Neutral Citation Number: [2019] EWHC 460 (Comm)

Case No: CL-2015-000555

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 07/03/2019

Before :

THE HONOURABLE MRS JUSTICE MOULDER

- -

Between :

THE CHARTERED INSTITUTE OF ARBITRATORS	**Applicant**
- and –	
B **C** **D**	**Respondents**

- -
- -

Mr J Potts (instructed by **the Applicant**) for the **Applicant**
Ms K Gough (instructed by **Browne Jacobson LLP**) for **Respondent B**

Hearing dates: 18 February 2019

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APPROVED JUDGMENT

Mrs Justice Moulder :

1. This is the judgment on the applications dated 4 June 2018 and 15 June 2018 by the applicant, The Chartered Institute of Arbitrators, for an order under CPR 5.4C(2) to obtain copies of certain documents and for declarations concerning the use of those documents (and related documents) in disciplinary proceedings pending between the applicant and the first respondent, B.

Background

2. The background to this matter is that B was a fellow of The Chartered Institute of Arbitrators and the applicant has laid disciplinary charges against B in respect of his conduct relating to his appointment in an arbitration.

3. In January 2013 D applied to the Chartered Institute of Arbitrators for the appointment of an arbitrator after a dispute arose on a contract between C and D. On 4 February 2013 The Chartered Institute of Arbitrators confirmed the appointment of B.

4. By letter of 18 February 2015 C, through its solicitors, Stephenson Harwood, raised requests for information concerning the nature and extent of the professional relationship between B and D. This followed a judgment of Ramsey J in *Eurocom Ltd v Siemens plc* [2014] EWHC 3710 (TCC). In that case D had applied to the Royal Institution of Chartered Surveyors for the appointment of an adjudicator, one of whom was B, and a representative of D stated that other named candidates were unable to act. The judge found that there was a strong prima facie case that this representative deliberately or recklessly answered the question as to whether there were conflicts of interest so as to exclude adjudicators who he did not want to be appointed.

5. D responded to that letter on 27 February 2015. Stephenson Harwood then posed further questions by letter of 11 March 2015 and wrote to B requesting related information.

6. Further correspondence ensued between the various parties and B called an arbitral hearing to determine whether the arbitral tribunal was “properly constituted”. The hearing took place on 17 April 2015 and following that hearing B issued a ruling confirming that the tribunal was properly constituted and that he had no conflict of interest.

7. Further correspondence was exchanged in May and June 2015 culminating in Stephenson Harwood writing on 8 July 2015 to B asking him to recuse himself.

8. An application was brought by C pursuant to section 24(1)(a) of the Arbitration Act 1996 (the "Section 24 Application") for the removal of B as the arbitrator on the grounds that circumstances gave rise to justifiable doubts as to his impartiality.

9. A hearing was held on 8 February 2016 and Hamblen J concluded in his judgment of 17 February 2016 [2016] EWHC 240 (Comm) that the grounds for removal were made out in that they raised the real possibility of apparent bias.

10. Following that judgment B resigned as arbitrator. However the Professional Conduct Committee of The Chartered Institute of Arbitrators determined, following a complaint from a third party, that disciplinary charges should be laid against B and referred to a disciplinary tribunal.

11. There are six charges made against B. In summary they are as follows:

    i) that he failed to disclose interests likely to affect his independence or impartiality; reliance is placed on the transcript of the hearing on 17 April 2015.

    ii) that he wrongfully signed and submitted the acceptance of nomination form.

    iii) that he failed to make disclosure on the acceptance of nomination form of any involvement with either party to the dispute; reliance is placed on the transcript of the hearing of 17 April 2015.

    iv) that he called a meeting which was carried on inappropriately and of his own motion; reliance is placed on the transcript of the hearing.

    v) that he questioned counsel during the hearing on 17 April 2015 in an aggressive and/or a hostile manner; reliance is placed on the transcript of the hearing.

    vi) to the extent that any of the disciplinary charges referred to above are found proven, it is alleged that B is guilty of misconduct having acted in a manner which is injurious to the good name of the Institute and acted in a manner which fell below the standards expected of a competent practitioner in the field of private dispute resolution.

Applications

12. By its application of 4 June 2018 (the "First Application") The Chartered Institute of Arbitrators seeks:

i) an order under CPR5.4 C(2) to obtain copies of the following documents from the court records in the proceedings in the Section 24 Application:

a) statements of case;

b) witness statements, including exhibits;

c) written submissions and skeleton arguments (together the "Documents");

ii) alternatively, an order that C supply the Documents to the Chartered Institute of Arbitrators.

13. In so far as the application sought "disclosed documents" on the court file, that was abandoned in oral submissions and I do not propose to consider that category of documents.

14. By its application of 15 June 2018 (the "Second Application"), the applicant seeks declarations that:

i) the Chartered Institute of Arbitrators and B are entitled in the context of the disciplinary proceedings to refer to and/or rely on:

a) the Documents and

b) the circumstances of B's nomination and appointment as arbitrator in matters concerning D;

ii) use of such documents is in the public interest.

15. The applications are supported by a witness statement of Thomas Cadman dated 15 June 2018 and a second witness statement dated 11 February 2019. Mr Cadman is the Director of Governance and Legal Services at The Chartered Institute of Arbitrators.

16. B has filed a witness statement dated 8 February 2019 in response to the application dated 15 June 2018 noting in particular that by that application The Chartered Institute of Arbitrators seeks an order that B pay the costs of that application. B does not respond by that witness statement to the First Application for documents. B was represented by counsel at the hearing of the applications; counsel for B attended on the basis of the serious nature of the Second Application and the application for costs. The court did not hear submissions on the application for costs at the hearing but counsel for B did address the court on the general principles arising out of the applications.

17. In his second witness statement Mr Cadman referred to a waiver by Stephenson Harwood on behalf of C by letter dated 28 June 2018**.** In that letter Stephenson Harwood acknowledged to The Chartered

Institute of Arbitrators that the transcript of the hearing in April 2015 was exhibited to the first witness statement of Mr Thwaite filed in support of the Section 24 Application. Stephenson Harwood also confirmed that the hearing of the Section 24 Application was held in open court and that Hamblen J was taken to various parts of the transcript during the hearing and lengthy oral submissions were made by all parties in relation to the transcript. Stephenson Harwood also noted that the transcript was quoted at length in the judgment.

18. In their second letter of 28 June 2018, Stephenson Harwood confirmed that their client consented to The Chartered Institute of Arbitrators and B being able to refer to and/or rely on the documents filed in the Section 24 Application and to The Chartered Institute of Arbitrators obtaining copies of the documents from the records of the court insofar as they are held on the court file. They further consented to The Chartered Institute of Arbitrators and B being able to refer to and/or rely on the circumstances of B's nomination and appointment as arbitrator in that case in the context of the regulatory proceedings. Stephenson Harwood said that they were unable to provide the documents without the permission of the other party, D, but that they would not oppose any application to the court.

19. Mr Cadman's evidence is that he sought to contact D but D has become part of another company following a sale and demerger process and he was informed that that company was not able to assist The Chartered Institute of Arbitrators.

The First Application

Relevant Law

20. CPR 5.4C provides that:

> (1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –
>
> (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
>
> (b) a judgment or order given or made in public (whether made at a hearing or without a hearing), subject to paragraph (1B).
>
> …
>
> (2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any

> other document filed by a party, or communication between the court and a party or another person.
>
> (3) A non-party may obtain a copy of a statement of case or judgment or order under paragraph (1) only if –
>
> ...
>
> (d) judgment has been entered in the claim.

21. CPR 5.4D states:

> (1) A person wishing to obtain a copy of a document under rule 5.4B or rule 5.4C must pay any prescribed fee and –
>
> (a) if the court's permission is required, file an application notice in accordance with Part 23; or
>
> (b) ...
>
> (2) An application for an order under rule 5.4C(4) or for permission to obtain a copy of a document under rule 5.4B or rule 5.4C (except an application for permission under rule 5.4C(6)) may be made without notice, but the court may direct notice to be given to any person who would be affected by its decision.

22. The current state of the law is set out in the Court of Appeal decision in *Cape Intermediate Holdings Ltd v Dring* [2018] EWCA Civ 795. That decision is under appeal to the Supreme Court but this judgment proceeds on the basis that the law is as set out by the Court of Appeal.

23. So far as relevant to the Documents which are now sought by the First Application, the position as set out in the rules and *Dring* needs to be considered separately in relation to the categories of documents which are sought.

24. A non party is entitled to obtain a copy the Part 8 arbitration claim form but not any documents filed with or attached to the statement of case (CPR 5.4 C (1)). The Chartered Institute of Arbitrators is therefore entitled to obtain copies of the statements of case.

25. Witness statements and exhibits in a Part 8 Claim are "records of the court" and it would appear from *Dring* that a non party may be permitted access to them: *Dring* at [36]-[41]:

> "[36.] The critical issue in relation to the court's jurisdiction under CPR 5.4C(2) is the meaning of the "records of the court".
>
> …
>
> [40.] … The "records of the court" are essentially documents kept by the court office as a record of the proceedings, many of which will be of a formal nature. The principal documents which are likely to fall within that description are those set out in paragraph 4.2A of CPR 5APD.4, together with "communication between the court and a party or another person", as CPR 5.4C(2) makes clear. In some cases there will documents held by the court office additional to those listed in paragraph 4.2A of CPR 5APD.4, but they will only be "records of the court" if they are of an analogous nature.
>
> 41. This will include a list of documents, but not the disclosed documents themselves. It may include witness statements and exhibits filed in relation to an application notice or Part 8 proceedings (see CPR 8.5), but not usually witness statements or expert reports exchanged by the parties in relation to a trial. Such statements and reports are not generally required to be filed with the court and they will typically be provided to the court only as part of the trial bundles.

26. CPR8.5 states:

> (1) The claimant must file any written evidence on which he intends to rely when he files his claim form.
>
> (2) The claimant's evidence must be served on the defendant with the claim form.
>
> (3) A defendant who wishes to rely on written evidence must file it when he files his acknowledgment of service.
>
> (4) If he does so, he must also, at the same time, serve a copy of his evidence on the other parties.
>
> (5) The claimant may, within 14 days of service of the defendant's evidence on him, file further written evidence in reply.

> (6) If he does so, he must also, within the same time limit, serve a copy of his evidence on the other parties.
>
> (7) …

27. Whilst not entirely free from doubt, the passages cited above would suggest that the witness statements and exhibits which were filed in the Section 24 Application can be obtained as being records of the court but it is not of right but will require the permission of the court under CPR 5.4C(2) and the issue is therefore whether the court should exercise its discretion and grant permission.

28. If I am wrong on that, and the documents do not fall within "records of the court" then the position as set out in *Dring* is that documents which have been read out and/or read by the judge in open court may be provided under the court's inherent jurisdiction: *Dring* at [107] and [108].

> "107. I accept that developments since *GIO* mean that the court should now be regarded as having inherent jurisdiction to allow non-parties access to documents read or treated as read in open court, but it is important that that category of documents is clearly defined and that it does not go too far and put non-parties in a markedly better position than they would have been when trials were conducted orally. "
>
> 108. Based on current civil court practices, I would accordingly confine the jurisdiction to documents which are read out in open court; documents which the judge is invited to read in open court; documents which the judge is specifically invited to read outside court, and documents which it is clear or stated that the judge has read. These are all documents which are likely to have been read out in open court had the trial been conducted orally."

29. Counsel for the applicant identified those documents sought which had been read out and/or read by Hamblen J in open court. The documents sought which, on the evidence of the transcript of the hearing on 8 February 2016, I am satisfied were read out and/or read by Hamblen J, are as follows:

    i) witness statements of Mr Thwaites of Stephenson Harwood and of B.

    ii) April 2015 transcript of the hearing

iii) RICS form dated 21 January 2010

iv) Correspondence relating to the appointment of B and the ruling of 30 April 2015 (items 15 – 32 and 34 of the Annex to the applicant's skeleton argument).

30. Accordingly, these documents fall within the inherent jurisdiction of the court and again the question is whether the court should exercise its discretion to grant permission.

31. As to the skeleton arguments, the applicant relied on *Dring* at [69]:

> "The GIO case is therefore authority that the court has an inherent jurisdiction to allow non-parties to obtain copies of skeleton arguments/written submissions used in lieu of oral submissions. The reason for this is that open justice requires that the public have the same opportunity to understand the issues in a case as they would have had if the openings had been given orally."

32. In *Dring* the court summarised the position at [112] as follows:

> "(1) …
>
> (2) There is inherent jurisdiction to allow non-parties inspection of:
>
> (i) Witness statements of witnesses, including experts, whose evidence stands as evidence in chief and which would have been available for inspection during the course of the trial under CPR 32.13 .
>
> (ii) Documents in relation to which confidentiality has been lost under CPR 31.22 and which are read out in open court; which the judge is invited to read in open court; which the judge is specifically invited to read outside court, or which it is clear or stated that the judge has read.
>
> (iii) Skeleton arguments/written submissions or similar advocate's documents read by the court provided that there is an effective public hearing in which the documents are deployed.
>
> "(iv) Any specific document or documents which it is necessary for a non-party to inspect in order to meet the principle of open justice. " [emphasis added]

33. The explanation provided in relation to skeleton arguments as set out at [61]- [68] is that skeleton arguments may be provided where it is necessary in order to understand the issues in the case:

> "61. ... GIO involved an application by a non-party, FAI, for disclosure of various classes of documents... On appeal the application was narrowed so as to seek copies of documents referred to in witness statements and of opening skeleton arguments and any documents referred to therein. FAI wanted access to these documents to assist it in assessing what defences and/or claims against third parties it might have in a closely related action in which the same brokers and sub-brokers were involved in placing certain reinsurance.
>
> 62. The procedural background to the application was that before the trial started there had been a settlement between the plaintiff reinsurers and the defendant reassured and there had also been a settlement between the assured and the third party brokers. That left for trial claims over by the head brokers against two third party sub-brokers. After short oral openings, counsel for the head brokers and sub-brokers respectively placed before the judge lengthy written openings and invited him to read them following which they would deal with any queries and the trial could proceed. The trial was then adjourned for five days to give the judge reading time. In the course of this period the claimant head brokers settled with one of three sub-brokers, leaving in issue its claim against the other two sub-brokers. These latter did not appear and accordingly, when the trial resumed, the judge went on to prepare and two days later to deliver judgment on that claim. In the meantime FAI had made its disclosure application.
>
> 63. ...
>
> 64. The court then considered FAI's application for copies of the written openings, skeleton arguments and the documents referred to therein. This application was advanced on the basis of the inherent jurisdiction of the court and in reliance on the principle of open justice.
>
> ...

68. The court accordingly rejected the application for copies of the documents. It, however, granted the application for the skeleton arguments/written submissions, explaining as follows at p995-7:

”the arguments for such an exercise in respect of the written submissions of counsel, or of skeleton arguments which are used as a substitute for oral submissions, seem to me to be a good deal stronger. [counsel for the respondent] for G.M.R. has emphasised the primary but limited purpose of the “public justice” rule, namely to submit the judges to the discipline of public scrutiny. As he neatly put it, it is designed to give the public the opportunity to “judge the judges” and not to judge the case, in the sense of enabling the public to engage in the same exercise of understanding and decision as the judge. That of course is true. However, the confidence of the public in the integrity of the judicial process as well as its ability to judge the performance of judges generally must depend on having an opportunity to understand the issues in individual cases of difficulty. As Lord Scarman observed in Home Office v. Harman [1983] 1 A.C. 280 , 316:

”When public policy in the administration of justice is considered, public knowledge of the evidence and arguments of the parties is certainly as important as expedition: and, if the price of expedition is to be the silent reading by the judge before or at trial of relevant documents, it is arguable that expedition will not always be consistent with justice being seen to be done.”

This is particularly so in a case of great complication where careful preliminary exposition is necessary to enable even the judge to understand the case. Until recently at least, the opportunity for public understanding has been afforded by a trial process which has assumed, and made provision for, an opening speech by counsel. Further, the introduction in the Commercial Court, followed by general encouragement, of the practice of requiring skeleton arguments to be submitted to the court prior to trial was, as the name implies, aimed at apprising the court of the bones or outline of the parties’ submissions in relation to the issues, rather than operating as a substitute for those

> submissions…. If, as in the instant case, an opening speech is dispensed with in favour of a written opening (or a skeleton argument treated as such) which is not read out, or even summarised, in open court before the calling of the evidence, it seems to me impossible to avoid the conclusion that an important part of the judicial process, namely the instruction of the judge in the issues of the case, has in fact taken place in the privacy of his room and not in open court. In such a case, I have no doubt that, on application from a member of the press or public in the course of the trial, it is within the inherent jurisdiction of the court to require that there be made available to such applicant a copy of the written opening or skeleton argument submitted to the judge.
>
> ...
>
> In my view, the appropriate judicial approach to an application of this kind in a complicated case is to regard any member of the public who for legitimate reasons applies for a copy of counsel's written opening or skeleton argument, when it has been accepted by the judge in lieu of an oral opening, as prima facie entitled to it." [emphasis added]

34. Notwithstanding the reasoning referred to above, the principle, as summarised at [112] is not expressed to be confined to circumstances where the complexity of the case and the use to which the written skeletons were put, justifies access to the skeletons. In my view this was not a case where the complexity and the use to which written skeletons were put justifies access to the skeleton arguments. However, assuming the principle is as broad as set out in [112], I will consider this category as a matter of discretion.

Exercise of discretion

35. The approach of the court to the exercise of its discretion was stated in *Dring* to be as follows:

> "127. As to the principles to be applied when the court is considering whether and how to exercise its discretion to grant permission for copies to be obtained by a non-party of the records of the court under 5.4C(2) the court has to balance the non-party's reasons for seeking copies of the documents against the party to the proceedings'

> private interest in preserving their confidentiality. Relevant factors are likely to include:
>
> (1) The extent to which the open justice principle is engaged;
>
> (2) Whether the documents are sought in the interests of open justice;
>
> (3) Whether there is a legitimate interest in seeking copies of the documents and, if so, whether that is a public or private interest.
>
> (4) The reasons for seeking to preserve confidentiality.
>
> (5) The harm, if any, which may be caused by access to the documents to the legitimate interests of other parties.
>
> 128. I would endorse the general approach adopted in *Dian* and *Pfizer Health* that the court is likely to lean in favour of granting permission under 5.4C(2) where the principle of open justice is engaged and the applicant has a legitimate interest in inspecting the identified documents or class of documents. Conversely, where the open justice principle is not engaged, the court is unlikely to grant permission unless there are strong grounds for thinking that it is necessary in the interests of justice to do so.
>
> 129. In relation to the court's inherent jurisdiction the factors relevant to the exercise of discretion are likely to be such as those set out in paragraph 127 above. In the light of the guidance provided in *GIO, Barings* and *Lilly Icos*, and the importance of the principle of open justice, the court is likely to lean in favour of granting access to documents falling within the categories set out in paragraph 112(2) above where the applicant has a legitimate interest in inspecting the identified documents or class of documents."

36. Dealing in turn with the factors identified: firstly the extent to which the open justice principle is engaged. In *Dring* the court held that:

> "[124] …In relation to trials I accept that there has to be an effective hearing for the principle to be engaged. Once there is a hearing, however, the

> right of scrutiny arises, the principle of open justice is engaged and it will continue to be so up and until any settlement or judgment. The same will apply to the hearing of interlocutory applications.
>
> …
>
> [126] The principle of open justice is accordingly engaged as soon as there is an effective hearing. It may be more fully engaged if the hearing proceeds to a judgment, but it is still engaged. The only circumstance in which a judicial decision is likely to be necessary to engage the principle is where the application is determined on the papers and so there is no hearing, as was the case with one of the applications in *Dian*."

37. However as is clear from *Dring* the essential purpose of granting access to such documents is to provide open justice, that is to say to facilitate maintenance of the quality of the judicial process in all its dimensions, so that the public may be satisfied that the courts are acting justly and fairly and the judges in accordance with their judicial oath. In this case the open justice principle is engaged but the documents are not being sought in the interests of open justice. Whilst on the principles cited above, the court should lean in favour of granting permission, the court has to consider the non-party's reasons for seeking copies of the documents and assuming the applicant has a legitimate purpose, balance that against the party to the proceedings' private interest in preserving their confidentiality.

38. It was submitted for the applicant that the Documents are sought for a legitimate purpose which is in the public interest.

39. The applicant is described in Mr Cadman's second witness statement (paragraph 9) as "the world's leading professional body for promoting the settlement of disputes by arbitration, mediation and other private dispute resolution methods." Mr Cadman also refers to its Royal Charter and the objects set out in the Charter to act in the public interest to promote and facilitate worldwide the determination of disputes by arbitration and alternative means of private dispute resolution other than resolution by the court (Article 4.1).

40. Whilst it is not the position that membership of authorisation by The Chartered Institute of Arbitrators is a prerequisite to persons wishing to act as arbitrators, the Charter also provides (Article 5.1(6)) that it supervises and monitors the performance of members and exercises disciplinary control through "an independent and impartial system of disciplinary proceedings" with the power to suspend or expel a member.

41. It therefore seems to me that The Chartered Institute of Arbitrators has a legitimate interest in seeking copies of the Documents and that interest can be said to be a public interest.

42. The court then has to balance the legitimate interest of the Chartered Institute of Arbitrators against the reasons for seeking to preserve confidentiality. It is accepted for the applicant that there is an implied obligation arising out of the nature of arbitration itself not to disclose or use for any other purposes documents prepared for, used or disclosed during the course of an arbitration: *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314 (CA); *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 and *Glidepath BV v Thompson* [2005] EWHC 818 (Comm).

43. In *Glidepath* Colman J considered an application under CPR 5.4 by a non party for access to documents in connection with a freezing injunction and a *Norwich Pharmacal* order where the proceedings had been stayed in favour of arbitration. The non-party was seeking the documents in connection with proceedings he was bringing in the Employment Tribunal.

44. Colman J referred to the decision of the Court of Appeal in *Trogir* and the exceptions to the principle of confidentiality in arbitration proceedings as follows:

> "[15] There can be no doubt that arbitration proceedings and materials produced in the course of them are treated as confidential to the parties and the arbitrator subject to certain exceptions. The result of the most recent Court of Appeal authority, Ali Shipping Corporation v. Shipyard Trogir [1999] 1 WLR 316, is that the exceptions to the general rule of arbitral confidentiality include disclosure by leave or order of the court which may be given when and to the extent that it is reasonably necessary to protect or establish the legal rights of a party to the arbitration by a third party or otherwise in the interests of justice. There appears to be no authority for the proposition that a third party can outside the ambit of disclosure by a party to an arbitration obtain an order from the court for access to materials in an arbitration to which he is not a party so that he can deploy them as evidence in other proceedings in which he is a party. [emphasis added]
>
> [16] The character of confidentiality relating to arbitration proceedings is reflected in CPR 62.4.5.1 set out in paragraph 12 above. Because the intervention of the court in relation to arbitration is

> a judicial facility ancillary to the arbitral process, the criteria by reference to which the court should exercise its discretion with regard to the granting of such permission must clearly give substantial and normally overriding weight to the principles upon which the courts preserve the confidentiality of that process. In particular, a stranger to the arbitration proceedings should not in general be given access to claim forms unless he brings himself within an exception to the protection of confidentiality exemplified in Ali Shipping Corporation v. Shipyard Trogir, supra." [Emphasis added]

45. Colman J concluded in that case that the applicant had failed to bring himself within the exceptions.

46. The issue therefore for this court is whether the present case falls within the exception "the interests of justice". Colman J in his judgment referred to the decision in *City of Moscow v Bankers Trust Co* [2004] 1 CLC 1099 citing the judgment at [38] and the different circumstances which may drive the choice of arbitration:

> "38. The range of arbitration claims within the definition in CPR 62.10 is very wide. Adapting words of the President, there "cannot properly be a blanket protection of non-publication in all cases" which fall initially to be heard in private under CPR 62.10. It may be possible to some extent to group cases arising out of the same type of circumstances. I find it difficult, as at present advised, to see why a judgment determining that there was no valid or applicable arbitration agreement or (probably) that arbitrators issued an award without jurisdiction, or dismissing an application for a stay of current proceedings in favour of arbitration should be private. There are arbitrations about factual circumstances and issues which appear unlikely to involve any significant confidential information at all. The main motive to arbitrate may be different considerations, such as the expertise or informality of the arbitrators—many shipping and commodity arbitrations must fall into this category. In arbitration claims relating to such arbitrations, the starting point may easily give way to a public hearing. In every case, while it will be appropriate to start the hearing in private as contemplated by CPR 62.10, the Court should be ready to hear representations from one or other

> party that the hearing should be continued in public, and should anyway if appropriate raise this possibility with the parties, as Lord Woolf stressed in ex parte Kaim Todner [1999] QB 966"

47. Having cited this, Colman J said at [19]

> "That case was concerned with the publication of judgments in respect of applications for ancillary relief. The judgment does, however, recognise that the confidentiality of the arbitral process should in general be protected unless in the public interest it is appropriate that a judgment should be published. However, it is definitely not authority for the proposition that arbitration claims except those covered by CPR 62.10(3)(a) should be heard in public unless the court otherwise orders."

48. It was submitted by counsel for B that the parties have a route under the Arbitration Act to seek the removal of an arbitrator in a particular case and nothing more is required which would justify waving confidentiality. However, in my view there is a general public interest in maintaining the quality of and standards of arbitrators and this extends beyond the interests of the parties in a particular case to the wider section of the public who choose to refer their disputes to arbitration. I do not accept the submission that any distinction is to be drawn in this regard between an institution which regulates all members of the profession such as solicitors or barristers and an institution, membership of which is voluntary, and which regulates only a section of the profession, as I understand to be the position in relation to chartered accountants or arbitrators. In my view the general public are entitled to expect that arbitrators who belong to a recognised body meet certain minimum standards as laid down by that body and that those standards will be enforced. Arbitration is a quasi-judicial process for the resolution of disputes and in my view the interests of justice lie in supporting the integrity of this alternative dispute resolution mechanism.

49. The charges in the disciplinary proceedings are based on the transcript of the hearing in 2015 and correspondence not the decision of Hamblen J. It would therefore appear impossible to pursue the charges unless the transcript and correspondence are made available to The Chartered Institute of Arbitrators.

50. Finally, the court has to consider the harm, if any, which may be caused by access to the documents to the legitimate interests of other parties. As acknowledged by Stephenson Harwood for C, the hearing before Hamblen J was held in open court and Hamblen J was taken to various parts of the transcript during the hearing and lengthy

oral submissions were made by all parties in relation to the transcript. The transcript was quoted at length in the judgment.

51. Whilst therefore D has not consented to disclosure pursuant to the first Application, these are materials which are largely already in the public domain.

Conclusion on the First Application

52. Colman J in *Glidepath* at [28] said:

> "It is important that the courts do not allow vague principles of open justice to cause them to pay mere lip service to the confidentiality of arbitration proceedings, while permitting inroads into that regime, unless it is really necessary to give access in the interests of justice."

53. In my view it can be said to be necessary in the interests of justice to give access to the transcript. As set out above the charges which are brought rely on the evidence of the transcript as to what transpired in the course of the hearing in April 2015 and given the extent to which it has been referred to publicly, there is minimal if any harm which would be caused by granting access.

54. As to the correspondence which is sought, the correspondence leading up to the hearing in April 2015 explains the background which led to the hearing and the way in which matters unfolded at the hearing. The subsequent ruling of B dated 30 April 2015 and the correspondence (identified above) which followed the hearing, provides part of the context as to what transpired in relation to the appointment and both the ruling and the correspondence were referred to by Hamblen J in his judgment. None of the correspondence contains details of the underlying dispute. Any harm to D resulting from the breach of confidentiality is in my view minimal. Insofar as the RICS form is concerned, this too is part of the context of the appointment of B and is again referred to in the judgment of Hamblen J. It seems to me therefore that it is in the interests of justice that all these documents should be made available to The Chartered Institute of Arbitrators.

55. Insofar as the witness statements are concerned, these are the witness statements of B and Mr Thwaites. These were clearly read by the judge and referred to in the transcript of the hearing before Hamblen J. It seems to me that these should be made available in the interests of justice to assist the disciplinary proceedings:

    i) Stephenson Harwood on behalf of C have consented to The Chartered Institute of Arbitrators and B being able to refer to

and rely upon the witness statements in the Section 24 Application;

ii) although D has not consented, any harm to D would appear to be minimal as to the extent that they relate to confidential matters in the underlying arbitration, the disciplinary tribunal can maintain confidentiality of the details by sitting (at least in part and to the extent necessary) in private.

iii) B has raised no objection to the access to his own statement other than on the basis of general obligation of confidentiality in arbitration proceedings.

56. Insofar as the application extends to skeleton arguments, the disciplinary proceedings are not based on the findings of Hamblen J and the arguments advanced before Hamblen J. In my view it is not necessary therefore in the interests of justice to give access to the skeleton arguments and I decline to grant an order in relation to these.

57. Should any of the documents ordered to be disclosed, no longer be available on the court records, then I direct that insofar as C has copies, C should make copies available to The Chartered Institute of Arbitrators (*Blue v Ashley* [2017] EWHC1553 (Comm) at [10]).

The Second Application -Declarations

Relevant law-jurisdiction

58. The first point which needs to be determined is whether or not the court has jurisdiction in the circumstances to make the declaration sought. The issue was raised in correspondence for B as to whether the court had power to make a declaration in an application brought under CPR 5.4, noting that there is no rule which allows a declaration to be made in the circumstances by a non-party.

59. It seems to me that the court has power to grant final declarations pursuant to section 19 of the Senior Courts Act 1981.

60. The circumstances in which the court will be prepared to grant declaratory relief were considered by the Court of Appeal in the case of *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387. It is clear from the judgment of Aikens LJ at [118] – [120] that the circumstances in which the court will be prepared to grant declaratory relief have been widened considerably in modern times.

> "[118] The court's present jurisdiction to grant a declaration is derived from statute, originally the Court of Chancery Act 1850, then section 50 of the Chancery Procedure Act 1852. The present

statutory foundation is section 19 of the Supreme Court Act 1981, and also CPR Pt 40.20. It is well – established that a claimant does not need to have a subsisting cause of action against a defendant before the court will grant a claimant a declaration: see Guaranty Trust Co of New York v Hannay.

[119] The grant of a declaration is discretionary. The law has developed since the statement of principle by Lord Diplock in the leading case of Gouriet v Union of Post Office Workers… There is no doubt that the circumstances in which the court will be prepared to grant declaratory relief are now considerably wider than they were thought to be after Gouriet's case and the Meadows case...

[120] For the purposes of the present case, I think that the principles in the cases can be summarised as follows: (1) the power of the court to grant declaratory relief is discretionary. (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question. (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue. (5) The court will be prepared to give declaratory relief in respect of a “friendly action” or where there is an “academic question” if all parties so wish, even on “private law” issues. This may particularly be so if it is a “test case”, or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned. (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court. (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised. In answering that question it must consider the other options of resolving this issue.”

61. Although it was suggested for B that The Chartered Institute of Arbitrators was not a party to proceedings for this purpose, it seems to me that The Chartered Institute of Arbitrators has made the application, albeit that in relation to the application under CPR 5.4, it applies for documents as a non party to the other proceedings before Hamblen J. It seems to me that The Chartered Institute of Arbitrators is a party to the application before the court and the question on which declaratory relief is sought for can be said to give rise to a real and present dispute between the parties as to the existence or extent of a legal right between them. The "legal right" between them is in my view the obligation (as referred to in *Emmott v Wilson* ibid at [105]) on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration and whether the exception for disclosure where the public interest requires it, is satisfied in this case.

62. I have also considered the point taken in correspondence for B that there is no jurisdiction on a Part 23 application to make the declaration sought. It seems to me that there would be jurisdiction if the applicant were required to bring its application for a declaration in the form of a Part 8 claim. The question therefore is whether or not the court should refuse to grant the declaration on the ground that a claim should be made on that basis.

63. In this regard it seems to me that the judgment of Teare J in *The "Styliani Z"* [2016] 1 Lloyd's Law Rep 395 at [43] where the court considered the scope of CPR 3.10 is of assistance.

64. CPR3.10 provides that:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction–
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error."

65. Having considered two authorities in which the wrong form had been used to commence proceedings and the court had corrected the error pursuant to CPR 3.10, Teare J said:

> "These cases establish that the court's approach, when asked to remedy the error of a claimant who, by an error of procedure, has issued the wrong originating process, should be as follows:"

> i) The court's discretion should be used so as to further the overriding objective to deal with a case justly.
>
> ii) In determining what is just the court must take account of all the circumstances of the case.
>
> iii) In particular, it is necessary to consider whether, notwithstanding the claimant's error, the defendants were made aware of the nature of the claim which the claimant wished to bring.
>
> iv) The order made by the court should not be disproportionate to the claimant's error of procedure.
>
> v) The fact that the claimant's error was culpable is a relevant matter to take into account but will not necessarily be a bar to the court remedying the error.
>
> vi) The fact that the defendants would be able to argue that any fresh issue of proceedings in the correct form would be time-barred is a relevant matter to take into account but will not necessarily be a bar to the court remedying the error.

66. In this case it is clear from the correspondence that the respondent was aware of the nature of the declaration which the applicant was seeking. If the order were to be refused on the basis that the matter should have been brought as a Part 8 claim, further cost will be incurred but the issues before the court and the considerations will ultimately be the same, a further hearing would be required at which no new evidence or submissions are likely to be before the court and there would be a delay in resolving the disciplinary proceedings. Accordingly, in the circumstances it is in furtherance of the overriding objective to use the broad power under CPR 3.10 to allow the application for a declaration to be treated as if it had been made in Part 8 proceedings.

Substance of the declarations sought

67. Turning then to the substance of the declarations which are sought, it seems to me that a distinction is to be drawn between the declaration which is sought to allow The Chartered Institute of Arbitrators and B in the context of the disciplinary proceedings to refer to and/or rely on (i) the Documents and (ii) the circumstances of B's nomination and appointment as arbitrator in matters concerning D.

68. In relation to the declaration concerning the Documents, it would have to be in the public interest in order to override the confidentiality obligation (*Glidepath* at [52]). In my view it would be in the public interest for the reasons set out above, in relation to the documents for which a right of access exists or for which access has been granted pursuant to CPR5.4 as set out in paragraphs 53-57 above.

69. The declaration however does not extend to those documents for which access has not been granted pursuant to CPR 5.4 that is the skeleton arguments and the disclosed documents for the same reason that led to the conclusion of the court that in the circumstances, access to these documents is not required in the public interest.

70. In relation to the declaration which is sought concerning the circumstances of B's nomination and appointment as arbitrator in matters concerning D, it is clear from the authorities that the public interest is independent of the consent of the parties. (*Emmott* at [107]). However, the parties to the other arbitrations in which B was nominated and/or appointed have not been notified of the application for the declarations which seek to lift the obligation of confidentiality by reason of the public interest. In these circumstances it seems to me that, the court has not heard arguments as to the position which may be advanced by such other parties and there may be considerations in those arbitrations which would lead the court to conclude that the obligation of confidentiality in the arbitrations outweigh the public interest. As stated in *Rolls-Royce*, and quoted above, before the court exercises its discretion to make a declaration, it must be satisfied that all sides of the argument will be fully and properly put. In this case the court cannot be so satisfied as there are other parties to previous arbitrations who have not been served with, and therefore are unaware of the application.

71. Accordingly, for these reasons the court declines to make a declaration insofar as it extends to the circumstances of B's nomination and appointment as arbitrator in matters concerning D and other parties who are not party to this application.

Conclusion on the Second Application

72. For the reasons set out above, I therefore make the limited declaration that The Chartered Institute of Arbitrators and B are entitled in the context of the disciplinary proceedings to refer to and/or rely on the documents which the court orders to be disclosed pursuant to CPR5.4, notwithstanding the obligation of confidentiality which would otherwise apply, by reason of the public interest.

73. The application for a declaration in relation to the circumstances of B's nomination and appointment insofar as it extends to arbitration proceedings other than as between C and D is refused.

Addendum

After the draft judgment was sent out to counsel in the usual way, counsel raised two matters: the first concerning whether or not certain documents were within the scope of the judgment ordering disclosure and secondly whether or not there should be further anonymisation of the judgment.

As to the first, I have clarified this by making amendments to paragraphs 24, 29, 54 and 68 of the judgment.

As to the second matter I was referred to the case of *Symbion Power LLC v Venco Imtiaz Construction Company* [2017] EWHC 348 (TCC). I note in particular the following passage of the judgment at [90]:

> 90. There is a strong public interest in the publication of judgments, including those concerned with arbitrations, because of the public interest in ensuring appropriate standards in the conduct of arbitrations. That has to be weighed against the parties' legitimate expectation that arbitral proceedings and awards will be confidential to the parties. Mance LJ, as he then was, described it as a spectrum:
>
> "40 … At the one end is the arbitration itself and at the other an order following a reasoned judgment under section 68 . In between is the hearing under section 68 . An order will normally give very limited information … even a section 68 hearing is likely to cover only limited aspects of the subject matter of the original arbitration … A reasoned judgment under section 68 will in likelihood disclose very much less about the subject matter of the arbitration than will have been covered during the section 68 hearing itself. Moreover, judges framing judgments are accustomed to concentrate on essentials, to avoid where possible unnecessary disclosure of sensitive material and in some cases to anonymise. …
>
> 41. When weighing the factors, a judge has to consider primarily the interest of the parties in the litigation before him or in other pending or imminent proceedings. … The concerns or fears of other parties cannot be a dominant consideration. Nor can there be any serious risk of their being deterred from arbitrating in England, if the court weighs the relevant factors appropriately. If, in the absence of other good reason for publication the

> court withholds publication where a party before it would suffer some real prejudice from publication or where the publication would disclose matters by the confidentiality of which one or both parties have set significant store, but publishes its judgments in other cases, businessmen can be confident that their privacy and confidentiality in arbitration will, where appropriate, be preserved. The limited but necessary interface between arbitration and the public court system means that more cannot be expected. There can be no question of withholding publication of reasoned judgments on a blanket basis of a generalised, and in my view, unfounded, concern that their publication would upset the confidence of the business community in English arbitration."[emphasis added]

In this case substantial changes were proposed by counsel including that neither the judgment of Hamblen J nor the judgment in *Eurocom* should be identified. The hearing before Hamblen J was in public and the judgment was public as was the judgment in *Eurocom*. In relation to this application, there is nothing in this judgment in relation to the details of the underlying dispute which was submitted to arbitration. Further as noted above C has consented to the application and D has raised no objection. Accordingly, publication would not disclose matters by the confidentiality of which one or both parties have set significant store. In the circumstances the public interest in the publication of judgments outweighs any confidentiality which the parties would expect to be preserved in relation to the arbitration. I note that the first respondent is not a party to the arbitration and in his witness statement expressed his position to be that he could not release details of the arbitration on the basis of general principles of confidentiality in arbitration. The fact that the references in the judgment could lead to the identification of B are not in my view sufficient to outweigh the public interest in the publication of judgements.