Neutral Citation Number: [2008] EWCA Civ 184

Case No: A3/2007/2785 & 2786

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION COMMERCIAL COURT
MR JUSTICE FLAUX
CASE NO: 2007 FOLIO 1521

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2008

Before :

LORD JUSTICE CARNWATH
LORD JUSTICE THOMAS
and
LORD JUSTICE LAWRENCE COLLINS

- -

Between :

JOHN FORSTER EMMOTT	**Respondent /Claimant**
- and -	
MICHAEL WILSON & PARTNERS LIMITED	**Appellant/ Defendant**

- -
- -

Mr Andrew Sutcliffe QC and Mr Nicholas Craig (instructed by Messrs Lane & Partners) for the Appellant
Mr Philip Shepherd QC and Mr Adam Cloherty (instructed by **Mr Michael Robinson**) for the Respondent

Hearing date : January 21, 2008

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Judgment

Lord Justice Lawrence Collins:

I Introduction

1. This appeal raises questions, in unusual circumstances, of considerable practical importance relating to confidentiality in national and international arbitration. It is an appeal from orders of Flaux J dated November 23 and December 4, 2007, in which he authorised the disclosure, for the purposes of proceedings in New South Wales and in the British Virgin Islands, of documents generated in an English arbitration.

2. The appeal is just one part of some bitter and hard fought worldwide litigation arising out of a dispute between Mr Michael Wilson, who is an English qualified solicitor, and Mr John Emmott, who was formerly a partner with Richards Butler & Co and who in 2001 joined Mr Wilson in Mr Wilson's company, Michael Wilson & Partners Ltd ("MWP"). MWP, which is incorporated in the BVI, was established by Mr Wilson, to provide legal services in Kazakhstan.

3. Pursuant to the terms of an agreement dated December 7, 2001, Mr Emmott joined MWP as a director and senior lawyer of MWP, and was to have 33% of its shares, with Mr Wilson having the rest. Mr Emmott left MWP in June 2006 and then practised through Temujin International Ltd ("TIL"), and Temujin Services Ltd, an associated service company ("TSL"), which are incorporated in the British Virgin Islands, together with two other former MWP employees, Robert Nicholls and David Slater (both Australian citizens).

4. MWP claims that all of this was part of a scheme by Mr Emmott to divert MWP's business in breach of contract and in breach of trust. This led to arbitration in London and court proceedings by MWP in England (for search orders and freezing orders in support of the arbitration) and in New South Wales ("NSW"), the British Virgin Islands ("BVI"), Jersey and Colorado. Mr Emmott's case is that the court proceedings in NSW and BVI and the London arbitration are part of the same dispute. This is because MWP says in the BVI and NSW proceedings that Messrs Nicholls, Slater and Emmott, along with TIL, have been involved in joint wrongdoing and/or that Messrs Nicholls and Slater and TIL have secondary/accessory liability for involvement in Mr Emmott's alleged primary breaches of duty.

5. Mr Emmott says that Mr Wilson is running a litigation campaign to outspend him, and to prevent him carrying on his business, and he relies on criticisms of Mr Wilson's conduct of this and other litigation by judges in England (including me): *ICS Incorporated Ltd v Michael Wilson & Partners Ltd* [2005] EWHC 404 (Ch), at [82], [111]; *Celtic Resources v Arduina Holdings* [2006] EWHC 2553 (Comm), at [46]; *Arduina Holdings v Celtic Resources* [2006] EWHC 3155 (Comm), at [48], [50]; *Michael Wilson & Partners Ltd v Emmott* [2007] EWHC 1949 (Comm), at [10].

London arbitration

6. The agreement under which Mr Emmott joined MWP contained an arbitration clause providing for arbitration in England under English law. MWP gave notice of arbitration to Mr Emmott on August 14, 2006. MWP obtained a search order from the

English court against Mr Emmott in support of the arbitral proceedings in August 2006, and freezing orders against Mr Emmott and his wife in December 2006.

7. There was considerable delay by MWP in progressing the arbitration but by early 2007 the tribunal was constituted, consisting of Mr Christopher Berry (Chairman), Lord Millett and Ms Valerie Davies. Points of Claim in the London arbitration were not served until July 2007. In the course of his affidavits in the interlocutory proceedings in the Commercial Court, Mr Wilson alleged that Mr Emmott had been guilty of what he described as "a substantial fraud on MWP", or "dishonest conduct" or a "serious fraud" or "fraud … massive in scale."

8. The Points of Claim served in July 2007 (shortly before the hearing of an application before Tomlinson J by Mr Emmott to discharge the freezing order on the ground, inter alia, of delay in the conduct of the arbitration) also made allegations of fraud and conspiracy against Mr Emmott. It was alleged that Mr Emmott had acted in breach of various duties "fraudulently", that he had "fraudulently sought and/or received secret profits"

9. On October 3, 2007, Mr Emmott made an application to the tribunal to strike out MWP's Points of Claim in the arbitration on the grounds that they purported to allege fraud without any proper particularisation; that they made prejudicial allegations which did not form the basis of any claim, and were otherwise embarrassingly vague. MWP was given the option by the tribunal of having its claim struck out or re-pleading its case. Amended Points of Claim were served in the London arbitration on October 19, 2007.

10. The Amended Points of Claim plead (at paras 23-26) that in breach of the terms of the agreement and his fiduciary duties, in breach of trust and in breach of his duty of confidence: Mr Emmott diverted work, commercial opportunities and clients and/or potential clients of MWP to Richards Butler; he dishonestly received secret profits; with the assistance of Mr Nicholls, Mr Slater and Mr Shaikenov, planned a consultancy in competition with MWP and formed Temujin as a competitor to MWP; and with the assistance of the same persons diverted work, commercial opportunities and clients and/or potential clients of MWP to Temujin. Claims of conspiracy and fraud against Mr Emmott are no longer made in the arbitration.

11. That pleading has, in turn, been the subject of an application by Mr. Emmott, heard by the arbitrators in December 2007, to strike out various aspects of it. By the time this appeal was heard, no determination had been made by the tribunal on that application.

New South Wales proceedings

12. In October 2006 MWP commenced proceedings against Mr Slater and Mr Nicholls in NSW to which Mr Emmott is not a party. Originally the Commercial List Statement (equivalent to particulars of claim) sought an account of profits and damages for breach of their contracts of employment and breach of fiduciary duties owed to MWP. The Statement included an allegation that Mr Slater and Mr Nicholls had conspired together with Mr Emmott to breach his agreement with MWP and his fiduciary duties. In January 2007 the Commercial List Statement was considerably amended to particularise these allegations (and to add the Temujin companies as defendants) but it did not directly allege fraud or dishonesty.

13. In an affidavit submitted on behalf of MWP to the NSW court on March 26, 2007 Ms Dixon of Clayton Utz said that the underlying contentions to be made by MWP in the arbitration were based substantially on the same substratum of facts as those raised in the NSW proceedings, with the principal potential difference being directed at some matters concerning Mr Emmott (for example relating to Richards Butler).

14. MWP applied on October 5, 2007 to amend the NSW proceedings to allege fraud and fraudulent conspiracy against Mr Emmott. In MWP's counsel's submissions on a hearing concerning the proposed amendments in NSW on October 5, 2007 it was stated that the purpose behind the amendments was to:

> "bring a level of parity to the proceedings presently being conducted in New South Wales, the British Virgin Islands and England."

15. Leave to file the Further Amended Commercial List Statement in NSW was granted on November 23, 2007. It makes extensive claims against Mr Nicholls, Mr Slater (and the Temujin companies) of breach of employment contracts, breach of fiduciary duty, fraud, and knowing participation in Mr Emmott's breach of contract, breaches of fiduciary duties and fraudulent acts. In particular the Further Amended Commercial List Statement alleges that Mr Nicholls and Mr Slater "acted fraudulently" and "knowingly participated in Emmott's … fraudulent acts" (para 6(c)); that Mr Nicholls and Mr Slater (and the Temujin companies) conspired with Mr Emmott "to defraud MWP and to conceal the fraud and the proceeds of it from MWP" (para 8(b)). Among the "key issues" in MWP's case which the Statement identifies is whether Mr Nicholls and Mr Slater (and the Temujin companies) "conspired with Emmott to defraud MWP and to conceal the fraud and the proceeds of the same from MWP" (para 10(g)).

BVI Proceedings

16. MWP also commenced proceedings against TIL and TSL (and others) in the BVI in December 2006 and freezing orders were obtained ex parte.

17. In the BVI, the Amended Statement of Claim (February 5, 2007) pleads that the Temujin companies had dishonestly assisted Mr Emmott, Mr Nicholls and Mr Slater in breaches of fiduciary duty, and that Mr Emmott "had conspired… to injure MWP, by unlawful means, including (without limitation) by fabricating evidence with the object of concealing and attempting to render judgment proof, assets of Emmott, or assets to which MWP might lay claim in equity" (para 14).

18. TIL and TSL agreed to be joined in the proceedings in NSW, and consented to a stay of the BVI proceedings, but MWP launched an application in the BVI to have a receiver appointed over TIL and TSL. The application was heard on 5 and 6 December 2007 in the BVI, but was adjourned for further evidence to be filed.

19. Mr Emmott says that the purpose of the application for an appointment of a receiver over Temujin is to prevent it from carrying on its business as a law firm in Kazakhstan, and to deprive Mr. Emmott of income.

Bahamas

20. There are also related proceedings in the Bahamas. One of the allegations in the London arbitration by MWP is that Mr Emmott received some shares (the Max shares) from a Mr Sinclair in lieu of payment of fees due to MWP and thereby secured a secret profit. Mr Sinclair has brought proceedings in the Bahamas, seeking a declaration against MWP and Mr Emmott that he is the owner of the shares.

Other proceedings

21. It appears from the papers before the court that there are related proceedings also in Jersey (against Mr Nicholls and Standard Chartered (Jersey) Ltd for disclosure orders) and in Colorado (against Mr Sinclair and others for disclosure).

II The use of pleadings in the London arbitration in the BVI and NSW, and the decisions of Flaux J

22. The original Points of Claim in the London arbitration had been shown to the BVI court pursuant to permission given by Tomlinson J in July 2007.

23. Mr Emmott says that he was concerned about the fact that allegations of fraud continued to be made against him in NSW and the BVI notwithstanding they had been dropped in the London arbitration, and he made an application to the Commercial Court on November 5, 2007 for an order that he be at liberty to disclose the documents in the London arbitration to the defendants in the BVI and NSW (and also in the Bahamas) and their lawyers so that they could be disclosed to the courts in those jurisdictions, because (a) MWP's case in the arbitration was materially inconsistent with that advanced in the BVI and NSW proceedings; and (b) MWP was presenting those courts with a misleading or inaccurate picture. Disclosure was said to be in the interests of justice and reasonably necessary to enable Mr Emmott to protect his legitimate rights, and caused no prejudice to MWP.

24. Permission was also sought in correspondence between the NSW lawyers. After the application for amendment of the Amended Commercial List Statement, but before the amendments were permitted by the NSW court, Henry Davis York, the NSW lawyers for Nicholls and Slater, asked (on November 8, 2007) Clayton Utz for access to all documents relied on in support of the English arbitration. On the same day Clayton Utz replied to say that their client was not in a position to provide them with information from an arbitration between their client and another individual, as it was the subject of a confidentiality regime. On November 14, 2007 Henry Davis York asked Clayton Utz whether MWP believed it was entitled to make submissions to the NSW court in respect of the need for "parity" where it knew that submission could not be tested because of its refusal to waive confidentiality or provide a simple confirmation by way of correspondence in respect of that issue.

25. The application in the Commercial Court came before Flaux J on November 23, 2007. MWP consented during the course of the hearing to disclosure of the Amended Points of Claim to the defendants in NSW and the BVI. On the same day Flaux J acceded to Mr Emmott's application and gave permission for disclosure in the BVI and NSW of the Amended Points of Claim and the skeleton argument before the arbitrators of Mr Emmott's application to strike out the Points of Claims served in July 2007. On

December 4, 2007, Flaux J gave permission in relation to the Points of Defence and Counterclaim in the arbitration, but with part of the Defence and the whole of the Counterclaim redacted.

26. Flaux J considered disclosure to be in the interests of justice so the foreign courts would not be misled or potentially misled where the cases that were being advanced in the various proceedings were essentially raising the same or similar allegations. The judge considered that in the Bahamas case, any order would be premature, as the proceedings had only got as far as challenging jurisdiction.

27. Applying *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314, to which I shall revert, the judge accepted that the material was in principle confidential, but the confidentiality was subject to two possible exceptions in the present case. The first was where disclosure was reasonably necessary for the protection of the legitimate interests of an arbitrating party, including reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action against a third party, or to defend a claim or counterclaim brought by the third party: *Hassneh Insurance Co. of Israel v Mew* [1993] 2 Lloyd's Rep 243. There was no principled reason for the application of that exception in relation to the proceedings in NSW and the BVI because Mr. Emmott did not need the Amended Points of Claim, or his own Defence, to establish or protect his legal rights vis-à-vis a third party in order to found a cause of action against that third party or to defend a claim or counterclaim brought by that third party. He was not a party to the proceedings in those jurisdictions. Nor, by definition, was a claim being brought against him by a third party, since even if he were a party, it would be MWP and not a third party which was bringing the claim.

28. The second relevant exception was the exception of public interest, for which the judge relied on *London & Leeds Estates v Paribas (No 2)* [1995] 1 EGLR 102. The judge said that the original Points of Claim in the London arbitration had been disclosed in NSW but the Amended Points of Claim had not been disclosed. There was a potential for the NSW court to have been misled by supposing that allegations that are made against, specifically, Mr. Nicholls and Mr. Slater in the NSW proceedings effectively mirrored allegations which were made against Mr. Emmott in the London arbitration. The interests of justice required that the English court, so far as possible, should ensure that parties to London arbitrations should not seek to use the cloak of confidentiality with a view to misleading or potentially misleading foreign courts, *a fortiori* where the cases which were being presented in the foreign courts were essentially raising either the same or similar allegations and are proceeding in parallel.

29. Flaux J made a similar order in order to ensure that the BVI court was not misled at the time of the application to appoint a receiver over Temujin into supposing that these allegations of fraud and conspiracy were still being pursued in London. But he restricted the order in relation to the BVI to the documents being shown to the Temujin defendants and to the BVI court without being shown to the other defendants to the BVI proceedings.

30. It was premature to authorise disclosure in the Bahamas proceedings, because all that had taken place in the Bahamas was a challenge to the jurisdiction by MWP, which failed at first instance and an appeal was to be heard by the Bahamas Court of Appeal.

But were there to be any question of what was said by MWP in the Bahamas court giving that court the false impression that the allegations of conspiracy and fraud were still being pursued in London, then he would readily accede to an application on behalf of Mr. Emmott that those materials should also be shown to the Bahamian court.

31. Flaux J gave permission for his judgment on the application to be used in the foreign proceedings.

III The appeal

32. There are three main points raised on this appeal. The first is whether the appeal should be dismissed as academic because the documents in issue have now been made available to the courts in the BVI and NSW and therefore an appeal would be pointless. The second is whether Flaux J had jurisdiction to make the orders. The third was whether his decision on the substance was right.

A Whether the appeal should be determined

33. MWP says that the matter is still live. It says that it is clear that Mr Emmott intends to apply for the disclosure of further documents as the arbitration progresses. In anticipation of further applications Flaux J has given Mr Emmott liberty to apply as regards further documents and reserved such to himself. As between the parties a precedent has been set by the decisions of Flaux J by which MWP is bound unless those decisions are appealed and overturned.

34. Mr Emmott says that is wrong. There was no precedent set between the parties: (a) the November 23, 2007 order merely provided: "The parties shall have liberty to apply in respect of the disclosure of the Claimant's defence in the arbitration…"; (b) the December 4, 2007 order merely gave Mr Emmott liberty to apply "in respect of the disclosure of the Counterclaim and any further pleadings or skeleton arguments in the Arbitration to the same parties [as already ordered]". Whether or not previous applications have or have not been successful cannot, and will not, have any bearing on the determination of any future applications.

B Jurisdiction

MWP's argument

35. Flaux J had no jurisdiction to make such an order. There is no jurisdiction to make an order for disclosure of documents in favour of a non-party in proceedings before the court unless such documents are a matter of public record (CPR 5.4(5)), and there is no basis for such a jurisdiction in relation to documents generated in an arbitration: *The Eastern Saga* [1984] 2 Lloyd's Rep 373, 379. The only way in which a foreign litigant might obtain documents (or other evidence) generated in a confidential arbitration with its seat in England is under the Evidence (Proceedings in Other Jurisdictions) Act 1975: *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547, 633. No such application has been made in this matter, and there is no suggestion that the court in NSW or in the BVI requires the assistance of the English court as regards disclosure of documents.

36. It is accepted that the court may retain its jurisdiction under section 37 of the Supreme Court Act 1981 to grant an injunction to restrain the breach of the duty of confidence arising in the arbitration context, provided that the jurisdiction is exercised in a manner consistent with the powers in section 44 of the 1996 Act.

37. It is for the arbitral tribunal to make the determination whether the documents are confidential, and whether any exception applies.

Mr Emmott's argument

38. Mr Emmott says that the court had jurisdiction. The court has power to grant permission: *Ali Shipping Corporation v Shipyard Trogir*, at 327; *Glidepath BV v Thompson* [2005] EWHC 818 (Comm), [2005] 2 Lloyd's Rep 549, at [15]; Mustill & Boyd, *Commercial Arbitration* (2001 Companion Volume), at 113. The court has a power to grant a declaration corresponding to the power to grant an injunction. The power is pursuant to the inherent jurisdiction and/or is part of the court's jurisdiction to grant negative declarations. The question of whether the application should be made to the arbitrators or the court does not arise in this case because MWP did not seek a stay and has waived any right.

39. The Evidence (Proceedings in Other Jurisdictions) Act 1975 is irrelevant. The present case has nothing to do with an application by a foreign party, litigating abroad, for the assistance of the English court.

C The substantive ruling

MWP's argument

40. The decision of Flaux J constitutes an unwarranted intrusion into the confidentiality of arbitrations, and has serious adverse consequences for the attractiveness of England as the seat of arbitration.

41. There was no evidence that MWP was presenting a misleading or inaccurate picture to the NSW or BVI courts. There was no inconsistency between the claim in the arbitration and the allegations in NSW and the BVI. Whilst there is no cause of action in fraud (i.e. deceit) against Mr Emmott, the claims made against him are claims in fraud in the sense that what it is alleged he did was "something dishonest and morally wrong" (*Ex p Watson* (1890) 21 QBD 301). In NSW it is alleged that there was a conspiracy between Mr Emmott and the third parties to defraud MWP. There is no such plea in the arbitration: such a plea would add nothing to the claims against Mr Emmott because none of his co-conspirators are before the tribunal.

42. Flaux J was wrong to hold that it was in the interests of justice that the documents be disclosed to the third parties: (1) neither the court in NSW nor the court in the BVI has asked MWP to provide the documents sought by the third parties, although each court is aware that the dispute between Mr Emmott and MWP is being determined in arbitration; (2) the third parties can make an application in NSW and the BVI against MWP as a party to the proceedings for specific disclosure insofar as they consider documents are considered or perceived to be relevant. What does or does not assist the court in NSW or the BVI is a matter for those courts, and not for the English court.

43. The "interests of justice" exception cannot be used to expand the limited exception in *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314 that disclosure is required for the protection of the legitimate interests of an arbitrating party. The protection of the interests of a non-party is irrelevant. The interests of justice exception is not concerned with documents produced by the parties to the confidential arbitration, but with the evidence of witnesses, who are not themselves parties to it. The interests of justice exception arises not as an exception to the implied duty, but as the basis for a court hearing a subsequent dispute to order that information be disclosed notwithstanding confidence.

44. The fact that cases may be run differently against different parties is not a reason to permit them to know what is being said in relation to an arbitration to which they are strangers, and the similarity or closeness of disputes is not a good reason to lift the cloak of confidentiality over an arbitration however desirable it may be to permit strangers to it to be able to see what is being said for the purposes of their related disputes: *The Eastern Saga* [1984] 2 Lloyd's Rep 373 at 379.

45. Even if it is in the interests of justice to permit disclosure of the Amended Points of Claim in the arbitration so that the courts in NSW and the BVI are not given a misleading picture as to what claims are advanced in the arbitration against Mr Emmott, this does not justify disclosure of the other documents. Mr Emmott's Defence is irrelevant as regards that concern. The skeleton argument used by Mr Emmott in support of an application to strike out the Points of Claim at a hearing before the tribunal on October 3, 2007 was not before Flaux J on the application and he did not see it before making his order. In such circumstances it was not possible for him to determine that it was in the interests of justice that this document be disclosed. Since the Points of Claim which were the subject of Mr Emmott's application have now been amended the skeleton argument is part of the arbitration history, and is of no relevance to or concern of the third parties.

46. Flaux J failed to recognise that MWP is prejudiced by the use of materials generated in the arbitration in other foreign proceedings. Prejudice will be presumed and, unless exceptional circumstances are established, confidentiality will be upheld.

47. The judge erred in permitting disclosure of his judgment because it discloses significant confidential information (*Moscow City Council v Bankers Trust Co.* [2004] EWCA Civ 314, [2005] QB 207) and there was no reason why it needed to be disclosed to the courts in NSW or the BVI or to the third parties.

Mr Emmott's arguments

48. If the documents were not disclosed to the courts in NSW and the BVI, there was a real risk that these courts would be seriously misled and this would also be to the detriment of Mr Emmott. Preventing courts from being misled – whether they be English courts or foreign courts – is a paradigm example of the interests of justice exception to confidentiality recognised in *Ali Shipping Corporation v Shipyard Trogir*. The exception is not concerned solely with the evidence of witnesses who are not party to the arbitration.

49. MWP has no legitimate interest in preserving the confidentiality of the documents if in fact it is preventing the courts in NSW and the BVI from learning that they are

being misled and/or in hiding from those courts the true way in which its case is put in the London arbitration.

50. MWP's submission that the judgment should have been confidential to the parties because it discloses significant confidential information fails to identify what that confidential information might be.

IV Conclusions

Is the appeal academic?

51. The starting point is that appellate courts should not generally entertain purely moot or academic points between private litigants: *Sun Life Assurance Co of Canada* v *Jervis* [1944] AC 111, at 113-114. Appeals which cannot affect the position as between the parties should not be heard: there should be a matter in actual controversy which is a live issue.

52. The point arises because the documents have been made available to the courts in NSW and the BVI. Following Flaux J's judgment, the Amended Points of Claim and the skeleton argument were filed with the BVI court by the lawyers for the defendants on November 27, 2007. The hearing in the BVI was on December 5 and 6, 2007, when these documents (and the Defence) were made available to the court, and the hearing was adjourned for further evidence to be put in. The documents were also filed with NSW court very shortly after Flaux J's orders.

53. All three documents had, therefore, been made available in NSW and the BVI by the time the application for permission to appeal, with a skeleton argument dated December 6 and signed by counsel, was filed with the Court of Appeal on December 7, 2007.

54. In section 8 of the application for permission a stay of execution was applied for, and it was said "if the learned judge was wrong to make the orders on 23 November 2007 and 4 December 2007 confidential documents will be placed in the hands of third parties who have no right to them." The application also asked for an order that in the event that MWP was successful on its appeal, Mr Emmott be ordered to take such steps as were necessary to recover all copies of documents which had been disclosed by him to third parties after being given permission to do so by the judge.

55. It was only in a footnote that the skeleton argument pointed out that the judge had refused a stay of execution, and that MWP had consented during the course of the hearing on November 23, 2007 to disclosure of the Amended Points of Claim to the third parties in NSW and the BVI.

56. The order made by Rix LJ on December 17, 2007 made it clear that he was treating the application as one for permission to appeal and a stay of execution, and he granted a stay and also ordered expedition because "if disclosure has to be made, it is needed in ongoing litigation." Plainly, therefore, Rix LJ was not told, and did not appreciate, that the documents had actually been handed over. It is likely that he was misled by the failure to disclose that the documents had been handed over, and by the application for a stay.

57. Nevertheless, although that might have been a ground for setting aside the permission to appeal (*Nathan v Smilovitch* [2002] EWCA Civ 759, at [9]; *Barings Bank plc v Coopers & Lybrand* [2002] EWCA Civ 1155) no application to that effect has been made, and this is not a case in which this court should adopt that course of its own motion, since the court has not been fully informed about which of MWP's advisers were aware of what had happened.

58. Nor is this, in my judgment, a case in which this court should refuse to hear the appeal because it has become academic. It is possible that either side may wish to disclose more arbitration documents to one or more of the courts hearing aspects of this dispute. The determination of the appeal might give some guidance if further disclosure were requested. I accept that the exercise may be fact-sensitive, and (as will appear below) somewhat different considerations may apply to the disclosure of documents such as those relating to the business of MWP, or dealings between MWP and Mr Emmott, or commercially confidential information. I also accept that it may be important in any future dispute on the subject of confidentiality between the parties to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways: *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2000] UKPC 11, [2003] 1 WLR 1041, at [20].

59. Consequently a judgment on this appeal may not be purely academic. But I hope that this situation will not recur. I have to say that this seems to be a case where each of the parties has reached the point where they will not concede an inch to the other. Why MWP and Mr Wilson were so keen to preserve the confidentiality of the pleadings and the skeleton argument in the London arbitration is mystifying, particularly when they had already told the court in Sydney that they had endeavoured to bring "a level of parity" between the proceedings in New South Wales and the London arbitration. Apart from the material which has been redacted from the Defence, there is nothing commercially sensitive in the documents, and I do not see how MWP could have been prejudiced by their disclosure.

Privacy

60. The uncontroversial starting point is that in English law arbitration is a private process. In *Russell v Russell* (1880) 14 Ch D 471 at 474 Sir George Jessel MR said of arbitration: "As a rule, persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful." This is the principle which underlies the decision in *The Eastern Saga* [1984] 2 Lloyd's Rep 373, which was an application to set aside an order made by arbitrators that the hearing of the arbitration between the parties (owners and charterers) should take place concurrently with that between the charterers and the sub-charterers. It was held that the arbitrators had no power to order concurrent hearings without the consent of the parties. It was implicit in the concept of private arbitration that strangers would be excluded from the hearing and conduct of the arbitration. The only powers which an arbitrator enjoyed related to the reference in which he had been appointed. Leggatt J said (at 379):

> "The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the party seeking it and however closely associated with each other the disputes in question may be."

61. The Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, 1996 (reprinted in Mustill and Boyd, *Commercial Arbitration*, 2nd edition, 2001 Companion, Appendix 1) said (at para 10) that privacy and confidentiality in arbitration had not been included in what became the Arbitration Act 1996, because they were unsettled and better left to the common law to evolve. The Committee said (at para 12) that there was "no doubt whatever that users of commercial arbitration in England place much importance on privacy and confidentiality as essential features of English arbitration" and approved what Sir Patrick Neill QC (as he then was) had said in a lecture, reprinted in (1996) 12 Arb Int 287, namely that it would be difficult to conceive of any greater threat to the success of English arbitration than the removal of the general principles of confidentiality and privacy. The Committee said (at para 16) that in English arbitration "the exceptions to confidentiality are manifestly legion and unsettled in part"; any provisions as to privacy and confidentiality would have to deal with the duty of a company to make disclosure of, for example, arbitration proceedings and actual or potential awards which had an effect on its financial position. But it concluded (at para 17) that "none doubt at English law the existence of the general principles of confidentiality and privacy" and that "whilst the breadth and existence of certain exceptions remains disputed, these can be resolved by the English courts on a pragmatic case-by-case basis."

62. Parties who arbitrate in England expect that the hearing will be in private, and that is an important advantage for commercial people as compared with litigation in court: see *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243, at 246-7; *Economic Department of City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207, at [2] and [30], Mance LJ emphasised that privacy and confidentiality were implicit in parties' choice to arbitrate in England, and valued by them. See also *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 128 ALR 391, at 398, per Mason CJ.

63. The privacy of arbitration is underlined by CPR 62.10(3)(b), which provides that subject to the power of the court to order that an arbitration claim (i.e. a court claim concerning arbitration) may be heard in public or in private, all arbitration claims will be heard in private except the hearing of a preliminary point of law under section 45 of the Arbitration Act 1996 or an appeal on a question of law arising out of an award under section 69. The starting point is that the parties' wish for confidentiality and privacy outweighs the public interest in a public hearing: *Economic Department of City of Moscow v Bankers Trust Co*. So also CPR PD62.5.1 provides that an arbitration claim (i.e. an application to the court under the Arbitration Act 1996 or an application affecting arbitration proceedings or an arbitration agreement or arbitral

award: CPR 62.2(1)) may only be inspected with the permission of the court: see *Glidepath BV v Thompson* [2005] EWHC 818 (Comm), [2005] 2 Lloyd's Rep 549.

64. The privacy of arbitration is almost universally recognised by institutional rules. Thus the privacy of the hearings is provided for in Article 19(4) of the Rules of London Court of International Arbitration ("LCIA") ; Article 21(3) of the Rules of the Court of Arbitration of the International Chamber of Commerce ("ICC"); Article 53(c) of the arbitration rules of the World Intellectual Property Organisation ("WIPO"); and Article 25(4) of the UNCITRAL Rules.

65. The confidentiality of the award is provided for by Article 30(1) of the LCIA Rules and also by the principle of non-publication of the award in Article 30(3); by Article 28(2) of the ICC Rules; by Article 75 of the WIPO Rules; and by Article 32(5) of the UNCITRAL Rules.

Confidentiality

66. In the last 20 years or so the English courts have had to consider the consequences of the privacy of the arbitral process and the scope of the obligations of confidentiality in several different contexts. It is apparent that the English jurisprudence on this subject (as distinct from the confidentiality of awards, which is much discussed in other countries) is much richer than that of any other important arbitration centre, and that it constitutes a major contribution to the development of the law of international arbitration. There have also been important decisions in Australia, France and Sweden. There are valuable discussions of the international practice in ICC Commission on Arbitration, Forum on ICC Rules/Court: *Report on Confidentiality as a purported obligation of the parties in arbitration*, 2002; Fouchard, Gaillard, Goldman, *International Commercial Arbitration* (ed Gaillard and Savage, 1999), para 1412; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (2003), paras 24-99 et seq.

67. Only a minority of arbitration rules in the major centres deal expressly with confidentiality of material generated in an arbitration, some of which are plainly influenced by the English case law, to which I refer below. Article 30(1) of the LCIA Rules provides:

> "Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority."

68. The Swiss Rules of International Arbitration provide (Art 43(1))

> "Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential

> all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not otherwise in the public domain, save and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and the Chambers."

69. The WIPO Arbitration Rules contain in Article 52 elaborate provisions for the protection of confidential information "of commercial, financial or industrial significance", and the Rules provide by Article 73:

> "(a) Except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body, and then only:
>
> (i) by disclosing no more than what is legally required; and
>
> (ii) by furnishing to the Tribunal and to the other party, if the disclosure takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reason for it.
>
> (b) Notwithstanding paragraph (a), a party may disclose to a third party the names of the parties to the arbitration and the relief requested for the purpose of satisfying any obligation of good faith or candor owed to that third party."

and by Article 74(a):

> "In addition to any specific measures that may be available under Article 52, any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential and, to the extent that such evidence describes information that is not in the public domain, shall not be used or disclosed to any third party by a party whose access to that information arises exclusively as a result of its participation in

> the arbitration for any purpose without the consent of the parties or order of a court having jurisdiction."

70. Some important arbitral rules are silent on confidentiality, such as the ICC Rules and the UNCITRAL Rules. But the UNCITRAL Notes on Organizing Arbitral Proceedings, in Redfern and Hunter, *International Commercial Arbitration* (4th ed. 2004), App D, say (at para 31) that it is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration; there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case; and parties who have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognise an implied commitment to confidentiality. The Notes conclude that an arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

The context

71. It is not always easy to distinguish confidentiality and privacy, and it is also important to bear in mind the context of the decisions. The context in which the question may arise is important, because quite different rules may apply in different contexts.

72. First, a party to litigation in the courts may seek discovery or disclosure of documents generated in an arbitration. Confidentiality of documents is, of course, not in itself a reason for withholding disclosure, but the court will compel disclosure only if it considers it necessary for the fair disposal of the case: *Science Research Council v Nassé* [1980] AC 1028. *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA) involved, in part, an appeal from an order requiring discovery in litigation of documents generated in an arbitration. The action was for money due under a policy of reinsurance for which the first defendant was one of the insurers and the second defendants were the placing brokers. The application was for an order that the first defendant should make a list of all documents relating to an arbitration in which a similar policy (where the first defendant was also an insurer and the second defendants were also the placing brokers) had been an issue. It was held that the documents were not relevant to the issues in the action, and even if they were relevant, producing them for inspection was not necessary for disposing fairly of the issues.

73. The main ground of the decision was that the plaintiff had not made out a case sufficient to enable the court to frame any acceptable order because there was a mass of documents covered by the order which could not conceivably be relevant to the issues in the action. But Parker LJ also considered the position on the assumption that his conclusion as to relevance was incorrect. Having said that there was an implied obligation on the parties to arbitration not to disclose or use for any other purpose any documents disclosed or generated in an arbitration, he said (at 1213):

> "It must be perfectly apparent that, for example, the fact that a document is used in an arbitration does not *confer* on it any confidentiality or privilege which can be availed of in subsequent proceedings. If it is a relevant document, its relevance remains. But that the obligation exists in some form

> appears to me to be abundantly apparent. It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the nature of arbitration itself. When a question arises as to production of documents or indeed discovery by list or affidavit, the court must, it appears to me, have regard to the existence of the implied obligation, whatever its precise limits may be. If it is satisfied that despite the implied obligation, disclosure and inspection is necessary for the fair disposal of the action, that consideration must prevail. But in reaching a conclusion, the court should consider, amongst other things, whether there are other and possibly less costly ways of obtaining the information which is sought which do not involve any breach of the implied undertaking."

74. A United States decision said to be inimical to confidentiality in arbitration is a case of this kind. In *United States v Panhandle Eastern Corp.*, 118 FRD 346 (D Del 1998) it was held, in a civil action by the US Federal Maritime Administration, that the defendant was not entitled to withhold from discovery documents generated in a Swiss ICC arbitration. One of the grounds of the decision was that the defendant had not shown that the effect of the ICC Rules was to impose an obligation of confidentiality. See also *Caringal v Karteria Shipping Ltd*, WL 874705 (ED La 2001); *ContshipContainerlines Ltd v PPG Industries, Inc*, WL 1948807 (SDNY 2003); *Lawrence E Jaffe Pension Plan v Household International, Inc*, WL 1821968 (D Colo 2004).

75. Nor is confidentiality an absolute bar in a second type of case, where a party to an arbitration may seek the assistance of the court to obtain through a witness summons material deployed in another arbitration, as in *London and Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102 (Mance J) and *Council of the Borough of South Tyneside v Wickes Building Suppliers Ltd* [2004] EWHC 2428 (Comm) (Gross J). But in such cases the court will take into account the strong policy in favour of confidentiality in arbitration.

76. Third, issues may arise about the disclosure of documents on the court file relating to an arbitration (*Glidepath BV v Thompson* [2005] EWHC 818 (Comm), [2005] 2 Lloyd's Rep 549, Colman J) or whether the judgment of a court given in relation to an arbitration should be published (*Economic Department of City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207). Here the privacy of arbitration will be an important, but not a decisive, factor.

77. In each of those three cases the court exercises a discretion in which privacy or confidentiality is an important factor in the balance.

78. Fourth (and most relevant to the present case), a party to an arbitration may have an interest (commercial or otherwise) in disclosing documents generated in an arbitration (including the award itself) to third parties (*Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243, Colman J; *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Law Rep 272, Colman J) or in another arbitration (*Ali Shipping Corporation v Shipyard Trogir*; *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2000] UKPC 11, [2003] 1 WLR 1041), and the other party to the arbitration may seek to restrain disclosure by injunction.

The obligation of confidentiality

79. Three legal concepts or categories have been in play in these cases. The first is privacy, in the sense that because arbitration is private that privacy would be violated by the publication or dissemination of documents deployed in the arbitration. The second is confidentiality in the sense where it is used to refer to inherent confidentiality in the information in documents, such as trade secrets or other confidential information generated or deployed in an arbitration. The third is confidentiality in the sense of an implied agreement that documents disclosed or generated in arbitration can only be used for the purposes of the arbitration. The distinction between the second and third cases may be illustrated by the case (not far from this one) where the relevant documents in the arbitration (such as the Defence) do not contain anything in themselves which is confidential: nevertheless the parties are under an obligation not to use it for any purpose other than the arbitration, and that obligation is described in the authorities as an obligation of confidence.

80. Some of the authorities treat as equivalent privacy and confidentiality in the present context: e.g *London and Leeds Estates Ltd v Paribas Ltd (No 2)* at 105-106, 109; *Hassneh Insurance Co of Israel v Mew* at 246-247. Others draw a distinction between privacy and confidentiality: *Dolling-Baker v Merrett* at 1213-1214. In *Ali Shipping Corporation v Shipyard Trogir* at 326, Potter LJ said that "the obligation of confidentiality … arises as an essential corollary of the privacy of arbitration proceedings."

81. Documents in arbitration may, as I have said, be inherently confidential, as where they contain trade secrets. But it is clear that what has emerged from the recent authorities in England is that there is, separate from confidentiality in that sense, an implied obligation (arising out of the nature of arbitration itself) on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court: *Dolling-Baker v Merrett* at 1213-1214; *Hassneh Insurance Co of Israel v Mew* at 246; *London and Leeds Estates Ltd v Paribas Ltd (No 2) Ltd* at 106; *Ali Shipping Corporation v Shipyard Trogir* at 326 (where the defendants had conceded the existence of the implied term: see at 328). The obligation is not limited to documents which contain material which is confidential, such as trade secrets. The obligation arises, not as a matter of business efficacy, but is implied as a matter of law: *Ali Shipping Corporation v Shipyard Trogir* at 326, disapproving *Hassneh Insurance Co of Israel v Mew* on this point.

82. In *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 128 ALR 391 a majority of the High Court of Australia rejected this approach and decided that there was no such implied obligation except as regards documents produced compulsorily pursuant to an order of the tribunal.

83. The formulation of the implied obligation in arbitration is plainly influenced by the English rule in court proceedings (now in CPR 31.22; on the history see *Home Office v Harman* [1983] 1 AC 280) that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed: see

especially *Hassneh Insurance Co of Israel v Mew* at 247. Breach of the rule of court is a contempt, but the court has a power to give permission for the document to be used, particularly when it is in the public interest. The analogy cannot be taken too far, because it has never been suggested that the implied obligation in arbitral proceedings is subject to the contrary direction of the arbitral tribunal, and plainly breach of the obligation cannot engage the power of the court to punish for contempt.

84. The implied agreement is really a rule of substantive law masquerading as an implied term. But if the implied agreement of the parties is to be taken as the basis of the obligation of confidentiality (at any rate where English law is the law governing the arbitration agreement) it ought to follow that disputes about its limits are within the scope of the arbitration agreement and should be determined by the arbitral tribunal. On the evidence of the reported cases, however, it seems that whenever a dispute has arisen as between the parties as to the applicability and extent of confidentiality it has been resolved by an application to the court for an injunction to restrain disclosure: *Hassneh Insurance Co of Israel v Mew*; *Insurance Co v Lloyd's Syndicate*; *Ali Shipping Corporation v Shipyard Trogir*. The application in the present case should be regarded as the mirror-image of such an application, i.e. it should be treated as a claim for a declaration that the confidentiality obligation did not apply. No stay was sought of that application.

Limits on confidentiality

85. It is plain that there are limits to the obligation of confidentiality. An award may fall to be enforced, or challenged, in a court. The existence and details of an arbitration claim may need to be disclosed to insurers, or to shareholders, or to regulatory authorities. What, then, are the limits of the obligation to use documents in an arbitration only for the purposes of the arbitration?

86. Before setting out the possible exceptions, two points should be stressed. First, the applicable rules accepted by the parties may provide the answer, or at any rate an answer. I have already set out the LCIA and WIPO Rules, each of which restates the basic confidentiality principle subject to exceptions.

87. The second point to be stressed is that it is particularly important that what has been said about the possible exceptions to confidentiality must read in context. I take two examples. First, if a court decides in the context of a witness summons (as it did in *London and Leeds Estates Ltd v Paribas Ltd (No 2)*) that the "public interest" may outweigh the confidentiality of arbitration documents, it does not necessarily follow that a party may voluntarily disclose documents to third parties on the ground that it is in "the public interest." Second, it does not follow from the fact that a court refers to the possibility of an exception for the order of the court or leave of the court in a case where it has the power to make the order or give leave (as in *Dolling-Baker v Merrett* or *Glidepath BV v Thompson*) the court has a general and unlimited jurisdiction to consider whether an exception to confidentiality exists and applies.

Influence of banking confidentiality principles

88. The English courts have been strongly influenced in the development of exceptions to the basic rule of confidentiality in arbitration by the principles of banking

confidentiality in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (CA), where in a famous passage, Bankes LJ said:

> "In my opinion it is necessary in a case like the present to direct the jury what are the limits and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle I think that the qualifications can be classified under four heads: (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer."

89. Scrutton LJ formulated (c) in terms of what was "reasonable and proper for its own protection" (at 481) and Atkin LJ in terms of what was "reasonably necessary for the protection of the bank's own interests" (at 486). The limits of those exceptions have not been the subject of much subsequent decision: see Paget, *Law of Banking*, 13th ed. 2007, paras 8.3 et seq. But it is plain that the exceptions (especially the cases of "duty to the public" and "interests of the bank") are potentially very wide indeed.

90. The application to arbitration of the principles of banking confidentiality started with *Dolling-Baker v Merrett*, continued with *Hassneh Insurance Co of Israel v Mew*, and culminated in the judgment of Potter LJ in *Ali Shipping Corporation v Shipyard Trogir*, who formulated a series of exceptions closely modelled on *Tournier.*

91. In *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2000] UKPC 11, [2003] 1 WLR 1041 the Privy Council, speaking through Lord Hobhouse, expressed reservations about this approach. There were two arbitrations in Bermuda between the same parties, but with differently constituted panels. In the first arbitration the agreed procedural directions included an express confidentiality provision for the result not to be disclosed to non-parties. In the second arbitration European Re wanted to rely upon the award in the first arbitration. Associated Electric contended that they were not at liberty to do so and that European Re might not show any part of the first award to the second arbitrators as it would breach the confidentiality of the first arbitration. Associated Electric sought an injunction, which was discharged by the Court of Appeal of Bermuda. It was held that the first award gave rise to an issue estoppel upon which the successful party could rely upon in the second arbitration, and for Associated Electric to raise again the same dispute in the second arbitration amounted to a failure by it to recognise and perform the earlier award.

92. The legitimate use of the award did not raise the mischief against which the confidentiality agreement was directed, and was not prohibited by it. The case did not therefore involve the more general issues of confidentiality. But Lord Hobhouse said (at [20]) about *Ali Shipping*:

> "However Potter LJ … having followed *Dolling-Baker v Merrett* … affirming the privacy of arbitration proceedings, went on to characterise a duty of confidentiality as an implied term … and then to formulate exceptions to which it would be

> subject …. Their Lordships have reservations about the desirability or merit of adopting this approach. It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality. Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain. This may mean that the implied restrictions on the use of material obtained in arbitration proceedings may have a greater impact than those applying in litigation. But when it comes to the award, the same logic cannot be applied. An award may have to be referred to for accounting purposes or for the purpose of legal proceedings …. or for the purposes of enforcing the rights which the award confers … Generalisations and the formulation of detailed implied terms are not appropriate."

The exceptions

93. Subject to that reservation, in the present context, the *Tournier* principles have been applied so as to recognise the following exceptions.

94. The first exception in *Tournier*, compulsion by law, was adapted in the context of a discovery application in *Dolling-Baker v Merrett* to refer to the order or leave of the court. In *Ali Shipping Corporation v Shipyard Trogir* an order for disclosure of documents generated by an arbitration for the purposes of a later court action was said to be a clear example. *London and Leeds Estates Ltd v Paribas Ltd (No 2)* is an example of the order for the disclosure of documents in one arbitration for use in another: contrast *Council of the Borough of South Tyneside v Wickes Building Suppliers Ltd. Glidepath BV v Thompson* is an example of the leave of the court, pursuant to express provision for disclosure in CPR 5.4(5).

95. *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 128 ALR 391 would, but for the High Court of Australia's rejection of the English approach to confidentiality, have been a case within this category. It was a claim by the Minister for Energy and Minerals for declarations against Esso/BHP and the Gas and Fuel Corporation of Victoria (GFC) and the State Electricity Commission of Victoria (SEC) that GFC and SEC were not restricted from disclosing to the Minister information disclosed to them in the course of arbitrations between each of them and Esso/BHP. The Minister had a statutory right to information from SEC: see at p 394. Brennan J (at 407) thought that both SEC and GFC had a least a moral duty to account to the public.

96. The second exception in *Tournier*, duty to the public requiring disclosure, has a counterpart in the public interest/interests of justice exception recognised in *London and Leeds Ltd v Paribas Ltd (No 2)* and *Ali Shipping Corporation v Shipyard Trogir*.

97. In *London and Leeds Estates Ltd v Paribas Ltd (No 2)* Mance J. held that a party to an arbitration was entitled to call for the proof of an expert witness in a previous arbitration in a situation where it appeared that the views that had been expressed in that proof of evidence were at odds with the views which he was expressing in the

present arbitration. This was an application by the plaintiff landlords and their expert to set aside subpoenas directed to the expert to produce in rent review arbitration between the plaintiffs and the defendants proofs of the expert which he had used as a witness in two earlier arbitrations between different parties.

98. Mance J held that confidentiality was not an absolute bar to the enforcement of the production of documents by subpoena, but it was a relevant consideration in deciding whether such a subpoena was necessary for the fair resolution of the proceedings and should be permitted. Privacy and confidentiality could be overridden "in the interest of individual litigants and in the public interest" where a witness had given inconsistent evidence in the arbitrations: at 109.

99. Australian cases also support a "public interest" exception. In *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 128 ALR 391 Mason CJ said that in any event any duty of confidence (which he rejected except in relation to documents compulsorily produced) would have to be subject to a "public interest" exception. Brennan J took direct inspiration from *Tournier* in holding that one of the exceptions was where there was a duty, albeit not a legal duty, to the public to disclose. Toohey J accepted the implied term as formulated by the English court, but agreed with Mason CJ that there was a "public interest exception." See also *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662, in which the Court of Appeal of New South Wales decided by a majority that an arbitrator had no power to make a procedural direction imposing an obligation of confidentiality which would have had the effect of preventing the government (a party to the arbitration) from disclosing to a state agency, or to the public, information and documents generated in the course of the arbitration which ought to be made known to that authority or to the public, because public health and environmental issues were involved.

100. In *Ali Shipping Corporation v Shipyard Trogir* Potter LJ referred to *London & Leeds Estates Ltd v. Paribas (No. 2)*, which, he said, tentatively recognised an exception where the "public interest" required disclosure, and went on (at 327-328):

> "It seems to me clear that, in that context, Mance, J. was referring to the 'public interest' in the sense of 'the interests of justice', namely the importance of a judicial decision being reached upon the basis of the truthful or accurate evidence of the witnesses concerned. Whereas the issue in the Paribas case related to a matter of expert opinion rather than objective fact, I see no reason why such a principle, which I would approve, should not equally apply to witnesses of fact who may be demonstrated to have given a materially different version of events upon a previous occasion. As a matter of terminology, I would prefer to recognise such an exception under the heading 'the interests of justice' rather than 'the public interest'; in order to avoid the suggestion that use of that latter phrase is to be read as extending to the wider issues of public interest contested in Esso Australia Resources Ltd. -v- Plowman ….While it may well fall to the English court at a future time to consider some further exception to the general rule of

> confidentiality based on wider considerations of public interest, it is not necessary to do so in this case."

101. The third exception in *Tournier*, interests of the bank requiring disclosure, was adapted in *Hassneh Insurance Co of Israel v Mew* and *Ali Shipping Corporation v Shipyard Trogir* to mean that disclosure was permissible when, and to the extent to which, it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-a vis a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by that third party. It would be this exception which would apply where insurers have to be informed about the details of arbitral proceedings.

102. The fourth exception (consent) is of course entirely uncontroversial. In *Ali Shipping Corporation v Shipyard Trogir* Potter LJ (at 327) spoke of the express or implied consent of the party who produced the document, but the present case shows that there may be circumstances in which the party who produced the document may be under a duty of confidentiality because it contains material relating to the other party's documents.

Summary

103. The position can be summarised as follows. The conduct of arbitrations is private. That is implicit in the agreement to arbitrate. That does not mean that the arbitration is private for all purposes. Prior to the modern arbitration legislation some of the most important cases in the law of contract or in the conflict of laws were decided in the context of cases stated by arbitrators for determination by the court. Those decisions identified the parties and the nature of the dispute: e.g. *Suisse Atlantique Soc. d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (fundamental breach of contract); *Cie d'Armement Maritime SA v Cie Tunisienne de Navigation SA* [1971] AC 572 (proper law of the contract).

104. Today there is an increasing trend for the privacy of arbitrations to be protected. That is illustrated by the rules in CPR Part 62 and the Practice Direction allowing arbitration claims to be heard in private and restricting (but not prohibiting) access to the court file by strangers to the arbitration. But it is clear from *Moscow City Council v Bankers Trust Co.* [2004] EWCA Civ 314, [2005] QB 207 that this policy may have to give way to the public interest. Consequently even under the modern law since the 1996 Act there will still be cases where the details of an arbitral dispute may become public, e.g. where a party seeks an injunction to restrain court proceedings brought in breach of an arbitration agreement (e.g. *West Tankers Inc v Ras Riunione Adriatica di Sicurta* [2007] UKHL 4, [2007] 1 Lloyd's Rep 391) or where a court deals with a challenge to an award for serious irregularity or an appeal on a point of law (e.g. *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 AC 221) or where enforcement of an award is resisted on grounds of public policy (e.g. *Westacre Investments Ltd v Jugo-Import-SPDR Holding Co Ltd* [2000] QB 288).

105. But case law over the last 20 years has established that there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what

evidence has been given by any witness in the arbitration. The obligation is not limited to commercially confidential information in the traditional sense.

106. As I have said above, this is in reality a substantive rule of arbitration law reached through the device of an implied term. That approach has led to difficulties of formulation and reliance (perhaps, over-reliance) on the banking principles in *Tournier*.

107. In my judgment the content of the obligation may depend on the context in which it arises and on the nature of the information or documents at issue. The limits of that obligation are still in the process of development on a case-by-case basis. On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure.

The present case

108. My conclusion is that the judge had jurisdiction to determine the question of confidentiality, and that the judge was right in the unusual circumstances of this case to authorise the disclosure of the Amended Points of Claim, the skeleton argument, and the Defence, in NSW and the BVI.

109. I have no doubt that the judge had jurisdiction to make the order. In essence the application was the mirror imagine of what often happens in cases of this kind, namely an application for an injunction by a party seeking to restrain disclosure. In the usual case the party relying on confidentiality is alerted to the danger of disclosure and takes action to restrain disclosure by injunction. In the present case Mr Emmott took the course of seeking directions. MWP did not seek a stay on the ground that it was a matter for the arbitral tribunal. Instead it took the point that the only way in which the documents could be obtained for the NSW and BVI courts was by a request under the Evidence (Proceedings in Other Jurisdictions) Act 1975. There is nothing in this point, since the 1975 Act only applies to requests for *evidence* and there is no case for suggesting that this material is evidence in that sense.

110. I have already expressed the tentative view that because the confidentiality rule has developed as an implied term of the arbitration agreement, any dispute as to its scope would fall within the scope of the arbitration agreement. But since MWP did not seek a stay on that ground I do not think that it is necessary to explore this aspect further. Nor is it necessary to explore the question whether the court would have an inherent jurisdiction in relation to these matters or whether section 37 of the Supreme Court Act 1981 or section 44(2)(e) of the Arbitration Act 1996 might have a role to play: *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 1 WLR 3555, at [74]; *Elektrim S.A. v Vivendi Universal S.A. (No 2)* [2007] 2 Lloyd's Rep 8, at [67]-[79]; *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), at [18]-[19]. I have seen Thomas LJ's judgment in draft and I see the force of what he says in paragraph 123 below, but since the point does not arise for decision on this appeal I express no concluded view on it.

111. The factors which lead me to the conclusion that the judge was right on the substance of the case are these: first, MWP had told the NSW court in March 2007 that the underlying contentions in the NSW proceedings and the London arbitration were the same; second, MWP had sought amendments in the NSW proceedings in October 2007 in order to bring a "level of parity" to the proceedings in NSW, BVI and the London arbitration; third, notwithstanding that claims of fraud against Mr Emmott had been dropped in the London arbitration, he was still said in the NSW proceedings to have been guilty of fraud; fourth, without being informed of the London arbitration, there was a danger that the NSW court would be misled. These matters lead me to the conclusion that the interests of justice required disclosure. The interests of justice are not confined to the interests of justice in England. The international dimension of the present case demands a broader view.

112. I should underline also that, having told the NSW court twice that the allegations in the London arbitration and the NSW proceedings were the same, MWP in fact consented in the course of the application to disclosure of the Amended Points of Claim, and in this combination of facts it is hard to resist the conclusion that MWP could not reasonably object to the document which brought about its amendment and to the Defence (at any rate insofar as the Defence did not disclose any confidential information). But the matter has not been argued on the basis of consent or waiver, and it is therefore not necessary to elaborate on the legal consequences of MWP's actions.

113. For those reasons I would dismiss the appeal. There is no reason why Flaux J's judgment, and (subject to any submissions to be made prior to handing down) the judgment of this court, should not be published. I would also express my hope that any future dispute on the disclosure of documents can be resolved by agreement.

114. I would add only that the concentration in this appeal, and in this judgment, on the limits of confidentiality in arbitration should not obscure the fact that the overwhelming majority of arbitrations in England are conducted in private and with complete confidentiality.

Lord Justice Thomas:

115. I agree that this appeal should be dismissed for the reasons given by Lawrence Collins LJ. I add some observations of my own in the light of the difficult and important issues which have arisen in the course of this appeal in relation to the use of documents generated in the arbitration outside the arbitration and the intervention of the court during the currency of the arbitration in the dispute over their use.

(a) The intervention of the Court

116. It was well settled by the time of the enactment of the Arbitration Act 1996 that it was implicit in an arbitration agreement governed by the law of England and Wales that there were obligations of privacy (*Haigh v Haigh* (1861) 31 L.J. Ch 403; *The Eastern Saga* [1984] 3 All ER 835) and confidentiality: (*Dolling-Baker v Merrett* [1990] 1 WLR 1205; *Hassneh Insurance Co. v Mew* [1993] 2 Lloyd's Rep. 243 and *Insurance Company v Lloyd's Syndicate* [1995] 1 Lloyd's Rep. 272. The obligation of confidentiality was, it seems clear, a much later development. It is not necessary to set out how this came about, as the law by 1996 was clear that both obligations were implicit in an arbitration agreement governed by

the law of England and Wales: see Sir Patrick Neill QC, *Confidentiality in Arbitration* (1996) 12 Arb Int 287.

117. Although the Act substantially reformed and codified the law relating to arbitration, as Lawrence Collins LJ has so clearly set out at paragraph 61, the deliberate decision was made by Parliament to leave to the courts, on a case by case basis, the development of the common law relating to the confidentiality and privacy of arbitrations; s.81 of the Act permitted this to be done. Although it was accepted that privacy and confidentiality were of great importance to the users of arbitration in England and Wales, it was considered undesirable to codify law which was unsettled. The Act was therefore silent on the issue of confidentiality and privacy, following in this respect all previous statutes relating to arbitration and the attempt in the late nineteenth century to codify the law of arbitration made by Lord Bramwell (see Veeder and Dye, *Lord Bramwell's Arbitration Code 1884-1889* (1992) 8 Arb Int 329).

118. Since 1996 the ambit of those obligations has been developed, primarily in *Ali Shipping v Shipyard Trogir* [1999] 1 W.L.R. 314, through consideration of the ambit of the terms of confidentiality to be implied as an incident of an arbitral agreement (a defined category of contractual relationship) and not as terms implied by custom or business efficacy (see *Ali Shipping* at page 326). The cases have centred on the implied obligation of the parties to the arbitration agreement; the law has been developed in this way rather than by consideration of the evolving general law of privacy and confidentiality.

119. It follows from this way of developing the law through implied obligations, that a dispute in relation to scope of the implied term of confidentiality and privacy between the parties relates to the interpretation of the terms of the arbitration agreement, in exactly the same way as would a dispute over the scope of an express term incorporated for example through an institutional rule. The arbitral agreement is an agreement distinct and separate from the principal contract: see *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 5 at paragraph 21 ([2006] 1 AC 221). It follows from this that the decision on the ambit of the obligations as between the parties to the arbitration agreement should ordinarily, during the currency of the arbitration, primarily be one for the arbitral tribunal. There may be a qualification to this, if the implied term itself confers jurisdiction on the court, as was argued by Mr Emmott– see paragraph 124 below. Subject to that qualification, in this case therefore the issue as to whether the documents could be used in the overseas jurisdictions should have been determined by the arbitral tribunal chaired by Mr Christopher Berry under the arbitration clause in the agreement. This was not a case, as were several of the cases cited to us, where the issue of privacy and confidentiality arose between a party and a non party where the issue must be determined by the court or a case where the issue arose under the law before the 1996 Act. The arbitration tribunal was seized with the facts of the dispute, could readily have ascertained the relationship of the issues in the arbitration to the other proceedings and the issue as to the determination of the scope of the obligations under the arbitration agreement should have been put before them by Mr Emmott.

120. Mr Emmott, however, did not go to the arbitration tribunal. He invoked the intervention of the court. The circumstances in which the court should intervene in a matter between the parties to an arbitration after the coming into force of the 1996 Act are narrowly prescribed; s.1 of the Arbitration Act 1996 provides by s.1(c):

> "In matters governed by this part the court should not intervene except as provided by this part."

The Part referred to in s.1of the Act is the Part of the Act which applies where the seat of the arbitration tribunal is in England and Wales; sections 42 to 45 and 66 to 71 set out specific circumstances in which the court can intervene. The application by Mr Emmott was not within those sections.

121. In a number of decisions it has been made clear that outside those express provisions of the Act and the application of s. 37 of the Supreme Court Act 1981, the circumstances in which the court can intervene are limited: *Vale Do Rio Doce & Navegacao SA v Shanghai Bao Steel Ocean Shipping Co* [2000] 2 Lloyds Rep. 1 at paragraphs 49-52; *Hiscox Underwriting v Dickson Manchester & Co.* [2004] 2 Lloyds Rep. 438 at paragraphs 41-43 and *Cetelem SA v Roust Holdings Ltd* [2005] 1 W.L.R. 3555 at paragraph 35.

122. Before Flaux J MWP did not seek a stay. It contended that Mr Emmott could only obtain the remedy he sought under the Evidence (Proceedings in other Jurisdictions) Act 1975; there was nothing in this point, as Lawrence Collins LJ has made clear . In the circumstances I consider Flaux J was right, in the absence of objection to the intervention of the court, to proceed to determine the application of Mr Emmott.

123. As a stay was not sought, the issue of the court's intervention did not arise before the judge. If it had arisen, it is difficult to see why the court should not have made it clear that this was an issue for the arbitration tribunal, as it arose in a pending arbitration. The fact that a court's power may be invoked in certain circumstances under s.44 (2)(e) of the 1996 or under s. 37 of the Supreme Court Act 1981 to obtain an injunction to restrain a threatened breach of confidentiality would not generally, in my view, provide a sufficient ground to justify the intervention of the court in an issue which should normally be one for the arbitrator to determine: see *Cetelem SA v Roust Holdings SA* [2005]1 WLR 3555 at paragraphs 45-47 and the useful analysis of Aikens J in *Elektrim v Vivendi Universal No 2* [2007] EWHC 571 Comm ([2007] 2 Lloyd's Rep 8 at paragraphs 67-71)

124. Nonetheless Mr Emmott contended that the court had jurisdiction as the formulation of the implied term in *Ali Shipping* by Potter LJ included the recognition of an exception under the heading "leave of the court". Plainly the leave of the court is a matter which arises in circumstances where the court is deciding the issue as between a party to the arbitration and a stranger (as where the court is ordering disclosure in litigation of arbitration documents in the possession of one party as discussed at paragraph 127 below) or in circumstances where the arbitration has come to an end. It has been suggested that Institutional Rules could leave such issues to be determined by the courts: see Paulson and Rawding, *The Trouble with Confidentiality* (1995) 11 Arb Int at page 315. Moreover it was argued that because the DAC Report on the Arbitration Bill stated at paragraph 17 that the courts could resolve the disputed exceptions on a pragmatic basis, it followed that those submitting to an arbitration governed by English law would expect such issues to be resolved by a court and not an arbitrator. However it is difficult to see readily how it is consistent with the principles in the 1996 Act that there is to be an implied term which requires resort to the court during the currency of the arbitration for the court to determine these issues as between the parties to the arbitration. *Ali Shipping* concerned an arbitration to which the 1996 Act did not apply; *Glidepath BV v John Thompson* [2005] EWHC 818 (Comm.) ([2005] 2 Lloyd's Rep 549) was a case where the court was determining an application made by a stranger to the arbitration. I cannot accept that the implied term of confidentiality should be formulated to confer by this means jurisdiction on the court; it would be contrary to the ethos and policy of the Act: see the observations of Lord Steyn in *Lesotho Highlands Development Authority v*

Impregilo SpA at paragraphs 17-18. It would be seen as a device by the court to create a means of intervening in arbitration agreements inconsistent with the 1996 reforms.

(b) The nature of the issue which arose for decision

125. The arbitration clause did not impose any express obligations of privacy or confidentiality; it was therefore necessary for Flaux J to consider the ambit of the implied obligations, primarily in the light of *Ali Shipping* and the observations of Lord Hobhouse of Woodborough in relation to *Ali Shipping* when giving the judgment of the Privy Council in *Associated Electrical & Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003] UKPC 11 at paragraph 20*:*

> "…Potter LJ, who delivered the leading judgment, having followed *Dolling-Baker v Merrett* (*sup*) affirming the privacy of arbitration proceedings, went on to characterise a duty of confidentiality as an implied term (p 326) and then to formulate exceptions to which it would be subject (pp 326-7). Their Lordships have reservations about the desirability or merit of adopting this approach. It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality. Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain. This may mean that the implied restrictions on the use of material obtained in arbitration proceedings may have a greater impact than those applying in litigation. But when it comes to the award, the same logic cannot be applied."

126. It seems to me that the task of the decision maker, whether it be a judge or arbitral tribunal, is to identify with precision the issue involved and then determine the application of the obligations of privacy and confidentiality that attach to the documentation or information which it is sought to use outside the arbitration. I agree with Lawrence Collins LJ that the difficulties that have arisen in approaching this task may in part be due to reliance on the analogy with banking confidentiality (through *Tournier*) and in part because the obligations of privacy and confidentiality may differ. In this respect the law relating to arbitrations may need to parallel the distinction in the general law where the law relating to privacy and confidentiality are distinct: see for example *MGN v Campbell* [2004] AC at paragraphs 13 and 14 of the speech of Lord Nicholls of Birkenhead.

127. In the present case the issue related to the right of Mr Emmott asserted against MWP during the currency of the arbitration to use the pleadings and a skeleton argument in the arbitration in other proceedings. It is important in my view to emphasise that this is a different issue to the issue that arose, for example, in *Dolling-Baker v Merrett* [1990] 1 WLR 1205 where the court was considering whether a party to an arbitration agreement with a contracting party had to disclose the arbitration documents in litigation with a stranger to the arbitration. In that type of case the court was concerned with the application of the procedural law of England and Wales relating to disclosure in litigation (now CPR Part 31) between parties to the case before it to the obligations arising under the arbitration agreement between one of the parties to that case and a stranger. In determining whether there has to be disclosure in the litigation it will have regard to the ambit of the obligations of privacy and confidentiality between the parties to the arbitration agreement (whether express or implied), but can compel disclosure not withstanding any such terms. As the decisions show, the courts of England and Wales

pay high regard to the obligations of privacy and confidentiality of arbitrations when considering whether to order disclosure. However the courts are ultimately no more bound to give effect to the agreement of the parties than they are to give effect to obligations of privacy and confidentiality that arise by agreement between the party to litigation and a non party in other contexts. There is a balancing exercise in which the exercise of the court's judgment (often referred to as a discretion) may ultimately turn on balancing the obligations of privacy and confidentiality between the parties to the arbitration as against the public interest of disclosure of documents in litigation. Similar principles are applicable to applications for third party order relating to witnesses: see *London and Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102 ; and to applications for the examination of court files relating to arbitrations: see *Glidepath BV v John Thompson*.

128. In this case, however, Mr Emmott was seeking to have determined as between the parties to the arbitration whether the obligations of privacy and confidentiality affected his ability to use pleadings and a skeleton argument produced in the arbitration in specific litigation outside the arbitration. The tribunal deciding the issue was not making a balancing exercise of the type conducted in *Dolling Baker* as between one party to the arbitration agreement and a stranger to the arbitration*;* it was determining the scope of the obligations of privacy and confidentiality as between the parties to the arbitration agreement during the currency of that agreement. Very similar considerations will arise, but the task is different as it is only necessary to determine the scope of the obligation and the balancing exercise does not arise.

(c) The obligations as between the parties in relation to documents produced during the course of an arbitration

129. That determination of the extent of the obligations must be made against the general policy that the privacy and confidentiality of arbitral proceedings are highly valued by those who arbitrate in England and Wales: see in particular the DAC report at paragraphs 16 and 17 and the judgment of Mance LJ in *Economic Dept of the City of Moscow v Bankers Trust* [2004] EWCA Civ 314 at paragraphs 2 and 30. Although the determination of the obligations and their application give rise to complex and difficult issues, the following are, in my view, established by the cases in relation to what is in issue in this appeal, namely documents generated in the course of an arbitration for the conduct of that arbitration.

i) The obligations of privacy and confidentiality are contractual. If there is an express agreement (as is the case in many institutional rules) those obligations must be interpreted and applied.

ii) There is implied, in the absence of specific agreement, a specific obligation of confidentiality in relation to documents produced by each party to the arbitration under the process of disclosure applicable by the procedural law of arbitrations conducted in England and Wales. This is analogous to that imposed by the courts of England and Wales in proceedings before them. As between the parties, all such documents are covered by the obligation of confidentiality.

iii) An obligation of confidentiality will attach to documents or evidence in an arbitration where the evidence or documents are inherently confidential or private (such as a trade secret).

iv) In the absence of an express term, it is implied that the conduct of an arbitration is private. The parties are under an obligation to keep it so. This obligation (in

contradistinction to the two specific obligations of confidentiality referred to in the preceding sub-paragraphs) is also often expressed in the cases in England and Wales as an obligation of confidentiality. In contradistinction, the High Court of Australia in *Esso Australia Resources Ltd v Plowman* [1995] HCA 19 (182 CLR 10) recognises an obligation of privacy, but not of confidentiality.

v) Although there has plainly been a move to greater privacy (as Mance LJ has explained at paragraph 28 of his judgment in *City of Moscow)*, the obligations of privacy are however not absolute. A clear instance is the right of a party to provide information about the arbitration which it is compelled by law to provide, such as to a regulator or in annual accounts.

vi) It is, I think, worth bearing in mind the observations of Lord Hobhouse, now established that a party is not bound to keep a matter relating to an arbitration private where it is reasonably necessary to use that matter to protect its legitimate private interests or where the public interest reasonably requires that the obligation of privacy no longer attaches to that matter. In *Hassneh v Mew*, for example, it was the need to protect the legitimate private interests of parties to arbitration which was considered by Colman J when determining the scope of the obligation; a party to an arbitration had to be able to rely on the award in proceedings against a stranger where it was necessary to show in those proceedings the result of the determination of that party's rights against the other party to the arbitration, but the party could not disclose pleadings or notes of evidence. (cf *Insurance Co v Lloyd's Syndicates* [1995] 1 Lloyd's Rep 272). Although on the facts of that case, use was not permitted outside the arbitration of the materials generated in the arbitration, the principle is clear.

vii) There may be other ways in which the obligations are qualified, but these remain to be determined; they do not arise in this appeal.

viii) As the obligations, whether express or implied, are contractual, the parties may modify them by subsequent agreement.

ix) Where the parties do not agree on the scope or the application of the obligations, then the issue must be determined by the tribunal having jurisdiction to determine it.

130. In the present appeal, MWP did not accept that the position in relation to the public interest is as I have expressed it. MWP contended that as between the parties to the arbitration there was no other qualification to the obligations of privacy or confidentiality than the need to protect legitimate private interests. A court could override the obligation in the public interest, but only where it was considering the matter in the context of a dispute between a party to the arbitration and a stranger (such as would arise on an application for disclosure). I cannot accept that argument. It is clear that where the public interest reasonably requires it, there is no obligation to keep a matter private. In *Ali Shipping*, Potter LJ considered that in addition to the legitimate private interests of the parties, matters required in the "interests of justice" could form an exception to the implied terms. In *London and Leeds Estates v Parisbas* Mance J had referred to considerations of public interest in arriving at his decision. I have used the term public interest as it in my view better expresses the nature of the issue; the terms "private interests" and "public interests" are used in other areas (see for example *Johnson v Gore Wood* [2000] UKHL 65), though Potter LJ considered that it was sufficient to use the term "interests of justice" to distinguish wider issues of public interest.

131. Although the essential nature of the obligations are by now, in my view, becoming clear, their application is at an early stage and particular difficulties apply in relation to awards (which were not an issue that arose in this appeal). Some examples may illustrate the problems. If an insurer which uses a standard form of its own devising with an arbitration clause, arbitrates issues arising on that standard form and has a body of arbitral decisions on that standard form, can a broker who knows of them use them to advise a new client contemplating using that insurer's standard form? In a market where most of the standard forms are considered in arbitrations and participants in the market will as a matter of practice know what they are, should potential entrants to the market have these made available to them so as to provide for greater transparency and competition in a market? If there are a large number of disputes in a market arising out a common factual substratum, to what extent should materials in the arbitration and awards remain private? (cf the litigation arising out of the personal accident spiral – *Sphere Drake v EIU* [2003] EWHC 1636 (Comm)) and *Sun Life v Lincoln National* [2004] EWCA Civ 1660 ([2004] 2 Lloyd's Rep 606 at paragraphs 68 and 83). These and similar issues relating to the insurance and reinsurance market were raised in discussions with the Department prior to the passing of the Act. Absent institutional rules (which are however making a real headway in many markets), such issues will, no doubt, be determined as the law is developed on a case by case basis.

(d) The conclusion in relation to the use in other proceedings of the pleadings and skeleton argument in the arbitration

132. In relation to the documents in issue in this case, it was clear that MWP would never agree to the use of the documents outside the arbitration. The dispute as to the use that might be made was therefore one which should have been determined by the arbitral tribunal for the reasons I have given. It, however, came before Flaux J. The documents in issue were pleadings and a skeleton argument; these were not documents which were inherently confidential or contained material which had been introduced into the arbitration as a result of the procedural rule of disclosure. The issue for the judge was whether, in the context of the general obligation to keep all matters in the arbitration private, it was reasonably necessary to use these documents (or parts of them) in the other proceedings to protect the legitimate private interests of Mr Emmott or whether the public interest reasonably required the documents (or parts of them) to be made available in those other proceedings. It involved consideration of the general obligations of privacy (and confidentiality) against the nature of the documents and the use sought to be made of them:

i) The pleadings and skeleton argument in this case were documents generated in the course of arbitration. However, in contradistinction to court proceedings, where the fact that proceedings are a public proceeding is central to the process (see *Scott v Scott* [1913] AC 417 and the authorities cited by *City of Moscow v Bankers Trust* by Mance LJ and by the court in *R (Trinity Mirror) v Croydon Crown Court* [2008] EWCA Crim 50), one of the reasons the parties to a contract have chosen arbitration is to ensure that the dispute is heard in private. A pleading or skeleton argument setting out the party's case is in my view an inherent part of a process that is private and not public.

ii) Thus a pleading or skeleton argument produced in an arbitration, even where it contains no subject matter that is inherently confidential, is subject to the obligation of privacy and is a document private to the parties to the arbitration and the arbitral tribunal. Making use of it outside the arbitration would generally be a breach of the obligation to keep the arbitration private.

iii) Use can, however, be made if it is reasonably necessary to protect the legitimate private interests of a party or the public interest reasonably requires its use. The use sought to be made was use by Mr Emmott in proceedings in other jurisdictions between MWP and parties having very similar interests to him. MWP was the claimant in the proceedings in New South Wales and the British Virgin Islands; the proceedings concerned the same substratum of fact; in New South Wales and in the British Virgin Islands the nature of the allegations against the defendants are inextricably intertwined with the conduct alleged against Mr Emmott; the issue as to the appointment of a receiver plainly involved Mr Emmott.

iv) In my view it was reasonably necessary, on the facts of this case, for Mr Emmott to make the documents available for use by those with very similar interests to him in those proceedings to protect his own legitimate private interests.

v) The public interest also reasonably required the use of these documents in the other proceedings; on the specific facts of the case it was necessary for the tribunal determining the other proceedings to have a proper understanding of the nature of the allegations made in the different proceedings by MWP so that they could determine the proper course of the particular proceedings before them.

vi) However the fact that the document might be reasonably necessary or required for these purposes does not mean that it is reasonably necessary to use the whole of the document. It was clear that it was not reasonably necessary that the whole of each document needed be made available; the redaction made to one document enabled use to be made of what was reasonably necessary and required, but retained the privacy of the arbitration in relation to the remainder. The redaction therefore underlined the fundamental importance of privacy and the limited use that could be made of the documents.

133. I agree therefore that Flaux J was plainly correct in deciding that Mr Emmott might use the documents to the extent permitted.

Lord Justice Carnwath:

134. I agree that the appeal should be dismissed for the reasons given by Lawrence Collins LJ at paragraph 112, which I take to be substantially the same as those of Thomas LJ at paragraph 132(iii)-(v). I commend, but cannot usefully contribute to, their illuminating discussion of the wider issues. Like Lawrence Collins LJ, I prefer to treat this case as falling under "interests of justice" exception, clearly recognised in *Ali Shipping*, and to leave for another occasion exploration of the boundaries of a possible "public interest" criterion. Also, since the court's power to deal with the dispute over documents was not in issue, I prefer to express no view on the interesting question raised by Thomas LJ as to the competing powers of the arbitrators.