

Court of Appeal Clarifies the Scope of “Public Domain” Carve-Outs in NDAs

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In *Illiquidx Ltd v Altana Wealth Ltd and others* [2026] EWCA Civ 874, the Court of Appeal dismissed an appeal against findings that Altana and its consultant, Brevent, had misused confidential information belonging to Illiquidx.

The Court of Appeal referred to the established legal meaning of the expression “*public domain*” and held that, where a professionally drafted NDA uses such an expression, the parties will ordinarily be taken to have intended its established legal meaning in the law of confidence, unless the contract or surrounding circumstances indicate otherwise.

Background

Illiquidx, an advisory and broking boutique firm specialising in Venezuelan distressed debt, entered into a joint venture with Altana and Brevent to explore setting up a fund targeting undervalued Venezuelan sovereign debt. The parties signed an NDA to protect the business opportunity during their discussions. The joint venture broke down in November 2019 without a fund being launched. Eight months later, in July 2020, Altana set up its own fund pursuing the same opportunity, leading Illiquidx to sue for breach of confidence and misuse of trade secrets.

At first instance, Mr Justice Rajah found in Illiquidx’s favour on both claims.

Altana and Brevent appealed. There were three key issues for the Court of Appeal.

Judgment

1. Did “public domain” bear its established legal meaning?

The NDA provided that its confidentiality restrictions did not apply to information that was already “*in the public domain*” at the time it was supplied.

Altana and Brevent argued that this should be read broadly to cover information that was

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available or disclosed without being subject to a duty of confidentiality. On that reading, limited marketing of the fund concept to a handful of prospective investors could have been enough to remove the information from the protection of the NDA.

The Court of Appeal rejected that interpretation. It stated that “*public domain*” has a well-established legal meaning in the law of confidence. It refers to information that is so widely accessible that it cannot realistically be regarded as confidential (per Goff LJ in *Attorney General v Observer Ltd* [1990] 1 AC 109 at [282]).

The Court of Appeal held that where a professionally drafted contract uses an expression with a well-established legal meaning, the parties are presumed to have intended that meaning to apply unless the wording of the contract or the surrounding circumstances indicate otherwise.

The Court found nothing in the NDA (including in its definition of “*Confidential Information*”) to displace that presumption. A broad definition of “*Confidential Information*” did not automatically imply a correspondingly broad meaning of “*public domain*”. They were two separate terms of the contract which had to be construed according to their own wording.

2. Did independent knowledge and third-party source carve-outs apply?

Altana and Brevent also argued that certain information fell outside the NDA’s restrictions because the information was known to them independently, or had been obtained from a third party who was not subject to an obligation of confidence.

Although these arguments had not been properly advanced at trial, the Court considered them on their merits. The Court held that none of the examples relied upon established independent knowledge of the specific opportunity or fund structure disclosed by Illiquidx.

3. Was the information in fact in the public domain?

Altana and Brevent also challenged the trial judge’s factual finding that neither the overall business opportunity nor the detailed information underlying it was in the public domain. They relied on marketing materials Illiquidx had itself circulated, press coverage of Venezuela’s distressed debt, and evidence that certain individual facts (such as which bonds could lawfully be traded) were publicly known.

The Court upheld the trial judge’s findings. Illiquidx’s marketing materials had been shared with around 200 potential investors by Illiquidx, Altana, and Brevent for the purposes of the joint venture. The documents were marked “*strictly confidential*” or “*private and confidential*”. This was intended to be a confidential opportunity to be presented to serious potential investors. The presentation was not put on the Illiquidx’s website or sent to the wider newsletter circulation of Illiquidx or Altana. It remained relatively secret because it was not circulated more widely. It was not intended to be, and was not, available to potential competitors to Illiquidx. Sharing information with a limited group of investors in circumstances where the information was intended to remain

confidential did not make that information generally accessible.

The Court also rejected an argument based on the absence of evidence as to what the recipients had subsequently done with the material, characterising it as an impermissible attempt to reverse the burden of proof, which rested on the party asserting that the information was in the public domain.

The Court upheld the finding that the fact that individual elements of the business opportunity were publicly available did not mean that the particular information communicated by Illiquidx was itself in the public domain. For example, although facts such as the distressed nature of Venezuelan debt and the possibility of lawfully trading certain bonds despite sanctions were publicly known, the evidence did not identify any publicly available source disclosing the opportunity to establish a sanctions-compliant fund to exploit that debt. The significance lay in the particular collation and presentation of the information to formulate the business opportunity. The Court held that the trial judge was entitled to conclude that the specific opportunity disclosed by Illiquidx was not generally accessible, notwithstanding that some of its constituent facts were publicly available.

Key Points to Note

The judgment is a helpful reminder of several practical points for businesses that share sensitive information under an NDA:

1. **“Public domain” has a legal meaning, and it will ordinarily carry that meaning unless the contract or surrounding circumstances indicate otherwise.** Where an NDA carves out information “*in the public domain*” without further definition, it will ordinarily be understood as referring to information so generally accessible that it cannot realistically be regarded as confidential. It does not necessarily extend to information that has merely been shared with someone who owes no duty of confidentiality. Parties wanting a broader carve-out than the established legal meaning provides, for example, one triggered by disclosure to a single third party, need to draft that outcome expressly into the NDA. The scope of each provision depends on its own wording.
2. **The burden of proving that information was in the public domain rests with the party asserting it.** A defendant cannot simply point to limited disclosure and infer wider circulation without evidence that that information had in fact become generally accessible.
3. **The collation and presentation of publicly available information can itself be confidential.** The fact that individual components of a business opportunity are publicly available does not necessarily mean that the particular way in which those components have been collated and presented is itself in the public domain.
4. **The Court’s conclusion was fact-sensitive.** Whether information has entered the public domain will depend on the circumstances, including the extent and nature of its dissemination and whether it has become generally accessible.