IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

[2015] EWHC 687 (Ch)

No. HC-2014-001575

Rolls Building
Royal Courts of Justice

Friday, 27th February 2015

Before:

MRS. JUSTICE PROUDMAN

B E T W E E N :

SARAH LYNETTE WEBB — Claimant

- and -

LEWIS SILKIN LLP — Defendant

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MR. J. RUSHBROOKE QC (instructed by Carter-Ruck) appeared on behalf of the Claimant.

MR. P. STANLEY QC (instructed by Bond Dickinson LLP) appeared on behalf of the Defendant.

J U D G M E N T

(As approved by the Judge)

MRS. JUSTICE PROUDMAN:

1 This case involves an email account ("the Account") operated by the claimant's solicitor when she was an equity partner at a firm of solicitors ("S").

2 A dispute arose between the claimant and S, and the claimant left S. The dispute went to arbitration. I have no details of that dispute. The arbitrator has according to the claimant made his award but may or may not be technically *functus officio*. It is common ground that I am unable to decide whether he is or not on the facts before me. Mr. Rushbrooke QC, leading counsel for the claimant, drew my attention to the only evidence on the question, which is in the claimant's witness statement of 19 January 2015. She says that "the hearing and submissions in those proceedings are completed and the award was made on 31 December 2014." However, it is not clear whether anything remains to be done, for example in relation to costs, and, if so, as to the effect of this on the arbitrator's functions.

3 The defendant is a firm of solicitors which acted for S in the arbitration. The claimant has brought an action in which she alleges that the defendant accessed the account and read her emails without leave from her and, indeed, contrary to its statement on 14 January 2013 that:

> "We will not proceed with our review of documents contained in your [S] email file until the position has been agreed or determined by [the arbitrator] if we cannot agree."

4 The claimant had told the defendant by email of 11 January 2013 that the Account contained highly sensitive information (which I will not specify further, save to say that it included medical records and legally privileged emails relating to matters which had nothing to do with the dispute between the claimant and S) and there was an ongoing dispute as to the proper method of resolving the matter. On 15 March 2013 the defendant wrote to the claimant saying:

> "We can confirm that we have not commenced a review of the contents of your [S] email account to date (but reserve our right to do so.)"

5 On 31 October 2013, a list of documents having been produced by S, the claimant complained that the emails on the list could only have been extracted by inspecting all her emails, which included the private emails mentioned above. Although she accepted that there were relevant documents in the Account, which was a work account, she said that they could be accessed by other means, and also said:

> "It appears that the respondents have breached my confidentiality, misused my private information, and are in breach of the Data Protection Act."

6 The defendant replied on 4 November 2013:

> "These allegations are without merit and are denied.
> The emails disclosed- which have been extracted from your work email account- are relevant to the matters in dispute, are in the respondents' possession and control, and are therefore subject to the standard disclosure obligation. As you know, any claim by you that the contents are personal or confidential does not operate to exempt an email from disclosure.
> For the avoidance of doubt, I confirm that no review of any legally privileged emails was undertaken in complying with the respondents' obligation."

7 The defendant also relied in correspondence on the fact that the Account was the claimant's work account and S had a Protocol which dealt with such matters. There is a dispute as to whether the Protocol applied to the claimant but I was told by the claimant (without contradiction) that the Protocol is in any event not in itself a document in the arbitration reliance on which could amount to a breach of arbitral confidence.

8 In accessing the Account the defendant operated filters so that its employees did not read email strings containing seven email addresses. The intention was to exclude (a) legally privileged material which had nothing to do with the dispute between the claimant and S and (b) emails to and from the claimant's husband. Three solicitors of or employees at the defendant read the claimant's emails for the purpose of deciding whether they should be disclosed. The defendant says that S did not read them. The claimant says she is "deeply upset" and "shaken to the core" by what she terms "a gross and deliberate invasion of privacy". She alleges it caused her "severe embarrassment and distress" which entitles her to aggravated damages.

9 The claimant replied to the defendant's email of 4 November 2013 on 11 December 2013, saying that she did not accept that her private emails were within S's power, possession and control or that the provisions about disclosure referred to applied in an arbitration or that there was any power to search them at all in the absence of agreement or order.

10 The matter was then passed to solicitors instructed on her behalf and there was an argument about S's email policy and its applicability and the terms of the Partnership Deed. On 17 February 2014 the claimant's solicitors wrote a comprehensive letter to the defendant setting out her position.

11 Proceedings (a claim form and particulars of claim) were issued in this Division on 4 June 2014, claiming, among other things, misuse of private information and breach of confidence including breach of the claimant's human rights pursuant to Article 8 of the Convention on Human Rights.

12 On 4 July 2014 the parties appeared before Master Teverson and an order was made, effectively with the consent of both parties, to seal the particulars of claim pursuant to CPR 5.4C.

13 On 7 July 2014 the defendant served an acknowledgement of service, indicating that it would dispute the Court's jurisdiction to hear the matter.

14 On 17 July 2014 amended particulars of claim were served. The object was to delete matters of arbitral confidentiality, although the defendant disputes that this was or could be adequately done. No application has been made to seal the amended particulars of claim or otherwise prevent access to them by third parties.

15 On the same day, 17 July, the defendant issued an application notice seeking a stay in accordance with CPR 11.1(a) on the basis that the Court has no jurisdiction to try the claim. The allegation relied on s.9 of the Arbitration Act 1996. There was an alternative claim under CPR 11.1(b) that, if it did have jurisdiction, the Court should not exercise it.

16 On 6 January 2015 the defendant served an amended application notice, abandoning its claim under CPR 11.1(a) and confining the relief sought to a stay under CPR 11.1(b) plus CPR 3.1(2)(f) and the inherent jurisdiction:

> "until such time as the claimant has obtained a ruling from the Arbitrator… or (as appropriate) from the Court, in accordance with s. 44 of the Arbitration Act 1996 to the effect that (a) the matters raised by the Amended Particulars of Claim and/or any Defence served by the Defendant will not amount to a breach of arbitral confidence and (b) the conduct and trial of these proceedings will not amount to a breach of arbitral confidence." The application went on:

> "The Defendant seeks an order in these terms because the Amended Particulars of Claim breach the confidence of the arbitration proceedings… and the Defendant is unable to defend the claim without breaching its own obligations of confidentiality to its client in the arbitration and in respect of arbitration proceedings generally, and because the Claimant ought, pursuant to s.1 of the Arbitration Act 1996, to seek permission of the Arbitrator or, if the Arbitrator is unable to act, of the Court, before making use of the information that is subject to a duty of confidentiality by virtue of the Arbitration Agreement."

17 Mr. Stanley QC, leading counsel for the defendant, points out that it is a coincidence for my purposes that the claim is for breach of confidential information as the same principles apply in all cases. Mr. Rushbrooke says that the facts are important as the claim is so strong that there can be no defence. In any event, equity treats that as done which ought to be done, so that there is no point, whatever the position in law, in the claimant seeking permission of any tribunal as it is bound to be given.

18 Mr. Rushbrooke further submitted that the whole application smacks of artificiality; S clearly knows all about the action and the defendant is merely S's stooge, deployed to create trouble. He says that the claimant's strong suspicion is that S is paying all the defendant's costs of the proceedings. I cannot however make any such assumption. The same principles would apply whether or not that was the case.

19 Mr. Rushbrooke also took the Court to the authorities, which emphasise that the power of the Court to stay proceedings should be exercised only in "rare and compelling circumstances": *Amlin Corporate Member Ltd v Oriental Assurance Corporation*. That is common ground; the issue is whether this is such a circumstance.

20 Mr. Stanley asked for an order that the hearing be held in private in accordance with CPR 39.2(3). I was also asked to order that no non-party should be provided with any documents from the court records relating to this claim save by order of the Court following a hearing made on notice pursuant to CPR 5.4C(4)(d). Mr. Rushbrooke supported the former request but, although not opposing the latter request, reserved debate on the topic until after the main question was decided, and Mr. Stanley did not disagree with this course.

21 I bear in mind (a) that the public interest demands that all hearings should be in public, (b) that the authorities show that a hearing in public is possible where reporting restrictions are imposed and (c) Mance LJ's strictures in *Department*

of Economic Policy and Development of the City of Moscow v Bankers Trust Co [2004] EWCA Civ 314; [2005] QB 207 at [34]:

> "The consideration that parties have elected to arbitrate confidentially and privately cannot dictate the position in respect of arbitration claims brought to court under Rule 62.10. Rule 62.10 only represents a starting point. Such proceedings are no longer consensual. The possibility of pursuing them exists in the public interest. The courts, when called upon to exercise the supervisory role assigned to them under the Arbitration Act 1996, are acting as a branch of the state, not as a mere extension of the consensual arbitral process. Nevertheless, they are acting in the public interest to facilitate the fairness and wellbeing of a consensual method of dispute resolution, and both the Rule Committee and the courts can still take into account the parties' expectations regarding privacy and confidentiality when agreeing to arbitrate."

22 Ultimately the issue of private or public is a matter for the Court's discretion taking into account all relevant matters. As the whole basis of the application is the extent of arbitral confidentiality, I was prepared to order that the hearing be held in private in accordance with CPR 39.2(3) but agreed that the issue of whether there should be an order under CPR 5.4C(4)(d) should await the outcome of the application. I also will give this judgment in public, although the names of the parties will be anonymised, at any rate for the time being.

The issue

23 The issue before me is the simple one of whether the claimant needs authorisation to bring her claim from either the arbitrator or the Court. The defendant says that she does, the claimant that she does not.

24 It is trite law that arbitration proceedings take place in private and are both private and confidential to the parties, whether or not they involve confidential matters. This is a rule of substantive law. I was taken to *Hassneh Insurance Co of Israel v Mew*[1993] 2 Lloyds Rep 243, *Ali Shipping Corp v Shipyard Trogir* [2007] EWCA Civ 3054, the *Moscow City* case and *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] 1 Lloyds Rep as authority for these propositions.

25 Accordingly, the claimant owes a duty to S to keep the arbitration proceedings confidential and the defendant, although not a party to the Arbitration Agreement, owes a similar duty both to the claimant and S. It is common ground that the defendant, as well as S, is within the arbitration "ring of confidentiality". The defendant also owes a duty to S, including a duty in

relation to privileged matter, because S is its client. However, the case has not been argued before me on the basis that legal professional privilege may apply.

26 Arbitral confidentiality is not absolute. There are circumstances in which a party to an arbitration agreement can rely on confidential matters arising from the arbitration proceedings where it is reasonably necessary to do so to protect his legitimate claims, such as to make claims against third parties: see especially *Emmott*. The issue is whether in this case the claimant has to ask permission from the Court to bring the proceedings under this principle or whether she can do so without such permission.

27 Mr. Stanley argues that it would drive a coach and horses – although he did not use that hackneyed expression – through the protection confidentiality lends to an arbitration if a party to it could simply bring proceedings in court whenever he liked. The matter would be in the press before evasive action could be taken to obtain an injunction.

28 Mr. Rushbrooke, on the other hand, cited the cases of insurers, such indeed as S's insurers, or a shareholder who is routinely informed of the course of an arbitration without seeking the leave of the arbitrator. He also postulated the hypothetical case in which the defendant commissioned a burglar to steal arbitration papers, saying that it would be ludicrous if the claimant was unable to tell the police and the court what was in the papers immediately. Mr. Stanley riposted that in such a case it would be possible to obtain redress without stating the contents of the papers, and in all the other cases it would be necessary to obtain the consent of the arbitrator for disclosure. Again, Mr. Rushbrooke relied on the case where enforcement of a foreign arbitral award was in issue but Mr. Stanley said that it was obvious that one did not need to obtain permission in such an instance.

29 Mr. Rushbrooke said that a party breaches arbitral confidentiality at his own risk and the more blatant the breach, the greater the risk. It is for the defendant to injunct a claimant from bringing proceedings, not for the claimant to seek leave from the court. The fact that a claimant can in some circumstances seek the direction of the arbitrator or the court does not mean that he, she or it must do so.

Is there a breach?

30 The first question I have to decide is whether the Amended Particulars of Claim are capable of breaching confidentiality at all. Mr. Stanley says that they do, Mr. Rushbrooke that they do not.

31 Mr. Stanley points to all the correspondence and says that there is a plain breach because the letters (for example that are referred to in paragraph 19 of the Amended Particulars of Claim which had to be pleaded for the claimant to establish misuse of information) were written in the arbitration as shown by the fact that the heading is in the arbitration and that the correspondence was copied to the arbitrator.

32 I do not think that Mr. Stanley's contention is necessarily correct. The mere fact that letters are written in the arbitration does not make them documents subject to arbitral confidentiality. They do not "[open] the door of the arbitration room", (see *Hassneh* at 247) to the parties to whom the documents are disclosed.

33 There is an implied obligation of a person who obtains documents on disclosure not to use them for any purpose other than the dispute in which they were obtained and again it does not matter that the documents were not in themselves confidential documents. However the correspondence in this case relates to documents that were not, and could not be, deployed in the arbitration at all. The material subject to the duty of confidentiality was considered by Colman J in *Hassneh* and although his summary cannot be considered to be exhaustive it is plain that the duty only applies to facts in issue in the arbitration. The whole point of the claim is that the documents in issue were personal documents, irrelevant to the subject matter of the arbitration.

34 That said, it seems to me that [21.3] and [21.4] of the Amended Particulars of Claim <u>are</u> capable of breaching the arbitral duty of confidentiality. [21.3] provides that the accessing of the emails in the Account was "unnecessary and disproportionate" and [21.4] alleges that "the handful of personal emails that were disclosed in the arbitration proceedings… could have been obtained by other means." In order to determine whether access was disproportionate and whether the emails could have been obtained by other means (and it is plain from the correspondence that these matters are in dispute) it might be necessary to enquire what had been disclosed and why. Non-disclosure for this purpose is the other side of the coin from disclosure.

35 The fact that the defendant is within the ring of confidentiality so that disclosure between the claimant and the defendant does not matter, as Mr. Rushbrooke says, is not enough as the issue will have to be disclosed to others as well as merely S and the defendant.

36. Accordingly, the issue of whether it is incumbent on the claimant to seek permission or not is crucial.

Permission to bring the proceedings?

37 Mr. Rushbrooke relies on the statements in *Hassneh* showing, in his submission, that a claimant is not under a duty to ask permission from the court before disclosure. Colman J said at 249,

> "That Counsel has advised the arbitrating party of such reasonable necessity should in practice normally be conclusive of the matter."

And, crucially, at 250,

> "Therefore I conclude in the present case that if, as asserted, it is reasonably necessary for the establishment by the defendant of his causes of action… that he should disclose or in his pleadings quote from the arbitration award…he should be entitled to do so without editing either the award or the reasons and without having to apply to the court for leave to do so."

Again, at 251-252:

> "If documents are subject to a duty of confidence but are nonetheless not privileged from discovery, they ought, if relevant, to be listed in the list of documents served upon discovery. It might well be suggested that the party who had listed the documents, being satisfied that disclosure of the documents was necessary for disposing fairly of the cause or matter… ought to permit them to be inspected by the opposing party without application to the court. Whereas this course may indeed be theoretically open to the party, it is a course which is potentially extremely hazardous. He may indeed unnecessarily disclose documents and may therefore be in breach of his duty of confidence. He is thus in a cleft stick….
>
> In these circumstances the course envisaged in… *Dolling-Baker v Merrett* [[1990] 1 WLR 1205] is for the court to resolve the conflicting interests on the one hand of protecting the confidential status of the documents, and on the other of facilitating production of documents in compliance with the discovery obligation and for the purpose of protecting the rights of the party in possession."

38 Mr. Stanley said that in the light of *Ali*, a more recent case decided by a higher court, one had to be very careful in applying *Hassneh*. In *Ali* the Court of Appeal held that to determine imposing an obligation of confidentiality was to be implied as a matter of law into arbitration agreements subject to certain exceptions. Potter LJ set out those exceptions, saying the following,

> "While acknowledging that the boundaries of the obligation of confidence…have yet to be delineated… the matter in which that may best be achieved is by formulating exceptions of broad application to be applied in individual cases, rather than by seeking to reconsider and, if necessary adapt, the general rule on each occasion in the light of the particular circumstances and presumed intentions of the parties at the time of their original agreement.
>
> As to those exceptions, it seems to me that, on the basis of present decisions, English law has recognised the following exceptions to the broad rule of confidentiality: (i) consent, that is, where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the court… (iii) leave of the court. It is the practical scope of this exception, that is, the ground on which such leave will be granted, which gives rise to difficulty. However, on the analogy of the implied obligation between banker and customer, leave will be given in respect of (iv) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. In this context, that means 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 that third party or to defend a claim, or counterclaim, brought by the third party; see *Hassneh*..."

39 Thus, said Mr. Stanley, it is plain from *Ali* that the exception at (iv) is dependent on (iii) and that leave must be applied for in all circumstances.

40 In the yet more recent case of *Emmott,* however, Lawrence Collins LJ restated the exceptions as follows,

> "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; ~~the~~ 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."

41 Thus, Lawrence Collins LJ decided that leave of the court was separate from the case where it was reasonably necessary for the protection of the legitimate interests of an arbitrating party.

42 At [109], Lawrence Collins LJ went on to say,

> "In essence the application was the mirror image of what often happens in cases of this kind, namely an injunction by a party seeking to restrain disclosure… In the present case Mr. Emmott took the course of seeking directions. MWP, [the respondent] did not seek a stay on the ground that it was a matter for the arbitral tribunal."

43 Indeed, it does seem that many cases have been brought without seeking leave of the court in advance, for example, the disclosure line of authorities such as *Dolling-Banker v Merrett* and the cases therein cited.

44 Thomas LJ decided that disclosure was a matter for the arbitral tribunal. Lawrence Collins LJ, while he saw "the force of what he [Thomas LJ] says in paragraph 123 below", expressed no concluded view on it and Carnwath LJ preferred "to express no view on the interesting question raised by Thomas LJ."

Thomas LJ said at [123]-[124],

> "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… 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….
>
> 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 between the parties to the arbitration. *Ali*... concerned an arbitration to which the 1996 Act did not apply; *Glidepath BV v Thompson* [2005] 2 Lloyds 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 seen as a device by the court to create a means of intervening in arbitration agreements inconsistent with the 1996 reforms."

45 And he observed at paragraph 122 that,

> "This was not a case, as with 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…"

46 Accordingly, my understanding is that Thomas LJ was saying that while the arbitration continued the arbitrator is the only party who should be determining the issue in circumstances where that issue is only between the parties to the arbitration.

47 If the claimant had chosen to sue S alone, there would be little doubt that the issue between them as to what use could be made of arbitration material would be a matter for the arbitrator, failing whom, for the Commercial Court or other court specified for the purpose.

48 However, the claimant has chosen to sue the defendant only, and the defendant is not a party to the arbitration agreement. The claimant's actions are not irrational or obviously tactical since the defendant has said that only members of the defendant have seen the Account and that no partner or employee of S has done so.

49 Mr. Rushbrooke objects to the form of the amended application notice. He says that, first, the defendant abandoned its position that the court had no power to determine the claim and then relied on s.44 of the Arbitration Act 1996, which had no application.

50 Mr. Rushbrooke submitted that s.44 of the Arbitration Act gives the court no such power as is alleged by the defendant in the event that the arbitrator is not *functus officio*. S. 44 is concerned with the court's power in support of arbitral proceedings in relation to specified matters. It provides:

> "(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
> (2) Those matters are--
> (a) the taking of the evidence of witnesses;
> (b) the preservation of evidence;
> (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings-

(i) for the inspection, photographing, preservation, custody or detention of the property, or
(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon the property;
And for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;
(d) the sale of any goods the subject of the proceedings;
(e) the granting of an interim injunction or the appointment of a receiver."

51 Mr. Stanley relied on *Westwood Shipping Lines Inc & Anor v Universal Schiffahrtgesellschaft MBH* [2012] EWHC 3837 Comm; [2013] 1 Lloyds Rep 670, in which Flaux J said at [6] (the parties taking no point on jurisdiction) that,

> "It is quite clear that, the arbitration having come to an end, the only court that has jurisdiction to determine whether materials which are produced in a confidential arbitration should be released, so the party can use them for the purposes of English proceedings is the English court, and specifically the Commercial Court, which is the supervising court under the Arbitration Act 1996. Therefore, this application is properly brought under s.44 of that Act..."

52 However, submitted Mr. Rushbrooke, Flaux J was simply wrong. Be that as it may (and far be it for me to challenge Flaux J in an area in which he has particular expertis), I agree with Mr. Rushbrooke that s.44 has no application to the present case. The two extensions of s.44 relied upon by Mr. Stanley cannot be right. First, he said that "property" in s.44(2)(c) must be given a wide meaning so as to cover misuse of confidential information, and secondly, s.44(2)(e) gives the court wide powers to restrain a party from misuse of confidential information. Property is restricted to orders specified in (c) and the claimant cannot, in my view, be brought within (e).

53 I suspect that Mr. Stanley saw the difficulty with his submission because he said that there was nothing stopping him from applying to amend his application notice to rely on CPR Part 62.2(1)(a) and (d) (respectively, "any application to the court under the 1996 Act" and "any other application affecting arbitration proceedings or an arbitration agreement".) In essence he said that there were two perfectly viable mechanisms to bring the matter before the correct tribunal and that was what should be done. I tend to agree with Mr. Rushbrooke that he is facing a moving target but I do not need to comment further because of the view I have taken.

54 I note that all the relevant authorities say that the boundaries of the law in this area have yet to be delineated. For example, Lawrence Collins LJ pointed out in *Emmott* at [107] that,

> "The limits of that obligation [of confidentiality] are still in the process of development on a case-by-case basis."

55 Also, I note that Robert Merkin on arbitration law says (under the heading "*Who decides the confidentiality question?"*) at 17.28 that,

> "If the arbitration is ongoing and X wishes to disclose arbitral documents to a third party, it would seem that X may do so only by means of an application to the arbitrators for permission to do so. This follows from the principle that the duty of confidentiality arises from an implied term in the arbitration clause itself and thus is a matter to be resolved by the arbitrators."

56 Mr. Stanley told me that he knew nothing about the arbitration and therefore was unable to advise on what would be a proper defence. On the other hand, he submitted, the claimant can apply to the arbitrator, failing whom the Court, and resolve the matter speedily.

Human Rights

57 As a separate matter, Mr. Rushbrooke submitted in written submissions that it would be an infringement of the claimant's rights under Article 6 of the European Convention on Human Rights ("ECHR") for her to be required to go through the arbitrator to seek such a ruling and that there would additionally be a significant breach of her Article 8 ECHR right. Although Mr. Rushbrooke accepted that a party can voluntarily waive her human rights by submitting to arbitration (see *Stretford v The Football Association* [2007] Bus LR 1052) he said that this is not such a case because the dispute submitted to arbitration was not the dispute with the defendant but a quite different dispute.

58 However, Mr. Stanley submitted 9in written submissions in reply and relying on *Emmott* at [119]) that as the obligation of confidentiality is implicit in the arbitration agreement (See *Emmott* at [116] and [118] and the passage cited from *Merkin*) any dispute as to the scope of that implied term must relate to the interpretation of the arbitration agreement. Thus the decision as to the ambit of the obligations should during the currency of the arbitration be a matter for the arbitrator. Mr. Stanley thus said that Article 6 cannot be breached because a stay is necessary to protect S's rights and to secure the orderly resolution of these proceedings. Similarly, if it is decided (by the arbitrator or the court) that

it is necessary that the claimant should preserve the confidentiality of the arbitration in order to protect S's rights, there will be no breach of Article 8.

59 I am not sure that Mr. Stanley's submissions are in accord with *Emmott* as it is made clear in that case at [119] that the principles to which he refers only apply as between the parties to the arbitration. The present claim is against a different party for alleged tortious conduct carried out in the course of arbitration proceedings.

60 Mr. Rushbrooke's submission was, first, that requiring the claimant to apply to the arbitrator would involve her in significant expense, which would in itself represent a substantial impairment of her right of access to the courts. Mr. Stanley objects that there is no evidence as to the extraordinary expense for which the claimant contends.

61 Secondly, says Mr. Rushbrooke, if the arbitrator refused to give the claimant permission, her claim would be at an end, so that she would have no "fair and public hearing" within Article 6.1. Instead, her access to the courts would have been barred because she would have no effective right of appeal or challenge. Mr. Rushbrooke asserts, and Mr. Stanley disputes, that the arbitrator's ruling would not be an award within the meaning of the Arbitration Act as it would be a collateral direction incidental to the issues in the arbitration claim but not determinative of any of them.

62 Even if Mr. Stanley were right and the arbitrator's ruling were to be characterised as an award, either an application to the court for permission would be necessary under s.69(2)(b) of the Arbitration Act or there would have to be a challenge under s.68 on the ground of serious irregularity. Thus, Mr. Rushbrooke submits, if the claimant were able to bring a challenge to an adverse ruling by the arbitrator, the jurisdictional gateways allowing her to do so would be so narrow as to amount to a substantial impairment of her Article 6 right of access to the courts to pursue her present claim, a claim made against a non-party to the arbitration.

63 Further, submits Mr. Rushbrooke, a hearing by the arbitrator would not satisfy the requirement that the claimant should have her rights determined by a public authority, as opposed to a private tribunal, required to guarantee due protection of her Article 6 and Article 8 rights.

64 I observe that in the context of the exception to the confidentiality principle of protection of a party's legitimate interests, the concept of reasonable necessity is sufficiently flexible that the court ought not to require a party to proceedings "to prove necessity regardless of difficulty or expense" (see Potter LJ in *Ali* at 327). The same must be true of the ECHR.

65 Mr. Stanley however argues that a stay does not breach Article 6 because the stay is necessary to protect S's rights and ensure orderly resolution of these proceedings.

66 Much of his argument depends on the contention that the claimant, in signing the Arbitration Agreement, agreed to limit her Article 6 rights. As I have said, I do not think this is correct but, in view of the decision I have reached, I do not need to decide the human rights question.

Conclusion

67 I find the claimant does not have to seek the permission of the arbitrator or the court before commencing proceedings against the defendant.

68 However, I see that the defendant is, as Colman J put it, in a cleft stick. Even though it is permitted to defend itself (it is undoubtedly reasonably necessary for the protection of its legitimate interests and, although not an arbitrating party it is within the same ring of confidentiality as the parties) it does not know how far it is permitted to go in so doing. Whatever it does, it is likely to be attacked either by the claimant or by S. I can do no better than to repeat the words of Colman J,

> "Whereas this course may indeed be theoretically open to it, it is a course which is potentially extremely hazardous."

69 However, if the claimant were to, as Mr. Stanley submits she should, apply to the arbitrator for permission to proceed, the defendant, as a non-party has no right to address the arbitrator, although this is not a matter which troubles Mr. Stanley, who is, after all, requiring application to be made to the arbitrator.

70 Nevertheless, Mr. Stanley would not be able to tell the arbitrator about the difficulty he is in. If the arbitrator simply said the claimant could bring her proceedings and that the defendant was entitled to defend itself, the defendant would be no better off. In particular, the arbitrator would be likely to decline to answer the questions about the defendant's putative defence or what might happen at trial. The terms of the application are so wide that it would be impossible for the arbitrator, even if he was minded to do so in relation to a non-arbitral matter, to say what the defence might be or what issues would arise at trial and therefore whether they would breach arbitral confidentiality. I therefore agree with Mr. Rushbrooke that the application notice is so widely drawn that it is impossible for the arbitrator to determine what issues will arise in the as yet unformulated defence or in the course of a court hearing.

71 I note however Mr. Stanley's submission that it is also impossible for the defence to be formulated because of arbitral confidentiality. So, if it is for the defendant to apply, not for an injunction, (which, according to Mr. Rushbrooke, it will not get), but for directions as to whether it will breach arbitral confidentiality in putting forward a particular defence, Mr. Stanley says that he is not permitted to see, let alone draft, that defence as he is not counsel in the case and indeed the defendant has no counsel in the case. The matter is different from *Dolling-Baker* as it is not the party itself but the solicitor to the party that is required to defend itself.

72 It seems to me that the only proper way out for the parties (assuming that S does not consent in the absence of such an application) is for the defendant to apply to the Court – and by "the Court", I mean the court seized of the action, that is to say, this Division and not the Commercial Court, for an order as to what it may and may not do, joining both the claimant and the defendant to the application.

73 Where it is necessary to protect his, her or its interests, an arbitrating party, including for this purpose a person within the ring of confidentiality, can breach arbitral confidentiality. There can therefore be no objection to the defendant instructing counsel and solicitors as to its defence, although if the defendant is afraid of comeback from S it can try to obtain express consent from S before so doing. I appreciate that S has already refused its consent(by letter dated 25 January 2015 addressed to the defendant's solicitors) but, if and when it is joined as a party to the defendant's application, it may take a different view. In any event, the Court can determine what the defendant is and is not permitted to do, and S will be a party to that application and can address the Court.

74 Although Thomas LJ repeatedly said in *Emmott* that the implied term of confidentiality should not be formulated so as to confer jurisdiction on the court, he was speaking only of the parties to the arbitration itself. He accepted that the case was different where the court was determining an application made by a stranger to the arbitration: see [119], [124] both at pages 634 and 635 and [127]. I appreciate that the defendant says it was within the ring of confidentiality and not therefore a stranger in any real sense but, crucially, it was not a party to the Arbitration Agreement.

75 As to the question I am expressly asked, therefore, my decision is that the claimant did not need to obtain the permission of the Court to commence proceedings and I therefore refuse the stay sought.