IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(MR JUSTICE CLARKE)

QBCMF 97/1288/B

Royal Courts of Justice
Strand
London WC2

Friday, 19 December 1997

B e f o r e:

LORD JUSTICE BELDAM
LORD JUSTICE POTTER
LORD JUSTICE BROOKE

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ALI SHIPPING CORPORATION

PLAINTIFF/APPELLANT

- v -

SHIPYARD TROGIR

DEFENDANT/RESPONDENT

- - - - - -

(Transcript of the handed down judgment of
Smith Bernal Reporting Limited, 180 Fleet Street,
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Official Shorthand Writers to the Court)

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MR KENTRIDGE QC with MR T WORMINGTON (Instructed by Messrs Ince & Co, London EC3R 5EN) appeared on behalf of the Appellant

MR FLAUX QC with MR J LOCKEY (Instructed by Messrs Stephenson Harwood, London EC4M 8SH) appeared on behalf of the Respondent

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J U D G M E N T
(As approved by the Court)

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Friday, 19 December 1997

J U D G M E N T

LORD JUSTICE POTTER:

INTRODUCTION

This is the defendants' appeal from the order of Mr Justice Clarke dated 18th September 1997 whereby he discharged an ex parte injunction previously granted by Longmore J. on 10th September 1997 restraining the defendants from deploying in arbitrations against three Liberian companies certain materials generated in the course of an earlier arbitration between the plaintiffs and the defendants. The plaintiffs' inter partes application to continue the injunction having been treated by consent as the trial of the action, the Judge dismissed the claims of the plaintiffs and ordered them to pay the defendants' costs of the action to be taxed if not agreed. Following judgment, the defendants undertook not to send any of the material to the arbitrators pending the hearing of this appeal.

THE BACKGROUND

On 22nd December 1998, the plaintiffs ("Ali") became party, by novation, to a ship building contract between Liera Shipping Corporation ("Liera"") and the defendants ("the Yard") by which the Yard undertook to build a vessel referred to as Hull 202 ("the Hull 202 Agreement"). On 29th April 1988, the Yard had also entered into other ship building contracts in respect of Hull 200 and Hull 201. These contracts were later novated in favour of Rula Shipping Corporation ("Rula") and Irma Shipping Corporation ("Irma") respectively. Subsequently, and in any event before 30th March 1990, the shares in the plaintiffs, Rula and Irma were all acquired by Greenwich Holdings Limited ("Greenwich"). Greenwich also wholly owned Sea Tankers Management Co. Limited ("Sea Tankers") who acted as agents and managers on behalf of Rula, Irma and Ali.

On 30th March 1990 Addendum No. 1 was agreed to the contracts for Hull Nos. 200, 201 and 202 which contained various provisions including an increase in the contract price of each vessel from $20,900,000 to $21,900,000.

Article 2 of Addendum No. 1 provided that Sea Tankers "on behalf of Company(ies) to be nominated have agreed to enter into contracts for 3 x 333,800/43,000 MTDW". Article 3 provided that all details and conditions were to remain "strictly private and confidential" and Article 4 provided that all other provisions in the Hull 202 agreement were to remain "in full force and effect". The three contracts anticipated were subsequently entered into on 15th April 1990 in respect of Hull Nos. 204, 205 and 206, the buyers being respectively Lavender Shipping Limited ("Lavender"), Leeward Shipping Limited, ("Leeward") and Leman Navigation Inc. ("Leman"). Those companies were also wholly owned by Greenwich. They were single purpose companies the function of which was limited to acquiring and operating their respective hulls.

Each of the ship building contracts contained a London Arbitration clause and was governed by English law.

The Yard failed to complete Hull 202 in accordance with the Hull 202 Agreement, and Ali rescinded the contract and claimed substantial damages. The dispute went to arbitration ("the First Arbitration") and the Sole arbitrator, Mr Bruce Harris, on 14th April 1997 made an award ("the First Award") in favour of Ali for $21,594,391 plus interest (amounting in all to $34,000,000) and costs.

In the First Arbitration, the Yard sought to defend Ali's claims for substantial damages on a variety of bases, including the fact that Lavender, Leeward and Leman had not paid the first

instalments of the price of the contracts for Hulls 204-206. In that connection the Yard contended that its obligations to build Hull 202 had become contractually dependent on performance of the subsequent contracts, and that the corporate veil should be pierced and all Greenwich-owned companies treated as one to permit the Yard's plea of justification and/or set-off in respect of its claims against Lavender, Leeward and Leman under the Hull 204-206 contracts. In a lengthy and fully reasoned award, Mr Bruce Harris rejected the Yard's arguments. Although he was satisfied that Lavender, Leeward and Leman were all in breach of the Hull 204-206 contracts in failing to pay the first instalments of the contractual price, he held that, whatever the position under the contracts for Hulls 204-206, it was irrelevant to the issue of the defendant's liability under the Hull 202 Agreement. He refused to pierce the corporate veil, holding that the use of one-ship companies in connection with such transactions was a normal way of doing business, and that the contractual arrangements were made by the parties deliberately observing the separate nature of the legal personalities involved. He ruled that any claims which the Yard might have in respect of Hulls 204-206 could not be set off against the sums due to the plaintiffs under the Hull 202 agreement.

The Yard made no payments in respect of the Award. Instead they reactivated three arbitrations previously commenced against Lavender, Leeward and Leman in respect of the Hull 204-206 contracts ("the Hull 204-206 Arbitrations"). Until February 1997 when Points of Claim were served, those arbitrations had not progressed since their commencement some 6 years before. In 1994, Lavender, Leeward and Leman had effectively gone into liquidation. We are told that their status in Liberian law is something short of that. However, it is clear that they are dormant save for the purpose of defending and counterclaiming in the Hull 204-206 Arbitrations. In June 1997 each served Points of Defence raising inter alia a number of matters which were the subject of investigation and/or findings in the First Arbitration. Each Defence pleaded that it was "without prejudice to any application the Respondent .. may make under section 13A of the

Arbitration Act 1950, as amended, for an order dismissing the claim .. on the grounds of inordinate and inexcusable delay".

The Yard has applied for interim awards in the Hull 204-206 Arbitrations in respect of the first instalments of the contractual price under the respective shipbuilding contracts and for damages to be assessed in respect of the alleged repudiation of each of the contracts. In response Lavender, Leeward and Leman have stated their intention to submit that the arbitrators have no jurisdiction to hear the Yard's claims as presently formulated, alternatively to seek to strike out the Yard's claims for want of prosecution. We have been informed that (by an order which is not before us) the arbitrators in the Hull 204-206 Arbitrations have ordered that, by a date now passed but in suspense depending the outcome of this appeal, the Yard are to serve all the evidence upon which they wish to rely in support of their application for an interim award, following which Lavender, Leeward and Leman are to serve their evidence.

On 5th September, the Yard served a draft affidavit of Mr Nicholas Phillips, the Yard's solicitor (the truth of which has since been deposed to in his absence by a colleague) which set out the documents upon which the defendants sought to rely pursuant to the arbitrators' order. The documents included certain materials generated in the course of the First Arbitration and which, but for the discharge by Clarke J of the original injunction granted upon 10th September by Longmore J, the Yard would be prevented from producing to the arbitrators, namely:

(1) The Award (including Reasons) of Mr Harris in the First Arbitration.

(2) The written opening submissions of Ali in the First Arbitration.

(3) Transcripts of the oral evidence given by certain witnesses for Ali in the First Arbitration: Mr Maehle and Captain Hoem.

The Yard state that they wish to rely upon those documents (collectively referred to as "The Phillips material") as evidence in order to rebut various contentions being advanced for Lavender, Leeward and Leman in the Hull 204-206 Arbitrations, and to rely upon the reasons of Mr Harris in support of a plea of issue estoppel which the Yard proposes to advance in the Hull 204-206 Arbitrations.

Upon learning of these intentions, Ali's solicitors, who also act for Lavender, Leeward and Leman in the Hull 204-206 Arbitrations, sought and obtained the ex parte injunction from Longmore J on the basis that use of the material would amount to breach of the Yard's implied obligation of confidentiality in respect of the First Arbitration.

THE RELEVANCE OF THE FIRST ARBITRATION MATERIAL

In the outline of issues contained in his award in the First Arbitration, Mr Bruce Harris listed, inter alia at paragraph 14(B), certain questions which I shall set out below, together (in square brackets) with the answers provided at paragraph 98:

"(a) Did Ali contract as purchaser of Hulls 204-206? [No]

(b) Did Ali agree (or is Ali estopped from denying that it agreed) to be jointly or severally liable for sums payable under the contracts for Hulls 204-206?..[No]

(c) Did Ali agree (or is Ali estopped from denying) that the Yard's obligation to build Hull 202 was conditional upon either

(i) Performance of the buyer's obligations under the contracts for Hulls 204-206?

or

(ii) Payment of the first instalments under the contracts for Hulls 204-206? [No]

(d)(i) Are there grounds for lifting Ali's corporate veil? [Does not arise]

(ii) If so, what are the consequences? [Does not arise]"

And at 14 F:

"(i) Was there a stoppage of work in July 1992 without justification' per clause XVI(b)? [Yes]

(ii) Was it justified:

(a) By non-payments under contract for Hulls 204-206? [No]"

In relation to those issues Mr Harris heard evidence and submissions from both parties to the extent that they thought it necessary or relevant in relation to the contentions of Ali that Lavender, Leeward and Leman were justified in withholding payment under the contracts for Hulls 204-206. The relevant evidence for Ali was given by Mr Maehle, a shipping broker, and Captain Hoem, Seatankers' fleet manager. In relation to the question of whether or not it was appropriate to pierce the corporate veil when dealing with matters of set off, Mr Harris found that Ali, Lavender, Leeward and Leman, and various other companies, including the management company, Seatankers, were 100% owned by Greenwich and that Mr Frederiksen was in turn the sole beneficial owner of Greenwich.

In relation to the issues raised by the Yard concerning the failure of Lavender, Leeward and Leman to pay their respective first instalments under the Hull 204-206 contracts, Mr Harris said as follows:

"32.... Those instalments were not paid then or at all. I do not think I need to go into why that was or may have been, nor the excuses which were given by Seatankers (though I accept that they seem to have been without any merit): probably all I need to find for the purposes of this arbitration is that the first instalments were never paid.

49..... I should perhaps deal briefly with the failure to pay the relevant instalments. On the evidence before me it appeared clear that those representing the buyers of Hulls 204-206 clearly considered that the contracts for those ships had become fully binding and indeed I consider that they had. It also appeared clear that the excuses raised on behalf of those buyers for not paying the first instalments under those contracts were bad and that the failures to pay those instalments amounted to breaches of contract. If - contrary to my view (para 32 above) - it is necessary for the purpose of this case that I make findings in respect of these matters, I should be taken as having reached conclusions according with the indications given in the previous two sentences. I appreciate, of course, that nothing I say can bind the parties to those contracts."

The Yard wish to use those particular findings in the Award, as well as various statements and admissions contained in the transcripts of the evidence of Mr Maehle and Captain Hoem called for Ali, in support of the Yard's case that Lavender, Leeward and Leman have no real defence to the Yard's claims in the Hull 204-206 Arbitrations. The Yard says that the contents of those documents support its case that (1) the issue whether the companies were in breach of the contracts for Hulls 204-206 in not paying instalments due was determined by Mr Harris, so as to create an issue estoppel as between the Yard and the three companies, and (2) that, even if there is no issue estoppel, the underlying material demonstrates that the three companies were indeed in breach of the contracts for Hulls 204-206 and have no defence to the Yard's claims.

THE DECISION OF MR JUSTICE CLARKE

Before Clarke J, Ali relied, as it has relied in this appeal, upon the decision of this Court in Dolling-Baker-v-Merrett [1990] 1 WLR 1205 and in particular the passage in the judgment of Parker LJ at 1213D to the following effect:

"As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must .. be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witnesses in an arbitration, save with the consent of the other party, or pursuant to an order or leave of the Court. The qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer ...

...that the obligation exists in some form appears to me to be abundantly apparent. It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the arbitration itself. When a question arises as to production of documents or indeed discovery by list or affidavit, the Court must .. have regard to the existence of the implied obligation, whatever its precise limits may be. If it is satisfied that, despite the implied obligation, disclosure and inspection is necessary for a fair disposal of the action, that consideration must prevail. But in reaching a conclusion, the court should consider, amongst other

things, whether there are other and possibly less costly ways of obtaining the information which is sought which do not involve any breach of the implied undertaking."

Ali also relied upon the recognition and development of that principle in Hassneh Insurance Co.-v-Stewart J._Mew [1993] Lloyds' Rep 243 and Insurance Co.-v-Lloyds'_Syndicate [1995] Lloyds Rep 272, in which Colman J considered the limitations or exceptions to the principle. In particular, in Hassneh he held that an exception arose:

"If it is reasonably necessary for the establishment or protection of an arbitrating parties' legal rights vis-a-vis a third party... that the award should be disclosed to that third party in order to found a defence or as the basis for a cause of action..." (see p.249)

Colman J. derived that exception from the parallel of the banker's duty of confidence to his customer referred to by Parker LJ in the passage earlier quoted from Dolling-Baker. In the Insurance Co. case, Colman J went somewhat further and held that the test of "reasonable necessity" applied only to disclosure where it was "unavoidably necessary" (p. 275); this led him to conclude (at p. 276) that

"It is sufficiently necessary to disclose an arbitration award to enforce or protect the legal rights of a party to an arbitration agreement only if the right in question cannot be enforced or protected unless the award and reasons are disclosed to a stranger to the arbitration agreement. The making of the award must therefore be a necessary element in the establishment of the party's legal rights against the

stranger. This is the furthest boundary to the qualification which business efficacy will support."

Finally, reliance was placed by Ali upon the decision of Mance J in London & Leeds Estates Ltd-v-Paribas (No.2) [1995] 2 E.G. 134, where the confidentiality of witness statements in arbitrations was strongly asserted in a case in which production of such statements under subpoena in subsequent court proceedings was nonetheless ordered "in the public interest".

Before Clarke J, the stance of the Yard was to recognise that the material generated in a commercial arbitration was covered by a duty or implied obligation of confidentiality, subject to the right of the Yard to argue before a higher court that English law should follow the approach of the High Court of Australia in Esso Australia Resources Ltd and Others-v-Plowman (Minister for Energy and Minerals) and Others [1995] 183 CLR 10, in which the majority of the High Court rejected the English judicial view that a general duty of confidence exists, albeit subject to limited exceptions and qualifications.

The Yard nonetheless argued that, in English law, the doctrine of confidentiality only applies in respect of "third party strangers" to the arbitration and should not be applicable in a case such as the present where disclosure was proposed to be made to and/or used against an entity which, in reality, was not a stranger but in the same beneficial ownership as the other party to the arbitration.

The Yard also asserted that, even if disclosure in the Hull 204-206 Arbitrations might otherwise constitute a breach of a duty of confidentiality owed to Ali, the circumstances of the case fell within a recognised exception to such duty because disclosure was reasonably necessary for the protection of the Yard's rights against a third party. Finally, it was argued that the circumstances

of the case fell within a further exception to the rule of confidentiality, namely public policy and/or that the facts were such that the case was not an appropriate one for injunctive relief.

In dealing with the above submissions, Clarke J referred to the judgments of Colman J in the Hassneh case and the Insurance Co. as having based the obligation of confidence, as well as the exceptions to it, upon a term of the arbitration contract necessarily to be implied on grounds of business efficacy, or, to put it another way, "to make the contract work". Having referred to the Yard's arguments, which included the submission that on the particular facts of the case there was no basis for implying a term into the arbitration agreement between the Yard and Ali to prevent disclosure of the documents to Lavender, Leeward or Leman, or to arbitrators appointed between the yard and any of them, Clarke J said:

> "He [Mr Flaux] submits that in all the circumstances of this case the implication of such a term would make no commercial sense. Alternatively, he submits that it would not be a breach of any obligation of confidentiality for the yard to disclose such documents in an arbitration with Lavender, Leeward or Leman.
>
> None of the cases to which I was referred was concerned with a case of this kind. Whether and what term of confidentiality should be implied into the arbitration agreement in any particular contract cannot be answered by saying that a particular term is always to be implied whatever the circumstances. Whether the particular term should be implied in a particular case will, in my judgment, depend upon the circumstances of that case, since the question is whether it is necessary to imply such a term to give business efficacy to the particular contract. Put another way, if the officious bystander were asked whether such a

term would be implied he would answer the question by reference to the circumstances surrounding the particular contract."

The Judge then turned to consider the full circumstances of the case. He referred to the fact that at the time of the negotiation of the Addendum, which he regarded as the material time, all the negotiations took place between Seatankers and the Yard in a context where, although each buyer was to be a separate legal entity, the negotiations concerning the contracts for Hulls 200-202 were concluded at the same time and by the same persons as those for Hulls 204-206, it being a matter of indifference which particular companies should be the buyers of which hulls. As the Judge put it:

"No distinction was drawn at that time between documents in the possession or custody or power of each of the shipping companies. They were all in the custody and possession of Seatankers. There is no evidence that the owning companies had separate personnel. All their operations were carried out by Seatankers, no doubt on the instructions of Mr Frederiksen. While it was no doubt intended that the liability of each buyer should be separate under each shipbuilding contract, no-one could or, in my judgment, would have supposed, as at March 1990, that a statement made by a representative of Seatankers for the purpose of the subsequent arbitration between the yard and Ali should be confidential to Ali and not available to the other buyers. If any of the interested parties, including Mr Frederiksen, Seatankers, any of the buying companies or the Yard, or indeed the officious bystander had been asked in March 1990 whether Lavender, Leeward or Leman were entitled to see a statement made by Captain Hoem of Seatankers or by Mr Maehle of the brokers relating to the negotiations with the yard in March 1990, which was relevant to the negotiations leading both to the

addendum to the existing contracts for Hulls 200-202 and to the new contracts for Hulls 204-206, they would be likely to have regarded it as a silly question. But, if they had been pressed for an answer, they would all have said "Of course". They would not, in my judgement, have said "Of course not" because it would lead to a practically absurd result and make no commercial sense.....

If Ali's arguments were correct and if, say, Lavender (or more likely Seatankers on behalf of Lavender) unreasonably insisted on a separate arbitration hearing from that in which, say, Leeward was a party, the evidence adduced in the Lavender Arbitration could not be used in the Leeward Arbitration even though identical issues were involved and each party was being directed by the same individuals. Any implied term which led to that result would, in my view, be neither necessary nor indeed reasonable.

Equally, in my judgment it is not necessary to imply a term into the arbitration agreement between Ali and the yard that it would be a breach of the duty of the yard to disclose such documents to the buyers of Hulls 204-206 in circumstances where, as the Points of Defence show, both negotiations and the contracts were closely bound up together and where, as I have stated more than once, all the companies were effectively in sole beneficial ownership of and under the control of one man. It follows in my judgment that no term can be implied preventing disclosure by the Yard to arbitrators in a dispute with those buyers. If Ali could disclose the documents to the other buyers (as in my judgment it could), I can see no reason why the yard should not disclose the same documents to arbitrators in a dispute with those buyers"

Finally, the Judge stated that he did not consider his conclusion was in any way inconsistent with the reasoning or conclusions of Colman J or the Court of Appeal in the cases already referred to. He said that a term should certainly be implied into all the contracts imposing a duty of confidence on the Yard and the respective buyers sufficient to ensure that documents disclosed in any of the arbitrations should not be disclosed to "third parties", in the sense of anyone other than the respective buyers or the arbitrators in the arbitration and stated that, to imply or give effect to the obligation of confidence so limited, was in his view consistent with common sense and commercial and business reality.

THE ARGUMENTS IN THIS COURT.

In pursuing this appeal, Mr Kentridge QC on behalf of Ali has, perhaps unsurprisingly, not sought to enter upon the merits of his client's position in relation to confidentiality as adumbrated by the Judge. He does not dispute that Ali, Lavender, Leeward and Leman are all part of the same shipping stable, administered by the same management company under the same corporate umbrella of 100% ownership by Greenwich and that all are "one-ship" Liberian companies, the raison d'etre of which is simply the pursuit of a claim (in the case of Ali) and the defence of a claim (in the case of the others), all through the evidence of the same personnel and the services of the same solicitor. It is not suggested that there is, or can be, any prejudice to Ali in any sense beyond the fact that the arbitrators will be made aware of the Phillips' material, they in turn becoming bound by obligations of confidentiality not to disclose the existence or contents of the documents outside the confines of the arbitration.

Mr Kentridge takes his stand on a matter of principle. He argues first (and to this extent Ali's position has moved on since the hearing below) that the implied term of confidence in relation to arbitration proceedings attaches as a matter of law rather than as a matter of business efficacy in

all the circumstances of the case. He submits that the Phillips' material is plainly material in respect of which the Yard are under an obligation of confidence to Ali arising out of the First Arbitration not to disclose material outside the confines of that arbitration, subject only to exceptions which, in his submission, do not apply in this case. Mr Kentridge further submits that it is not necessary to show prejudice when, as here, the object of the injunction sought is to restrain breach of a negative obligation and he justifies the grant of the relief on the basis of a 'quia timet' order against the threat of a knowing breach of a confidential obligation. He also attacks the position of the Yard as being one whereby the Yard, having failed in the First Arbitration, nonetheless seeks to obtain assistance from the award of the arbitrator while refusing to honour it by payment.

The position of the Yard is as follows:

(1) It accepts for the purposes of this appeal that, in what it calls "the ordinary case" of a commercial arbitration, there is a duty of confidentiality not to disclose the evidence, Award or Reasons to a third party stranger, although it reserves the right to argue before the House of Lords, should the matter not end in this court, that the approach of the English cases to which I have referred is not correct and that the approach of Mason CJ and the majority in the Esso Australia case is to be preferred.

(2) It seeks to support the Judge's approach to the implied term of confidentiality on the basis of the "officious bystander" test i.e. as a matter of business efficacy, its nature and extent being variable according to the circumstances of the particular case.

(3) Alternatively, if the approach of the Judge was wrong and the implied term attaches as a matter of law rather than business efficacy, then nonetheless the Judge's decision is to be

supported on the basis that no breach of confidentiality is involved when the parties to whom disclosure is contemplated are not in any real sense "third party strangers" but are in the same beneficial ownership and management as the complaining party.

(4) In any event, disclosure and/or use of the Phillips' materials is 'reasonably necessary' for the protection or enforcement of the Yard's rights in pursuit of its claims against Leeward, Lavender and Leman and hence within the exception recognised in Hassneh and the Insurance Co case. In particular, without being able to deploy the Phillips' materials:

(i) The Yard would be unable to pursue its allegation of issue estoppel and abuse of process before the arbitrators.

(ii) It would be hindered in demonstrating that the purported defences raised in the current arbitrations are without merit and thus would be prevented from complying with the order of the arbitrator to produce at this stage all the Yard's evidence relied upon in support of its application for an interim award;

(iii)It would be hindered in defending the application to dismiss for want of prosecution.

In this connection, it is submitted that, in relation to the Yard's intention to use the disputed materials to advance those matters before the arbitrators, it is not for the court to determine whether the Yard's case in relation to those matters is well founded, thereby usurping the role of the Arbitrators.

(5) It would be contrary to the public interest to permit Ali to suppress evidence given in the First Arbitration by the very persons whose evidence will be relied on in the current arbitrations when any material alterations in their testimony should be before the arbitrators in their truth-seeking exercise.

(6) Finally, it is said that Ali, as a single purpose, no-ship company in the same beneficial ownership as the respondents, has no legitimate interest in restraining the disclosure of the disputed material and that the court should, in its discretion, deny injunctive relief.

I shall deal with the Yard's submissions in order.

THE NATURE OF THE IMPLIED TERM.

I deal under this heading with the Yard's submissions (1) and (2).

As Leggatt J stated in "The Eastern Saga" [1984] 2 Lloyds Rep. 373 at 379 the privacy of arbitrations is a concept that "derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them". It is implicit in this, as he held in that case, that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute should be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the parties seeking it and however closely associated the disputes in question may be. In Dolling-Baker, shortly before the passage which I have already quoted, Parker LJ (at p.1213E) referred to

"the essentially private nature of an arbitration"

which he coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained, in order to

arrive at his decision in that case. Thus, the principle which he propounded did not depend upon any inherent confidentiality in the material protected (which he expressly rejected), although the implied obligation arising was broadly similar in effect. So far as the juridical nature of that implied term is concerned, while I note that in Hassneh (at p.246) Colman J remarked that

"the implication of the term must be based on custom or business efficacy"

I consider that the implied term ought properly to be regarded as attaching as a matter of law. It seems to me that, in holding as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings, the Court is propounding a term which arises "as the nature of the contract itself implicitly requires": see per Lord Wilberforce in Liverpool City Council-v-Irwin [1977] AC 239 at 254 and Lister-v-Romford Ice & Cold Storage Co. Ltd [1957] AC 555 per Viscount Simonds at 576-577. As Lord Bridge observed in Scally-v-Southern Health Board [1992] 1AC 294 at 307, a clear distinction is to be drawn

"between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will necessarily imply as a necessary incident of a definable category of contractual relationship".

In my view an arbitration clause is a good example of the latter type of implied term.

The distinction referred to by Lord Bridge in Scally is of some practical consequence in this case. That is because considerations of business efficacy, particularly when based notionally upon the "officious bystander" test, are likely to involve a detailed examination of the

circumstances existing at the time of the relevant contract, (in this case the original agreement to arbitrate), whereas the parties have indicated their presumed intention simply by entering into a contract to which the court attributes particular characteristics. While acknowledging that the boundaries of the obligation of confidence which thereby arise have yet to be delineated (c.f. Hyundai Engineering & Construction Co Ltd -v- Active Building & Civil Construction Ltd (C.A. Transcript, 9th March 1994 per Phillips J), the manner 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 i.e. where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the Court, an obvious example of which is an order for disclosure of documents generated by an arbitration for the purposes of a later court action; (iii) leave of the court. It is the practical scope of this exception i.e. the grounds on which such leave will be granted, which gives rise to difficulty. However, on the analogy of the implied obligation of secrecy 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-a-vis a third party in order to found a cause of action against that third party or to defend a claim (or counterclaim) brought by the third party (see Hassleh).

In that connection, I make two particular observations. Although to date this exception has been held applicable only to disclosure of an Award, it is clear (and indeed the parties do not dispute) that the principle covers also pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration (see Dolling-Baker). Second, I do not think it is helpful or desirable to seek to confine the exception more narrowly than one of 'reasonable necessity'. While I would endorse the observations of Colman J in the Insurance Co. case that it is not enough that an award or reasons might have a commercially persuasive impact on the third party to whom they are disclosed, nor that their disclosure would be

"merely helpful, as distinct from necessary, for the protection of such rights,"

I would not detach the word 'reasonably' from the word 'necessary', as the passage just quoted appears to do. When the concept of 'reasonable necessity' comes into play in relation to the enforcement or protection of a party's legal rights, it seems to me to require a degree of flexibility in the Court's approach. For instance, in reaching its decision, the Court should not require the parties seeking disclosure to prove necessity regardless of difficulty or expense. It should approach the matter in the round, taking account of the nature and purpose of the proceedings for which the material is required, the powers and procedures of the tribunal in which the proceedings are being conducted, the issues to which the evidence or information sought is directed and the practicality and expense of obtaining such evidence or information elsewhere.

Finally, in at least one decision, the English court has tentatively recognised a further exception (v) where the 'public interest' requires disclosure: See London & Leeds Estates Ltd-v-Paribas Ltd (Supra). In that Case, Mance J, ruling upon the validity of a subpoena, held that a party to

court proceedings was entitled to call for the proof of an expert witness in a previous arbitration in a situation where it appeared that the views expressed by him in that proof were at odds with his views as expressed in the court proceedings. Mance J. observed:

> "if a witness were proved to have expressed himself in a materially different sense when acting for different sides, that would be a factor which should be brought out in the interests of individual litigants involved and in the public interest".

It seems to me clear that, in that context, Mance J. was referring to the 'public interest' in the sense of 'the interests of justice', namely the importance of a judicial decision being reached upon the basis of the truthful or accurate evidence of the witnesses concerned. Whereas the issue in the Paribas case related to a matter of expert opinion rather than objective fact, I see no reason why such a principle, which I would approve, should not equally apply to witnesses of fact who may be demonstrated to have given a materially different version of events upon a previous occasion. As a matter of terminology, I would prefer to recognise such an exception under the heading 'the interests of justice' rather than 'the public interest', in order to avoid the suggestion that use of that latter phrase is to be read as extending to the wider issues of public interest contested in the Esso Australia case . In that case, only the dissenting judgment of Toohey J. appears to me to treat the law of privacy and confidentiality in relation to arbitration proceedings on lines similar to English law. While it may well fall to the English Court at a future time to consider some further exception to the general rule of confidentiality based on wider considerations of public interest, it is not necessary to do so in this case.

If I have stated the position in English Law correctly, I consider that the Yard's concession in this appeal as to the existence of the implied term of confidentiality in commercial arbitrations is well advised. On the other hand, it does not seem to me that the Judge's approach on the basis

of the "officious bystander" test was correct. His proper starting point would have been to assume an implied obligation of confidence, subject to proof of circumstances apt to bring the Yard within one of the recognised exceptions, or otherwise justifying the withholding of injunctive relief.

"THIRD PARTY STRANGERS"

So far as the Yard's submission (3) is concerned, I observe by way of preliminary that, to date, the confidentiality rule has been founded fairly and squarely on the ground that the privacy of arbitration proceedings necessarily involves an obligation not to make use of material generated in the course of the arbitration outside the four walls of the arbitration, even when required for use in other proceedings (subject to the exceptions already discussed).

In considering the question of relief, the Court has not hitherto undertaken any detailed examination of the objecting party's motives for seeking to uphold such privacy. No doubt the Court ordinarily acts on the working assumption that, in agreeing to arbitration, each party considers that his interests will be best served by privacy and that both parties recognise and undertake mutual obligations of confidentiality, subject only to such exceptions as the Court may recognise. Because the doctrine rests upon the assumption that the parties have a legitimate interest in privacy which the Court will protect, an exception based on the subsequent need to protect the inconsistent interest of one party alone is properly formulated in terms of reasonable necessity rather than mere convenience or advantage. Further, where exceptional circumstances are asserted, it will usually be appropriate for the court to limit its task to establishing whether such circumstances have been made out, and not to explore the motives of the objecting party or whether the Court considers that his interests will in fact be prejudiced by disclosure. In the

ordinary way, prejudice will be presumed and, unless excepting circumstances are established, confidentiality will be upheld.

Are there good reasons why that principle should not apply or, put another way, should a further exception be created to the confidentiality rule, simply because the parties to whom disclosure is contemplated are in the same beneficial ownership and management as the complaining party? I do not think so. I say that for two particular reasons. First, whatever the position in this case, it is possible to envisage a situation where, despite the feature of common beneficial ownership between them, one entity may wish to keep private from another the details of materials generated in an earlier arbitration. Second, where the problem arises in relation to disclosure in later proceedings, to propound such an exception is to leave out of account that (as appears to be the position in this case) the real interest of the objecting party is to withhold disclosure of such materials from the subsequent decision maker. In this context the latter is the "third party stranger" in respect of disclosure to whom the objecting party seeks protection. While such motives may not be "worthy" in the broad sense, and certainly do not assist the course of justice, they may yet be a permissible tactic in advancing or protecting the interests of the objecting party. The fact that the arbitrator in the subsequent proceedings will in turn be bound by duties of confidentiality is no cure for the damage which the objecting party perceives may be caused to his interests from an adverse decision resulting from, or influenced by, the disclosure sought to be made. Unless the stance of the objecting party can be shown to be fraudulent or in the nature of an abuse of process, then the court should be prepared to grant injunctive relief, subject only to proof of a recognised exception to the rule of confidentiality.

REASONABLE NECESSITY

Thus it seems to me that it is necessary to consider whether or not the Yard can show, as they contend under submission (4), that use of the Phillips material is reasonably necessary for the protection or enforcement of the Yard's rights in the Hull 204-206 Arbitrations.

There can be no doubt that, if the Phillips material cannot be used by the Yard, its assertion of issue estoppel and abuse of process will not be able to be pursued before the arbitrators. However, Mr Kentridge for Ali meets that difficulty in this way. He invites the Court to look at the Award in the First Arbitration and to hold that, by simple application of the principles of issue estoppel, it is apparent that those allegations cannot succeed. Indeed, he suggests that the plea of issue estoppel, which does not so far appear in the pleadings in the Hull 204-206 Arbitrations, is no more than a ruse by which to get the material before the arbitrators for the purpose of prejudice. He points out that, for an issue estoppel to be established on the basis of the findings in the First Arbitration, it would be necessary for the Yard to show that, (i) the very issues pleaded in the Hull 204-206 Arbitrations were decided in the First Arbitration; (ii) the parties to the First Arbitration, or their privies, were the same persons as the parties or their privies in the Hull 204-206 Arbitrations and (iii) the decision in the First Arbitration was a final one .

Mr Kentridge submits that it is plain that those requirements cannot be satisfied. He accepts that, in respect of (i), the issue whether Lavender, Leeward and Leman were in breach of the contracts for Hulls 204-206 was raised. However, he points out that it was dealt with by Mr Harris in Paragraphs 32 and 49 of his Award in the First Arbitration only in the broadest of terms and to the extent considered necessary by the Arbitrator in relation to Ali's obligations under the Hull 202 Agreement as amended. He goes on to submit that it is clear that (ii) cannot be satisfied because the parties in the First Arbitration and the Hull 204-206 Arbitrations are different. Although conceding that Ali on the one hand and Lavender, Leeward and Leman on

the other are all in the common beneficial ownership of Greenwich and have at all material times shared common managers, Mr Kentridge relies upon the finding in the First Arbitration (which he says was plainly correct) that this is not a case where the corporate veil can be brushed aside or the independent legal existence of the corporate entities ignored. Finally, as to (iii), Mr Kentridge submits that the finding of Mr Harris on the question of the adequacy of the reasons why Lavender, Leeward and Leman withheld payment was not intended, and specifically did not purport, to be a final finding as between those three companies and the Yard.

In response to these points, Mr Flaux has argued first, that where a bona fide plea by way of claim or defence has been raised in proceedings in support of which it is necessary to adduce material used in a previous arbitration, such plea should be taken at face value as a matter required to be adjudicated before the arbitrators; he submits that, on an application of this kind, the Court should not entertain the merits of the plea. Second, he has argued that while, on the face of it, the parties and their privies are not the same, for the Court so to conclude is to ignore or beg the question, which the Yard wishes to recanvass before the Hull 204-206 arbitrators, whether, in the circumstances of this case, it is right for the arbitrators to pierce the corporate veil and to treat Lavender, Leeward and Leman as no more or other than manifestations of Greenwich or Mr Frederiksen.

As to Mr Flaux's first point, I would accept that, in the ordinary way on an application of this kind, the Court should approach any averment pleaded by Counsel in an arbitration as raised bona fide and (if disputed) as creating an issue for decision by the arbitrator. As Colman J observed in Hassneh, when considering the question whether or not disclosure of an award to a third party was reasonably necessary for the protection of the disclosing party's rights:

"That Counsel has advised the arbitrating party of such reasonable necessity should in practice normally be conclusive of the matter" (p249).

However, there may arise cases, and in my view this is one, where the plea in respect of which disclosure is sought to be justified is essentially one of law, and the materials by which its merits can be judged are all before the Court. In such a case, if the Court is satisfied that the plea is unsustainable and that for the arbitrators to uphold it would be a clear error of law, then the Court is plainly in a position to rule that disclosure is not reasonably necessary for protection of the disclosing party's rights. That seems to me to be the position here.

In that connection, I would first observe that Mr Flaux's submissions are not advanced in support of a plea of estoppel set out and defined with appropriate precision and particularity in a pleading already before the arbitrators; that at least would enable this Court to consider the precise nature and extent of the issue(s) in respect of which an estoppel is said to arise. Instead he has asserted and sought to justify an intended plea in general terms which have not encouraged precision of thought or argument as to its validity. Nonetheless, on the basis of the material referred to before us, I can see no prospect of success for a future plea of issue estoppel however formulated, given the terms in which the findings of Mr Harris were couched in the First Arbitration Award.

Whether or not Mr Harris was right in his decision that the case was not one in which it was appropriate to pierce the corporate veil (and nothing which Mr Flaux has submitted causes me to doubt the correctness of that decision), it is quite plain that his view that the parties must be treated as separate legal entities (albeit acting through the same, or largely the same, personnel) conditioned his whole approach to any findings which he made on the question of the excuses advanced by Lavender, Leeward, or Leman for non-payment. In paragraph 32 of his Award, Mr

Harris appears to have regarded it as unnecessary to make any findings in that respect; moreover, in paragraph 49, his findings that the excuses were bad were made in very general terms and subject to his express observation that nothing he said could bind Lavender, Leeward and Leman. It does not seem to me that findings of that kind, in the context in which they were made, can be said to satisfy the requirements of issue estoppel in respect of the detailed defences raised in the Hull 204-206 Arbitrations. Accordingly, I am not prepared to find that the use in evidence of the Phillips material can be justified on the basis of a proposed plea of issue estoppel.

Nor, as matters presently stand, do I consider that a case of "reasonable necessity" can be made out on the basis that the Phillips material is needed to demonstrate that the defences raised are without merit. That is plainly so in respect of the Award in the First Arbitration which, absent any viable plea of res judicata, is strictly irrelevant to the task of the Hull 204-206 arbitrators, which is to come to their own decision on the factual evidence placed before them. Equally, to the extent that the Yard seeks to disclose and rely upon the evidence of Mr Maehle and Captain Hoem as part of a "package" necessary to demonstrate issue estoppel, their use cannot be justified. However, Mr Flaux has sought to justify the use of the transcripts on the grounds that it is plain that Mr Maehle and Captain Hoem are the very witnesses upon whom Lavender, Leeward and Leman must rely to make out the grounds of their defence. That being so, he says it is right that the arbitrators should have before them the evidence of those witnesses on issues which are essentially similar to those to which they spoke in the First Arbitration. Either, says Mr Flaux, they will give similar evidence in the Hull 202-204 Arbitrations, in which case the arbitrators will (as Mr Harris did earlier) reject the validity of the pleas based on that evidence, or they will give different evidence, in which case their earlier evidence will properly be before the Court in the interests of justice in order to demonstrate their lack of veracity or reliability.

Leaving aside the question of admissibility, that argument has superficial attractions to the extent that use of the Phillips material might well save time and expense and reduce the danger of inconsistent findings as between the Hull 202-204 arbitrators and Mr Harris upon the various areas of dispute common to the first and later arbitrations. However, in the absence of agreement between the parties, I do not think that convenience and good sense are in themselves sufficient to satisfy the test of "reasonable necessity". The principle of privacy in relation to arbitrations inevitably throws up problems of this kind, as Mr Kentridge has pointed out. He submits that it would be wrong for this Court to permit what is essentially a pre-emptive strike by the Yard in the Hull 204-206 Arbitrations, simply on grounds of procedural convenience and evidential short-cut.

Mr Kentridge analyses the position of the Yard in this way. Its own claim is a straightforward one based upon non-payment of a sum due under the express terms of the shipbuilding contracts, together with a claim for repudiation based on letters received from the respondent renouncing the shipbuilding contracts, which repudiation was accepted by a letter from the Yard. Such factual evidence as the Yard seeks to introduce on background matters which relate to the negotiation and history of the contracts and the ability of the Yard to perform the various contracts, is all evidence which will come from their own witnesses. The evidence given by Mr Maehle and Captain Hoem for Ali at the First Arbitration is evidence which is subject to an obligation of confidentiality unless or until a situation arises in which it appears that they are proposing to give inconsistent evidence for Lavender, Leeward and Leman in the Hull 204-206 Arbitrations. That position has not yet arisen, and Mr Kentridge submits there is no present reason to suppose it will do so. If the evidence they give is consistent, then the time to demonstrate its inadequacy as a defence will be in final submissions to the arbitrator. If the evidence given is inconsistent, then Mr Kentridge concedes that, in the interests of justice, the

Yard would be entitled to disclose and rely on the previous inconsistent statement or evidence in the Hull 204-206 Arbitrations, but not until then.

I think Mr Kentridge is right. I have considerable sympathy with the position of the Yard. It wishes to obtain an interim award in respect of payments which on the face of it are due under the terms of the Hull 204-206 shipbuilding contracts, and in relation to which a number of defences have been mounted which plainly did not appeal to Mr Harris when he was considering them collaterally or incidentally to the issues between the Yard and Ali in the First Arbitration. For that purpose the Yard is anxious to put the Phillips material before the Hull 202-204 arbitrators in an attempt to obtain an interim award on a basis analogous to Order 14 proceedings for summary judgment in the High Court, in which the plaintiff seeks to establish from statements or admissions made by a defendant in other proceedings that his pleaded defence is either not advanced bona fide or can be demonstrated to be without substance. However, quite apart from problems of admissibility, the Yard faces two substantial difficulties in that attempt. First, the arbitrators do not, without the consent of the parties, have any power equivalent to that of the High Court under Order 14. Second, the materials sought to be relied on were generated in the course of an arbitration with a third party who is unwilling to waive confidentiality. That being so, the ability of the Yard to make use of those materials must be governed by the principle of confidentiality already discussed. That principle seems to me to preclude disclosure of the transcripts, at least at this stage of the proceedings.

I make that proviso because the submission of Mr Flaux that the Yard will be hindered in defending any future application by Lavender, Leeward and Leman to dismiss the claims of the Yard for want of prosecution raises different considerations. This Court asked Mr Kentridge in the course of argument whether those three companies were indeed intending to pursue such an application. At that point Mr Kentridge, or rather those instructing him, retreated behind the

Chinese Wall which, notionally at least, divides the interests of Ali from the interests of the three companies upon this application; they were unable to give the Court an answer. That gives rise to an unsatisfactory position because, should an application to strike out be made, and should it appear that Mr Maehle and Captain Hoem are indeed the material witnesses to be called in support of the respondents' case in the Hull 204-206 Arbitrations, it seems to me that the Yard may well be justified in disclosing and relying upon their evidence in the First Arbitration, in order to rebut any suggestion of evidential prejudice by reason of delay. If it were asserted that the memory of witnesses had dimmed, the quality, nature and substance of their evidence upon the issues raised in the Hull 202-204 Arbitrations would be highly relevant. In those circumstances therefore, it seems to me that the Yard would be likely to succeed in establishing that disclosure was reasonably necessary in protection of its litigation interests.

Turning briefly to the Yard's submissions (5) and (6), these have essentially been covered in the course of dealing with submissions (1)-(4). If it appears that Lavender, Leeward and Leman will be seeking to rely upon evidence which is significantly at odds or inconsistent with the evidence of witnesses in the First Arbitration, then it would indeed be contrary to the interests of justice to allow Ali to seek to suppress that earlier evidence. However, that is not a position which has been reached or, in my view, ought to be assumed at this stage. Finally, for the reasons already stated, I do not think it right to say that Ali has no "legitimate interest" in seeking to restrain the disclosure of the Phillips material. While, in broad terms, the position of Ali appears to be more tactical than meritorious, it is based upon an assertion of principle which, in my view, entitles Ali to relief.

That said however, it seems to me both sensible and appropriate that the injunction originally granted by Longmore J should be made final subject to argument as to its precise wording and in particular subject to an appropriate reservation or proviso to preclude the necessity for the Yard

to return to the Court for exemption from its terms in respect of the transcripts of evidence, should the respondents in the Hull 204-206 Arbitrations make an application to dismiss the Yard's claim for want of prosecution, or should any witness for the respondents supply statements or give evidence inconsistent in some relevant respect with evidence which he gave in the First Arbitration. Such a proviso ought to be capable of agreement between the parties but, if not, it should be resolved by further argument.

Subject to those observations, I would allow the appeal.

LORD JUSTICE BROOKE: I agree.

LORD JUSTICE BELDAM: I also agree.

(Discussion on consequential orders adjourned to a date to be fixed)