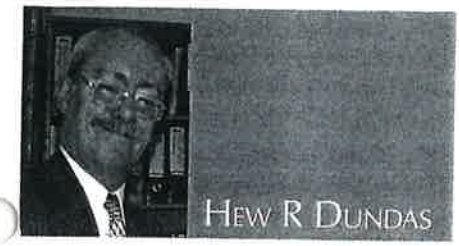
Confidentiality in Arbitration: The Final Chapter?



HEW R DUNDAS

Confidentiality in arbitration has been a hot topic since the *Dolling-Baker*[1] decision, prior to which it had been assumed to apply[2]. *Esso v Plowman*[3] showed that there was no implied confidentiality obligation in Australian law and the Swedish Supreme Court reached the same conclusion in *Bulbank*[4]. A recent decision of the English Court of Appeal has raised questions of considerable practical importance relating to confidentiality in national and international arbitration.

In *Emmott v Michael Wilson & Partners Ltd*[5], E was in dispute with W concerning a British Virgin Islands-incorporated legal partnership, MWP, which provided services in Kazakhstan. E had left MWP to set up a new practice and MWP claimed that this was part of a scheme, in breach of contract and in breach of trust, to divert its business. Arbitration in London ensued, with related litigation in several jurisdictions. E argued that part of the litigation derived from the same dispute as the London arbitration and was very concerned that, in the foreign litigation, W continued to allege fraud by E, notwithstanding that such assertions had been withdrawn from the London arbitration.

In the English High Court, Flaux J gave E permission to disclose certain arbitration documents in the foreign litigation. He applied *Ali Shipping*[6] and accepted that the material was in principle confidential, but that the confidentiality was subject to two possibly relevant exceptions[7]: (i) where disclosure was reasonably necessary for the protection of the legitimate interests of an arbitrating party[8], and (ii) the public interest exception[9], in respect of which he held that the interests of justice required that the English court should, so far as possible, 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 where the cases being presented therein essentially raised either the same or similar allegations and were proceeding in parallel.

The present appeal was founded (*inter alia*) on whether Flaux J's decision on the substance had been correct.

Lawrence Collins LJ gave the principal judgment. In *Russell v Russell*[10] Sir George Jessel MR had said:

"As a rule, persons enter into [arbitration] contracts with the express view of keeping their quarrels from the public eye ... "

Parties who arbitrated in England expected that the hearing would be in private and that was an important advantage for commercial people as compared with litigation in court[11]. In the last 20 years or so, the English courts have had to consider the consequences of the privacy of arbitration and the scope of the confidentiality obligation. However, only a minority of the major arbitration centres had rules dealing expressly with the confidentiality of material generated in arbitrations[12].

Four main propositions could be derived from the authorities:

(1) A party to litigation could seek disclosure of documents generated in an arbitration. Confidentiality of documents was, of course, not in itself a reason for withholding disclosure, but the court would compel disclosure only if it considered it necessary for the fair disposal of the case[13].

(2) Confidentiality was no absolute bar in cases where a party to an arbitration might seek the assistance of the court to obtain, through a witness summons, material deployed in another arbitration[14]. In such cases the court would take into account the strong policy in favour of confidentiality in arbitration.

(3) Issues might arise about the disclosure of documents on the court file relating to an arbitration[15] or whether the judgment of a court given in relation to an arbitration should be published[16]. Here the privacy of arbitration would be an important, but not a decisive, factor.

(In each of these three cases, the Court exercised a discretion in which privacy or confidentiality was an important factor in the balancing exercise.)

(4) Most relevantly 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[17] and the other party to the arbitration may seek to restrain disclosure by injunction.

The case raised three distinct legal concepts:

(1) 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;
(2) confidentiality in the sense of inherent confidentiality in the information in documents, such as trade secrets or other confidential information generated or deployed in an arbitration; and
(3) confidentiality in the sense of an implied agreement that documents disclosed or generated in an arbitration could be used only for the purposes of that arbitration.

English jurisprudence over the last twenty years has established that there is an obligation on both parties, implied by law and arising out of the nature of arbitration, (i) not to disclose, or use for any other purpose, any documents prepared for and used in, or disclosed or produced in the course of, an arbitration, or transcripts or notes of evidence in the arbitration or the award, and (ii) not to disclose in any other way what evidence had been given by any witness. This obligation was not limited to commercially confidential information in the traditional sense.

On the authorities as they now stand, the principal cases in which disclosure would be permissible are: (i) where there is consent, express or implied; (ii) 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); (iii) where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and (iv) where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure.

As regards the specific facts of the *Emmott* case, the interests of justice required disclosure, such interests not being confined to the interests of justice in England, the international dimension of the present case demanding a broader view. Lawrence Collins LJ concluded that MWP's appeal should be dismissed.

The learned judge expressed the tentative view that, because the confidentiality obligation had 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 had not sought a stay on that ground, it was unnecessary to explore it further. It was also unnecessary to explore the questions whether either (i) the court would have an inherent jurisdiction in relation to these matters or (ii) s 37 of the English Supreme Court Act 1981 (the 1981 Act) or s 44(2)(e) of the English Arbitration Act 1996 (the 1996 Act) might have a role to play[18].

In a concurring judgment, Thomas LJ agreed that the appeal should be dismissed but added -

"some observations of my own in the light of the difficult and important issues which have arisen in the course of this appeal ... "

A dispute in relation to the scope of the implied term of confidentiality related 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. An arbitration agreement is an agreement distinct and separate from the principal contract, therefore disputes between the parties to the former as to that scope should ordinarily be for the arbitral tribunal.

Since no stay had been sought, the issue concerning the court's intervention had not arisen before the judge. If it had arisen, it was difficult to see why the court should not have made it clear that this was an issue for the 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 Act or under s 37 of the 1981 Act to obtain an injunction to restrain a threatened breach of confidentiality would not generally, in Thomas LJ's view, have provided sufficient ground to justify the court's intervention in an issue that should normally be one for the tribunal to determine[19]. Formulation of an implied term of confidentiality in order to confer jurisdiction on the court was contrary to the ethos and policy of the 1996 Act[20]. It would be seen by the court as a device to create a means of intervening in arbitration agreements that was inconsistent with the 1996 reforms.

Thomas LJ identified the following principles as established by the authorities in relation to documents generated in the course of an arbitration and for the conduct of that arbitration.

(1) The obligations of privacy and confidentiality are contractual; if there were an express agreement (as is the case in many institutional rules) those obligations must be interpreted and applied.
(2) In the absence of specific contrary agreement, a specific obligation of confidentiality is implied in relation to documents produced by each party to the arbitration, analogous to that applicable in litigation. As between the parties, all such documents are covered by the confidentiality obligation.
(3) A confidentiality obligation will attach to documents or evidence in an arbitration where the evidence or documents are inherently confidential or private (such as trade secrets).
(4) In the absence of an express term, it is implied that the conduct of an arbitration will be private and the parties are under an obligation to keep it so; this obligation is distinct from those in (2) and (3).
(5) Although there has plainly been a move to greater privacy (as Mance LJ explained at §28 of the *City of Moscow* case), privacy obligations are not absolute, eg parties have the right to provide information about the arbitration that they are compelled by law to provide, such as to a regulator or in submitting annual company accounts.
(6) 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.
(7) There may be other ways in which the obligations are qualified, but these remain to be determined; they did not arise in this appeal.
(8) As the obligations, whether express or implied, are contractual, the parties may modify them by subsequent agreement.
(9) 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.

Carnwath LJ agreed with his colleagues regarding dismissal of the appeal, stating –

"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 the '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."

It seems to the present author that three matters stand out from this very comprehensive restatement, even development, of English law in this area:

(1) the elucidation of an obligation on both parties, implied by law and arising out of the nature of arbitration, not to disclose or use for any other purpose anything[21] prepared for or used or disclosed or produced in the course of the arbitration;
(2) whether issues of confidentiality fall to be dealt with by the tribunal or by the courts[22];
(3) that the court has no general or unlimited jurisdiction to consider whether an exception to confidentiality exists and is applicable.

More interesting still is the 'tribunal or the court' issue, where Lawrence

Collins LJ expressed a tentative view, Thomas LJ a much firmer one and Carnwath LJ declined to express any view. By analogy with the House of Lords' decision (albeit in a different area) in *Premium Nafta* (aka *Fiona Trust*) it must be correct in principle that the matter be dealt with by the tribunal. It must be the case that s 1(c) of the 1996 Act applies here.

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1 *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (Court of Appeal, England).
2 Merkin's *Arbitration Law* contains a concise summary of the development of the law at §§17.26-17.34.
3 *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 128 ALR 391.
4 *Al Trade Finance v Bulgarian Trade Bank*; Supreme Court case 1881-99 (27 October 2000).
5 [2008] EWCA Civ 184; Carnwath, Thomas and Lawrence Collins LJJ (12 March 2008, unreported).
6 *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314 (Court of Appeal, England).
7 The first is in fact inapplicable in the present circumstances.
8 *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243.
9 *London & Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102.
10 (1880) 14 Ch D 471 at 474 (Court of Appeal, England).
11 The 2006 and 2008 Queen Mary University of London/PriceWaterhouseCoopers studies of commercial users of arbitration showed confidentiality as ranking second to enforceability as the principal reason for choosing arbitration.
12 LCIA Rules (1998 Edn), art.30(1); Swiss Rules of International Arbitration (2004 Edn), art. 43(1)); WIPO Arbitration Rules 1994 Edn), arts. 52, 73. See also the. UNCITRAL Notes on Organizing Arbitral Proceedings (1996) at §31.
13 *Science Research Council v Nassé* [1980] AC 1028 (House of Lords).
14 *London and Leeds Estates Ltd v Paribas Ltd (No 2)* (note 9 above) (expert evidence) and *Council of the Borough of South Tyneside v Wickes Building Suppliers Ltd* [2004] EWHC 2428 (Comm) (Gross J, 4 November 2004, unreported).
15 *Glidepath BV v Thompson* [2005] 2 Lloyd's Rep 549.
16 *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2005] QB 207 (Court of Appeal, England).
17 *Hassneh Insurance* (note 8 above); *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Law Rep 272; *Ali Shipping* (note 6 above); *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2000] [2003] 1 WLR 1041 (Privy Council).
18 *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555, at [74] (Court of Appeal, England); *Elektrim SA v Vivendi Universal SA (No 2)* [2007] 2 Lloyd's Rep 8, at [67]-[79]; *Starlight Shipping Co v Tai Ping Insurance Co Ltd (Hubei Branch)* [2007] EWHC 1893 (Comm), at §§18-19 (1 August 2007, unreported).
19 See *Cetelem* (note 18 above) at §§45-47 and the "useful analysis" (per Thomas LJ) by Aikens J in the *Elektrim* case (note 18 above) at §§67-71.
20 See the observations of Lord Steyn in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] 3 WLR 129 at §§17-18 (House of Lords).
21 As itemised supra.
22 *Premium Nafta Products Ltd v Fili Shipping Co Ltd)* [2007] UKHL 40 (House of Lords, 17 October 2007, unreported), *sub nom Fiona Trust & Holding Corporation v Privalov*. For commentary, see HR Dundas, *Renewed Support for Arbitration: the House of Lords Reaffirms Key Court of Appeal Decision* (2008) 74 Arbitration 95.