present therein consists of DNA consisting of 500 base pairs or less."

3. The claimants claim that the defendants have infringed the patent by their Harmony Prenatal Test. Infringement is not admitted and the defendants counterclaim for revocation of the patent on the grounds of insufficiency, want of novelty and want of inventive step.

4. In the early phases of this action the parties agreed a consent order to deal with confidentiality. The order of Arnold J dated 4 May 2018 set up a confidentiality club. It included external solicitors and counsel, and no issue arises as to those. So far as those internal to the claimants were concerned it set up a club consisting of two in-house lawyers of Illumina (Mr Marcus Burch and Mr Roland Schwillinski) and one in-

house lawyer for Sequenom, Mr John Peterson. Each of those individuals was obliged to give an undertaking to keep confidential information received as confidential. Information was to be designated as confidential by the party providing it. This was achieved by paragraph 1 of the order:

“1. There be a confidentiality club (the “Confidentiality Club”) for the protection of confidential information and confidential documents... in these Proceedings, as so designated by the disclosing party when the documents or information are disclosed.”

5. Paragraph 6 dealt with the provision to experts:

“6. The Confidentiality Club to further include each of the following members upon the provision to the respective Solicitors of Record of an undertaking in the form of the Draft Confidentiality Undertaking attached at Schedule 1:

(a) any person external to a party who has been retained by that party with a view to giving expert evidence in the Proceedings, subject to written approval being obtained from each other party (such approval not to be unreasonably withheld);”

6. Schedule 1 is the schedule which contains the undertakings which the other members of the club were obliged to give. It contains familiar confidentiality undertakings including one which restricts use of disclosed confidential information to these proceedings.

7. The dispute in this case arises out of the provision by the defendants of their Product and Process Description (“PPD”), provided for in the usual way by an order of the court. It was served under cover of a letter from solicitors for the third defendant (Herbert Smith Freehills) dated 5th October 2018 which sought to introduce additional confidentiality restrictions in respect of parts of it. It said:

“Please note that the enclosed PPD contains the Defendants’ confidential information in Confidential Annexes B to J inclusive, which are being disclosed for the eyes of Powell Gilbert LLP and UK counsel instructed in these Proceedings only.

While the consent order of Mr Justice Arnold dated 4 May 2018 (Confidentiality Club Order) names certain individuals from your client as designated to receive confidential information, we note that since the establishment of the confidentiality club, your clients have issued infringement proceedings against the Third Defendant in the Northern District of California based on two US patents that claim priority from the application for the Patent and which appear to have substantially similar claims. The individuals named as in-house counsel for the First Claimant in the Confidentiality Club Order have been involved in US litigation against Ariosa since 2014 and we are concerned about them participating in litigation concerning non-UK counterparts of the Patent whilst being privy to the Confidential Annexes and Exhibits.

Accordingly, should you wish for permission to show the Confidential Annexes and Exhibits to the individuals named in the Confidentiality Club Order, please confirm that these individuals will not be involved in any non-UK litigation concerning Harmony and similar subject matter to the patent.”

8. The claimants declined to accept the restrictions. They take the view that the existing regime allows the information to be given to the three members of the club, and it is for the defendants to apply for any variation of that provision, and the defendants have not done so. Insofar as may be necessary they also say that there is no more reason for withholding any information in the PPD from the three members of the club than there is for other confidential information which has been or may be provided.
9. An additional point arises in relation to the expert appointed by the claimants, namely one Prof Michael Lovett, Chair of Systems Biology at the National Heart and Lung Institute. The claimants required his assistance in preparing the evidence for this application, and therefore asked the defendants for permission to admit him into the confidentiality club pursuant to paragraph 6 of the order. The defendants gave that consent conditional on the understanding that he would not assist in any foreign proceedings relating to the equivalent of the patent. Since the claimants did not have the time to argue that point so far as the provision of material to Prof Lovett was concerned, because they needed his participation in the preparation of the evidence, they agreed under what they described as duress. However, in this application they seek the removal of the restriction relating to Prof Lovett’s participation in other proceedings.
10. Although the claimants maintain that the burden is effectively on the defendants to impose further restrictions on the three original members of the confidentiality club, the

claimants have taken it on themselves to seek an order clarifying the position. So far as Prof Lovett is concerned, they seek in their application that he be released from the restriction against assisting claimants in foreign proceedings.

11. I shall deal first with the question of the restriction of the three named individuals and then turn to the position of Prof Lovett.
12. The claimants' first point, advanced by Mr Abrahams QC is a technical one. He says that the question of the provision of information to the three named individuals in the order of Arnold J is something which is permitted under that order as it stands. If there is to be any variation of that order in any respect then it behoves the defendants to make an application to vary it. They have not done so, and at one level that is an end of the matter. Had they sought to do so then they would have had to fulfil the requirements of *Tibbles v SIG plc* [2012] 1 WLR 2591 relating to the variation of a court order. They could not do so on the facts of this case because there has been no material change of circumstance and no other justification for a variation.
13. Mr Delaney for the defendants disputes that analysis. He says he is not seeking to vary the order. It applies to documents which a party chooses to disclose under the confidentiality regime provided for by that order. His clients have not chosen to provide the PPD under that order; they are willing only to disclose it separately, and are entitled to seek different confidentiality provisions including the restrictions on the individual recipients' participation in litigation about the same patent family. If he were wrong about that then he should be treated as making an application now to vary Arnold J's order, and he relied on the appreciation by his clients of the particularly confidential nature of some of the material in the PPD as being a material change of circumstances which justified a variation.
14. The first question is therefore whether the PPD falls under the present regime or whether either party can choose to disclose any document it chooses on a different basis by saying that it does not "designate" (to use the word used in the order) that document as being confidential for the purposes of the order.
15. In support of his entitlement to do so, Mr Delaney relied on *Smith & Nephew plc v Convatec Technologies Inc* [2014] EWHC 146 (Pat). In that case Birss J said:

"4. The difficulty in dealing with disclosure of technical secrets is a problem which has been recognised in patent cases for many years. At the stage of disclosure it is well established that in a proper case a confidentiality scheme or "club" can be set up. See

three Court of Appeal authorities *Warner Lambert v Glaxo* [1975] RPC 354, *Roussel Uclaf v ICI* [1990] RPC 45 and *Lilly ICOS (No 2)* [2002] EWCA Civ 2. The scheme may be arranged by order of the court but is often arranged by an agreement between the parties, albeit always subject to the Court's jurisdiction. The scheme provides that documents in disclosure which are identified as confidential are identified as being part of the scheme. For the documents in the scheme, access to them and their use by the receiving party and its legal team will be expressly restricted. Commonly the documents will be accessible to the solicitors and counsel and relevant independent experts who are to give evidence in the case. Commonly also the documents will be accessible only to named individuals at the receiving party. The system is flexible and there are many variations. In some cases signed undertakings are required from some or all of the persons to whom the documents are to be disclosed. In some rare cases it is fair to restrict access to the documents even further.”

16. I do not think that that passage assists Mr Delaney. It describes the concept of a confidentiality club, how it comes about and how it may be operated. It does not deal with the question of whether the established confidentiality club is the only way in which confidential information in any given case is to be handled. That depends on the true construction of the arrangements setting up the club, in their litigation context.
17. Looking at the order made in this case, in its context, it is plain enough that it was establishing a regime applicable to all documents which a party designated as being confidential as opposed to documents which have a normal treatment. I was not shown any evidence that the parties had in mind that there might in due course be some documents which would need a different confidentiality regime. In fact the converse was true. It appears that the regime was proposed by the defendants themselves as covering all documents which needed to be treated confidentially. In a letter of 1st February 2018 they enclosed a draft order and undertaking (which eventually became Arnold J's order) and said:

“We suggest that the Parties to the Proceedings enter into a confidentiality regime akin to that entered into by the Parties in HP-2016-00001, pursuant to which [a particular witness statement] can be provided to your clients.

We therefore enclose a draft Consent Order and draft Confidentiality Undertaking in the same terms as those agreed by the Parties in HP-2016-00001. We consider that this regime is appropriate to address all concerns regarding the confidentiality of information and documents to be disclosed in

the Proceedings. This includes the confidentiality of the Pooled Patents Agreement.”

We would be grateful if you would confirm your agreement to this proposal.”

The claimants must have confirmed it. Thus the regime was provided to cover all information that fell to be treated as confidential. There was no reservation for a separate class which might need separate treatment. Mr Abrahams’ argument thus far succeeds.

18. There are two references in that letter which require explanation because points about them arise later on. The first is the other proceedings referred to there. There had been previous proceedings between the same parties over a related but different patent. In those proceedings the claimants had succeeded in establishing that the patent was valid and infringed. As the letter suggests, the same confidentiality regime operated in relation to those earlier proceedings as operates now. That is a point relied on later by Mr Abrahams in this application.
19. The other reference is the Pooled Patents Agreement. That is an agreement operating between the claimants (and perhaps others – it does not matter) under which various interests are pooled. For present purposes it is said by the defendants to be important that under that agreement, although the second claimant is the patentee, all significant decisions, including those in this litigation, are taken by Illumina. Again, that becomes significant later in the application.
20. Thus far, therefore, Mr Abrahams has established that the PPD should fall under the existing confidentiality regime. There is an order governing that, and if the defendants wish to vary it then they should apply for a variation under CPR 3.1(7). Mr Abrahams did not seek to object when I said I would, so far as necessary, treat such an application as before me. That was a sensible course. Had he not adopted it he would merely have delayed matters pending such an application being formally made, and then Mr Delaney would have advanced all the arguments that could be, and were, advanced before me at my hearing.
21. CPR 3.1(7) provides:

“(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order.”

Mr Abrahams relied on *Tibbles v SIG plc* as standing in the way of a variation under that rule. In that case it was confirmed that the rule did not give the court an unconstrained discretion to vary existing orders. There were various constraints on its application which Rix LJ summarised as follows:

“39. In my judgment, this jurisprudence permits the following conclusions to be drawn:

(i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.

(ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.

(iii) It would be dangerous to treat the statement of these primary circumstances, originating with Patten J and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.

(iv) Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case.

(v) Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also factors going to

discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.

(vi) *Edwards v. Golding* is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake on the part of the judge in the formulation of his order. It was plain in that case from the master's judgment itself that he was seeking a disposition which would preserve the limitation point for future debate, but he did not realise that the form which his order took would not permit the realisation of his adjudicated and manifest intention.

(vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.”

22. It was not, and could not be, suggested that the original order resulted from a decision made on some mistaken factual basis. The court did not actually make any decision; it merely made a consent order. Therefore, on the basis of *Tibbles* Mr Delaney has to establish a change of circumstances, or some sort of out of the ordinary change of circumstances, to justify the variation.
23. The letter of 5th October, in which the defendants sought additional undertakings from the 3 named recipients of the information, might be thought to suggest that the US proceedings amounted to a change of circumstances justifying a more tightly drawn confidentiality regime. Mr Delaney did not suggest that in his submissions and I would not accept it anyway. It must have been appreciated that there would or might be proceedings in other jurisdictions. That is extremely common in the case of patents, and in any event on the facts nullity proceedings had already been started in Germany.
24. So that leaves the PPD itself, and its contents, as being the change of circumstances. What the point amounts to is this. When the regime was agreed the defendants did not appreciate that they would have to disclose the sort of sensitive information which is said to be contained in the PPD. Now that that has become apparent that amounts to the sort of change in circumstances, or residual exceptional circumstances, which requires a modification of the regime.

25. I am not convinced by that line of argument. The defendants were prompt in proposing a confidentiality regime. They proposed one which was apparently intended to govern the whole of the proceedings, in line with the parties' experience in the earlier proceedings. It was intended to govern the documents which were likely to need to be disclosed. A PPD was obviously going to be one of those. That would have been anticipated by the parties, and particularly by the defendants. The defendants would know what information they had, and in a case such as this would have a keen eye on the confidentiality of its information. The fact (if it be the case) that the PPD would need to contain particularly sensitive information ought to have been something of which the defendant was aware. They did not propose any special regime for that information at the time, and the order of Arnold J does not contain a liberty to apply. In all the circumstances I do not consider that any recent appreciation of the particular confidentiality of some of the information is a change of circumstances which would justify varying Arnold J's order within the *Tibbles* principles.
26. I would add that there was some debate at the hearing before me as to just how confidential and sensitive the material really is. I have not considered that point. It was not debated fully, and a proper debate would have taken a significant amount of time, would have trespassed on material appropriate for the trial and would probably have been more appropriately conducted before a technically qualified patent judge who hears category 4 and category 5 cases (which this one would seem to be).
27. At one point in the argument Mr Delaney pointed out that there could well be other circumstances in the future in which sensitive documents might have to be treated differently. He instanced licences that might be relevant to damages claims. I accept that that might be the case, but a different phase of this action, with different categories of documents being relevant, could well amount to a change of circumstances which would require, or justify, a different regime. But the present phase is not one of those, and (as already pointed out) the PPD would be a document that would obviously be anticipated.
28. I do not rule out the possibility that in other cases a consent order dealing with confidentiality might be agreed in circumstances which demonstrate that there was an anticipated need for flexibility. A confidentiality regime might be thought to be the sort of regime in which flexibility might be required. In those cases something short of a change of circumstances might justify a variation, even in the absence of a liberty to apply. However, for the reasons given above the present case is not one of those.
29. The defendants therefore fail in their attempt to procure a variation of the regime so far as it affects the three named individuals. However, I still have to consider the instance of Prof Lovett, who is not covered by the same regime since he needs to be an approved recipient and there is a dispute as to whether approval has been unreasonably withheld insofar as it seeks to engraft the condition about non-participation in foreign litigation.

That point requires a consideration of similar points as those which would have arisen had I decided that circumstances justifying considering a variation had arisen. Because of that, and in case I am wrong in my reasoning thus far, I will consider whether, had it fallen for decision, it would have been justifiable to adjust the confidentiality regime for the three named individuals in the manner proposed by the defendants.

30. The capacities of the three named individuals, and the reasons why they are important to the claimants in this respect, are as follows.
31. Mr Schwillinski is the Vice President, IP and Commercial Litigation at Illumina. He is the more senior of the two Illumina confidentiality club members. He is himself a qualified attorney. He and Mr Burch are part of a small team of 4 lawyers in Illumina who are collectively responsible for the management of all patent litigation in which Illumina is involved. The other three (including Mr Burch) report to Mr Schwillinski. He and Mr Burch provide strategic input into the other litigation currently pending in US and Germany on this patent. Dr Bethan Hopewell of Powell Gilbert LLP, solicitors to the claimants, has deposed to the fact that it would be unworkable and cause severe prejudice were either of Mr Schwillinski or Mr Burch to be prevented from working on any non-UK cases involving foreign equivalents of the patent in suit or the defendant's Harmony product. Mr Burch has day to day management of these proceedings and Mr Schwillinski is involved in any significant or strategic decision-making. Both give instructions to Powell Gilbert in this litigation.
32. Mr Peterson is Associate General Counsel at Sequenom. He is the sole individual at Sequenom responsible for managing litigation relating to Sequenom's patents. That is said to make it inappropriate if not impossible for him to be barred from being involved in parallel non-UK litigation.
33. Mr Delaney for the defendants started his submissions by making it clear that the defendants were not relying on a risk of deliberate misuse in trying to keep the 3 club members out of foreign litigation. His concern was unintentional leakage.
34. His first stance in this application was different from that proposed in the letter of 5th October. That letter proposed that the PPD be disclosed to the three members subject to their additional undertaking. His first line of argument proposed something even narrower. His clients proposed that only Mr Burch should receive it, and he should give the additional undertaking about foreign proceedings. His submission was that it was not necessary for anyone else within the claimants to receive the information and his clients should not be exposed to the additional risks arising out of a wider disclosure. Mr Schwillinski was a senior lawyer, not involved in the technical details of the proceedings. It was not suggested by the claimants that the technical details would be

understood by him anyway, so he would not be able to form his own view of the merits of any aspect of the present claim. Experience in other areas demonstrated that it was just not necessary for him to see it. Thus in the earlier proceedings he did not see the PPD until after the exchange of experts' reports; and in the parallel US proceedings he is not allowed to see confidential material because there is an "external lawyers only" confidentiality provision. That apparently did not affect his ability to contribute to strategic decision-making. It has thus been demonstrated that he had no need to have access to this material.

35. So far as Mr Peterson is concerned, Mr Delaney submitted that he had no need to see it because he was not the real decision-maker in these (or any) proceedings. The terms of the Pooled Patents Agreement give Illumina control over all relevant matters, so there was no need to consult Mr Peterson. Although Dr Hopewell, in a reply witness statement, said that Mr Peterson had to be consulted on all strategic matters, that sort of decision did not require sight of the really confidential parts of the PPD. Furthermore, like Mr Schwillinski, he did not have access to any confidential material in the US proceedings, and that did not seem to pose insuperable problems.
36. Mr Delaney accepted that Mr Burch should see the PPD, but subject to the undertaking that he would not be involved hereafter in any foreign proceedings related to any foreign equivalent patent or the defendants' Harmony product. If he failed in his attempt to keep Mr Schwillinski and Mr Peterson away from the PPD, then they should give the same undertakings. There was a precedent for such a limitation in *Roussel Uclaf v Imperial Chemical Industries plc* [1990] RPC 45 at p51. He asserted, in general terms, that there was a risk that there would be leakage in foreign proceedings, and this would be particularly prejudicial in any foreign proceedings where there is not the same degree of disclosure as there is in English proceedings. It would be wrong for limited disclosure to be by-passed by leakage of information obtained in England. If the individuals were involved in the instruction of experts then the presence of information acquired from the PPD might affect how experts were consulted. The inability of any of the three club members to have confidential information in the US did not seem to be causing problems. If they were privy to some of that information here, then there might be a situation in which they acquired some of the information known to US external lawyers, but not all of it, which would cause confusion. There were other lawyers within Illumina who could deal with the litigation in the US and elsewhere, so Mr Burch's exclusion would not inevitably cause problems in the running of that litigation.
37. The claimants' case was that there was no case for restricting the numbers of the club who could see the PPD or their future participation in foreign litigation. Mr Schwillinski was the senior person from whom instructions were taken and with whom liaison with the client took place. Every point that Mr Delaney took against the club members could have been taken in the first proceedings, but was not. The information at stake in the allegedly super-confidential parts of the PPD was of no higher degree of confidentiality than information which the three club members were allowed to see in

the earlier proceedings, and there was no suggestion that the earlier proceedings contained any general problem or required a specific undertaking about foreign proceedings. None of the “new” information in the PPD would be useful in the foreign proceedings in any event, unless the defendants chose to raise a point to which it was relevant, in which case it would have to be disclosed in the foreign proceedings in any event. Mr Abrahams said that Mr Delaney had not suggested any way in which the information might be deployed, or misused, in the foreign proceedings. It would be unworkable for the club members to be limited or restricted in the manner proposed by the defendants, and Dr Hopewell, an experienced litigator has said she would need to be able to get instructions from the individuals on relevant points. For example, she might need to discuss whether any particular claims in the patent should be particularly emphasised, or perhaps not asserted. So far as Mr Peterson was concerned, it needed to be noted that the defendants were running a positive defence that Illumina was not entitled to assert the patent and that only Sequenom had a right to sue (a point on which the defendant won in the first action), so there was an argument that only Sequenom was Powell Gilbert’s proper client; and in any event Dr Hopewell’s clear position (again as an experienced litigator) was that she needed to be able to get full instructions from a representative of Sequenom, and that representative was Mr Peterson.

38. I will deal first with the question of the proposed exclusion of Mr Schwillinski and Mr Peterson from seeing the most confidential parts of the PPD. There was no dispute that on the authorities such a course is possible. Mr Abrahams drew my attention to *TQ Delta llc v Zyxel Communications UK Ltd* [2018] Bus LR 1544, where Henry Carr J summarised the law on the extent to which an “external eyes only” condition should be imposed. It is not necessary for me to set out here the summary at paragraphs 21 to 24 of that judgment, with which I respectfully agree. However, that case is of limited relevance to Illumina because the defendants do not seek to impose such a condition on Illumina. It does technically apply to Sequenom, but it is not really the substance of this application. In the case of Illumina the question is whether, on the evidence, it is appropriate to exclude Mr Schwillinski and Mr Peterson from what are said to be particularly sensitive parts of the PPD. I do not consider that it is, for the following reasons.
39. The evidence of the defendants seeking to justify the exclusion of Mr Schwillinski from knowledge of the sensitive parts of the PPD is of a familiar nature. It is said that the information is highly confidential, and that while any suggestion of deliberate misuse is disclaimed the defendants say they fear inadvertent disclosure in, “for example, commercial discussions, patent prosecution and the conduct of proceedings in other jurisdictions (or the decision of whether or not to commence proceedings in other jurisdictions)” (S Moore 7th witness statement para 4.1). This was not a risk that was suggested when the PPD was first disclosed. At the time of the first disclosure the defendants were content that Mr Schwillinski should see the full PPD provided he were not thereafter involved in foreign proceedings. There was no suggestion that the risks of commercial disclosure elsewhere should mean that he should have no access at all. That approach was repeated in a follow-up letter from the defendants’ solicitors of 12th November 2018 in which they reiterated that:

“We are merely asking for some level of segregation between the UK and the non-UK proceedings, to ensure that the obligations of CPR 31.22 and those set out in the confidentiality undertakings given by your clients are complied with. Given the highly confidential nature of the PPD, our client wishes to ensure that the information it contains cannot be used in proceedings other than the Proceedings.”

40. It is true that later in the letter the solicitors propose that Mr Burch alone should see the whole PPD, but that is not put on the basis that suddenly Mr Schwillinski represents an overall unacceptable risk of leakage in a context other than foreign proceedings. The idea that Mr Schwillinski presents some sort of unnecessary risk outside the context of foreign proceedings is a recent proposition inconsistent with the expressed original concerns, and in my view is a recent contrivance.
41. The extended view of the risk of Mr Schwillinski outside the scope of foreign proceedings is also inconsistent with his being admitted to this case’s confidentiality club in the first place. He was presumably accepted because he was thought to be appropriately discrete, honest and conscientious, and there is no suggestion that that has changed. Furthermore, he was an appropriate member of the club in the earlier proceedings too, from which the same conclusions can be drawn as to his qualities of integrity and conscientiousness. The defendants seek to justify new restrictions being imposed on him by virtue of the particularly confidential nature of the particularly confidential parts of the PPD, which is information not disclosed in the earlier proceedings. I do not find that convincing. In my view it has not been established that the specially confidential information relied on by the defendants is such that it shifts the risk of accidental disclosure or accidental misuse. Examples are given in the defendants’ evidence - information about proprietary formulations of certain buffers, multiple sets of raw experimental data and precise information about samples that were processed. I do not understand how that sort of information shifts the risk of accidental misuse. In fact, if anything the nature of that information is such that accidental misuse in commercial activities would be hard to imagine.
42. I therefore find that nothing has happened which displaces the trust which has hitherto been placed by both parties in Mr Schwillinski. On the other side of the line the claimants have made a good case for having someone with Mr Schwillinski’s seniority being able to understand all aspects of the case so that they can obtain appropriate instructions. He is a lawyer who well understands the confidentiality involved and the need to comply with the stringent confidentiality undertakings that he is given. He is an appropriate member of the club in general terms and in relation to the sensitive parts of the PPD.

43. The same points apply mutatis mutandis to Mr Peterson. He was treated as an appropriate confidentiality club member in the earlier proceedings and in these proceedings, and nothing has happened to displace that status. It is appropriate that the claimants' representatives should have someone from whom they can obtain instructions and who needs to understand confidential material in order to be able to do that, Dr Hopewell's clear evidence is that he needs to be party to strategic decisions. It is likely that he would need to know about the PPD as a whole in order to do that. There is no good reason for an "external lawyers only" requirement in relation to Sequenom, and Mr Peterson is an appropriate single member of the club on behalf of Sequenom. This is despite the fact that Illumina has a great degree of control over the litigation. Sequenom's interest cannot be treated as minimal.
44. That deals with the attempts to limit disclosure only to Mr Burch. I now turn to the particular limitation proposed by the defendants, namely that the three members of the confidentiality club who receive the whole of the PPD should thereafter not be involved in foreign litigation about related patents.
45. Again, there is no dispute that such a condition could be imposed if the circumstances justify it – see *Rousell Uclaf v Imperial Chemical Industries* (supra). The defendants' arguments in favour of imposing it appear above – there is a risk of leakage into the foreign proceedings if the three members of the club are allowed to participate in the decision-making process in relation to those proceedings, and the leakage would not necessarily be of information that would become apparent in those proceedings in any event because the disclosure rules are or may be different in the jurisdictions in which they are proceeding.
46. I confess that I felt there to be something odd about this argument. What the defendants seek to prevent is leakage of something which might affect foreign proceedings and which would otherwise not be available in those proceedings. It would therefore be a leakage of something relevant but which the defendants themselves choose to withhold. It seems to me to be a little strange that this is perceived as being an unacceptable danger. It smacks more of a game than serious litigation. However, the claimants did not press this oddity upon me, other than to say that the English court should not be party to any attempt to conceal material from a foreign court (with which I agree) and it did not seem to be an oddity to Aldous J or the Court of Appeal in *Rousell*, so I shall not consider it further.
47. The main problem with the defendants' case at this point is that they merely run it at a high level of abstraction. They do little more than assert the possibility of different procedures in different jurisdictions (which is probably justified to a degree), which will lead to different levels of disclosure in various jurisdictions (which also may be justified) and then assert the possibility of leakage in the form of unintentional use of information in the PPD, acquired in this jurisdiction, for the purposes of the foreign

jurisdiction. Since intentionality is not alleged the use must be subconscious, but how this might happen has not been made apparent by the defendants. They do not suggest any way in which this might happen in order to elaborate their fears. Mr Delaney suggested that Mr Burch (or Mr Schwillinski) might subconsciously be affected in the manner in which they instruct experts in the foreign jurisdiction, but he did not suggest how, and looking at the confidential information in this case I do not myself see how that is a plausible possibility. It was also suggested that confusion could be caused in the US litigation, where Mr Burch and Mr Schwillinski do not see the confidential information, because they would (if allowed to act) be instructing US lawyers (who have confidential information) knowing perhaps only part of what the US lawyers know. While that might require Mr Schwillinski and Mr Burch to be particularly careful, I do not see how it will create confusion. If the US lawyers know the information from disclosure in the US, they know it and will act on it accordingly, whatever Mr Schwillinski and Mr Burch know. I do not see how this leads to the principal vice relied on by the defendants, which is unconscious leakage by Mr Burch and Mr Schwillinski.

48. When this inadequately articulated risk is put against the justifiable (and justified) need of Illumina to be able to give instructions and receive advice, I cannot see any case for imposing the restriction which the defendants seek to impose. The claimants have an understandable and justifiable desire that the same people should be able to oversee patent disputes in a number of jurisdictions. To impose a restraint which prevents that happening would require a real and serious danger to exist if the restraint were not imposed, and the defendants have simply failed to do that. I rule that Mr Burch and Mr Schwillinski should not be required to give the further undertaking restricting their involvement in foreign proceedings.
49. The same applies to Mr Peterson. His involvement with lawyers in foreign jurisdictions may be less, and if that is right then the risk of unintentional leakage (if it existed) would be less. But everything that I have said about Mr Schwillinski and Mr Burch applies to Mr Peterson. He need not give the additional undertaking either.
50. It is now necessary to turn to Prof Lovett. Pursuant to the order of Arnold J, an independent expert can be admitted to the confidentiality club, but the other side's consent must be obtained, that consent not to be unreasonably withheld. The claimants asked for Prof Lovett to be admitted so that he could assist in this application (which includes a question about a request for further information, with which this judgment is not concerned). The defendants consented to his being admitted but subject to the same qualification as to his not being involved in foreign proceedings involving equivalent patents as they sought to impose in the cases of Mr Schwillinski, Mr Burch and Mr Peterson. Because the claimants needed his assistance for this application they agreed to the imposition of that condition for the time being, but now seek to have the restriction removed on the basis that it involves an unreasonable withholding of consent to his appointment.

51. The defendants' concern about Prof Lovett is akin to the concern that they have over the other three members of the club. They have a concern that if he becomes privy to confidential information from the PPD he will find himself in an impossible position if he is asked to act as an expert in foreign proceedings about an equivalent patent. By way of example, it is said that he might be obliged to give an answer to a question when a full answer would be based on his knowledge acquired from the PPD but not information disclosed in those foreign proceedings. Or he might be required to interpret publicly available material relating to the Harmony Test for the purpose of establishing infringement, and find himself in an impossible position if he knows too much as a result of the PPD. To impose a restraint on his being deployed in foreign proceedings would not, according to the defendants, be unfair on the claimants because at the moment he is used only in the UK proceedings and it has not been suggested that other experts would not be available to be instructed in relation to proceedings elsewhere.

52. The claimants maintain that there is no case for limiting Prof Lovett in that way. They have no current intention of using him in foreign proceedings relating to equivalent foreign patents, but they would not wish to be constrained should they choose to do so in the future, and say they should not be. They point out that he acted in relation to both English and Australian proceedings in relation to the earlier patent dispute, without difficulty. (To this point the defendants respond that since the professor had access to similar material in both jurisdictions the question of leakage did not arise.) Furthermore, the defendants have not suggested that their own proposed expert should be subject to the same constraint, so there would be an inequality of arms in that respect – the defendants could use the same expert elsewhere whereas the claimants could not. Presumably they would not see any risk of unintentional leakage from their own expert in a foreign jurisdiction; the same applies to Prof Lovett.

53. Again, I find that the case mounted by the defendants for imposing a “foreign proceedings” restriction on Prof Lovett is thin to the point of contrivance. There is no suggestion that Prof Lovett will be anything other than conscientious in his use of the information that he gets. There is no suggestion of deliberate leakage by him, or some deliberate attempt to sidestep the unavailability of some evidence in foreign proceedings by bringing in what he knows from the English litigation. The suggestion is that he will somehow subconsciously bring in that knowledge, or be forced to reveal it in response to some foreign question. No other examples are given. Neither is convincing. In the event of his being asked to give evidence about infringement in foreign proceedings it will have to be on the basis of the evidence that is disclosed in those foreign proceedings. He will have to form his view, and justify it, on the basis of what he legitimately knows in those foreign proceedings. In the event that he finds himself in some genuine difficulty because of what he knows in these proceedings, then he may have to decline to act, but that will be a matter for the future. If he is asked a question which somehow requires a reference to the English proceedings for a full answer, he will either have to answer it on the basis of what he “knows” from the foreign proceedings, explain his position and see what the response of the foreign court is, or again recuse himself (if he is able to do so at the time). None of this requires that he be

prevented from acting in relation to foreign proceedings. In fact, the idea that he should be in difficulties if asked a question to which he knows a more accurate answer by reason of his English knowledge is not an attractive one. Presumably, if he is asked a question it will be a relevant one. The idea that the defendants should be able to suppress a fully accurate answer by ensuring that the claimants' expert is someone who does not know it is one I confess to finding unattractive, but that is not the basis of my decision.

54. I therefore find that the defendants have unreasonably withheld their consent to the admission of Prof Lovett to the confidentiality club, and he should therefore be admitted to it without the added restriction about foreign proceedings proposed by the defendants.