Neutral Citation Number: [2021] EWCA Civ 1908

Case No: A4/2021/1466

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Robin Knowles CBE
[2021] EWHC 2720 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2021

Before:

LORD JUSTICE MALES
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE WARBY

- -

Between:

CDE	**Claimants/ Appellants**
- and -	
NOP	**Defendants/ Respondents**

- -
- -

Nathan Pillow QC & David Davies QC (instructed by **Steptoe & Johnson UK LLP**)
for the **Appellants**
Lawrence Rabinowitz QC & Simon Paul (instructed by **Simmons & Simmons LLP**)
for the **Respondents**

Hearing date: 2nd December 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 a.m. on Wednesday 15th December 2021

Lord Justice Males:

Introduction

1. This appeal is concerned with the tension between open justice and arbitral confidentiality.

2. It is not possible in this judgment to say much about the facts of the case or anything about the identity of the parties.

3. The defendants in this action proceeding in the Commercial Court are accused of having orchestrated a fraud. The allegations against them have received some publicity.

4. Those same allegations were the subject of an arbitration against companies who are said to have some connection with the defendants. Arbitrators were appointed who held a hearing, heard witnesses including individuals who are defendants in this action and produced a lengthy award.

5. Although we have not seen the award itself, the claimants say and the defendants do not deny that the arbitrators found that the claimants' allegations were well-founded and that the defendants had given false evidence.

6. Now the question arises whether the arbitrators' award is binding on the defendants in this action. The claimants say that it is, because there is privity between the individual defendants in this case and the companies who were parties to the arbitration. Even if there is no such privity, the claimants say that it would be an abuse of process for the defendants to insist on litigating the same issues all over again. The defendants say on the other hand that the award is not binding on them: there is no privity and it is not an abuse of process for them to defend themselves in this action against the allegations made against them. They say that if the award is not binding on them, it will not be admissible at all as evidence against them in this action in accordance with the rule in *Hollington v Hewthorn* [1943] 1 KB 587, considered more recently in *Rogers v Hoyle* [2014] EWCA Civ 257, [2015] QB 265 and *Ward v Savill* [2021] EWCA Civ 1378. Who is right about this is due to be determined at a hearing in February 2022 at which the claimants will apply for summary judgment. I will refer to this as "the privity application", without distinguishing between the privity arguments and the arguments about abuse of process.

7. The claimants would like the award to be made public. They wish the world to know what the arbitrators have decided and say, among other things, that there is a public interest in the award's principal findings entering the public domain. They point out that the defendants have said publicly, in response to the allegations made against them, that they would be vindicated in the arbitration; and say that, now that they have not been vindicated, this should be publicly known. The defendants and the company against which the award was made (which I will call "X Co") would prefer that the award, which is confidential, does not become public, at any rate until after the privity application has been determined. They say, therefore, that it should not enter the public domain at this stage; and that if the claimants' privity application fails, there will be no need (and it will not be permissible) to refer to it again in this action, and no justification for making the award public.

8. The defendants and X Co accept that the claimants must be permitted to use the award for the purpose of preparing for the privity application, to adduce it in evidence before the judge hearing that application, and to make whatever submissions about it they wish to make. There is, therefore, no doubt that the judge hearing the privity application will have all the relevant evidence on which to make a decision. The defendants' and X Co's position, however, is that all this should be done in such a way that the award does not become public if they succeed in resisting the privity application, which in practice (they say) can only be done by conducting that application in private.

9. I should record that it has been agreed that all of the documents disclosed in the arbitration should form part of the disclosure in this action, as also should documents produced in the course of the arbitration such as witness statements and transcripts of evidence. Indeed the pleadings in the action include numerous references to evidence given in the arbitration. It is therefore likely that material which would in the ordinary course be subject to arbitral confidentiality will in due course become public as this action proceeds. But that does not in itself mean that the arbitrators' decision or findings will become public.

10. The broad issue argued on this appeal concerns the extent to which the proceedings in this action which involve reference to the contents of the award – and in particular the privity application – should be heard in public. But as I shall explain, the issue which the judge actually decided is much narrower.

The CMC

11. A case management conference took place before Mr Justice Robin Knowles in July 2021. This was shortly after the publication of the arbitrators' award. It appears that X Co was present, represented by the same legal team as represented the defendants. In addition to the usual matters arising to be dealt with at such a hearing, the claimants had indicated that they proposed to apply for permission to amend their Particulars of Claim, a draft of which was supplied, to rely on the arbitrators' findings, and to issue an application for summary judgment accordingly. The application was not issued at that stage, but in due course it became what I have referred to as the privity application.

12. Accordingly a question arose whether the case management conference should be heard in public or in private and whether an order should be made ensuring that documents such as the draft Amended Particulars of Claim and the claimants' skeleton argument should not become publicly available. The claimants submitted that the hearing should be in public in the usual way in accordance with the important principle that court proceedings are conducted in public. The defendants resisted this: a public hearing in which the confidentiality of the award was debated would inevitably reveal what the arbitrators had decided.

13. The judge decided that the hearing should at least begin in private, while the issue was debated. In the event the whole hearing took place in private. It appears that when the debate about the award was concluded, nobody raised the question whether it should then continue in public. The parties' submissions extended not only to the question of how the case management conference should be conducted, but also to the question whether the as yet unissued privity application should be in public or in private.

The judgment

14. At the conclusion of the argument about the award, the judge gave an *ex tempore* judgment. He said that he had no hesitation in concluding that "at this point in this case the partial award should retain the confidentiality that it attracts by virtue of the arbitration itself, and the respect for arbitral confidentiality seen in CPR 62 and the LCIA Rules". But he also made clear that this was only a view "for now", or as he described it "holding the ring", and that "nothing that I say today can or is intended to bind the judge who will consider the summary judgment application and decide it".

15. Despite this, there are passages in the judgment which call into question the extent to which the judge intended to determine that, in the absence of any change of circumstances in the meanwhile, the privity application should be heard in private. Some passages do appear to say this. It appears that the parties were under the impression that the judge had decided this, at any rate until they saw the approved transcript of his judgment and the order which he made which, in some respects, differed from the agreed draft which the parties had submitted to him. It is not surprising that the parties were under this impression as, in the course of argument, the judge had indicated in clear terms that he proposed to deal with the issue whether the proceedings up to the proposed summary judgment application should be heard in private. It appears, however, that the judge had thought better of this by the time he came to approve the draft order submitted by the parties.

The order

16. What the judge decided must be determined by reference to the order which he made. A judge is entitled to revise the transcript of a judgment delivered *ex tempore* and is not bound by the terms of a draft order submitted by the parties. The contrary was not suggested.

17. The order which the judge made recorded that the claimants had indicated their intention to apply for permission to amend their claim to rely on the award and for summary judgment in respect of the proposed amendments. It referred to this as the "Intended Privity Application".

18. The order then provided as follows:

> "(1) This CMC, which refers to the contents of the Partial Final Award … (the 'LCIA Award'), and any application heard today which refers to or necessitates reference to the contents of the LCIA Award, is heard in private. The Court records that this is the position simply at this early stage after the recent issue of the LCIA Award and is not an indication that the same position will necessarily hold in due course whether in light of the Intended Privity Application or otherwise.
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> (2) For the time being no party shall, at any hearing in these proceedings not taking place in private, rely on or refer to any part of the contents of the LCIA Award without first seeking a determination from the Court as to whether and to what extent those proceedings ought to be conducted in private.

> (3) For the time being … any correspondence or other materials placed in the CMC bundle which refer to the LCIA Award and/or to the Claimants' intended contentions of issue estoppel and/or abuse of process and this Order shall be treated as private and not be made available to any non-party (save that the parties are permitted to share this Order with the Tribunal in the LCIA Arbitration/the LCIA (for the purposes of communicating with the Tribunal), and with [an overseas court].
>
> (4) On filing any document which includes or refers to any part of the contents of the LCIA Award, the party filing such document shall identify it to the Court as subject to this Order, and each such document shall be treated as private and not be made available to any non-party.
>
> (5) The parties to the Privacy Application [i.e. the application by X Co to maintain the confidentiality of the award] shall be anonymised."

19. The effect of this order was that the judge had made no decision whether the privity application (or indeed any other application which might be made) should be heard in public or in private, but had placed the onus on the claimants who would need to refer to the contents of the award in making the privity application to seek a determination from the court whether the application should be heard in public or in private.

The scope of the appeal

20. The claimants appeal against the judge's order, submitting that the judge failed properly to apply the test in CPR 39.2 and to give proper weight to the fundamental principle of open justice, that he failed to take account of or gave insufficient weight to various factors, and that he took into account or placed excessive weight on various irrelevant factors. Their written submissions, perhaps not surprisingly, did not to my mind distinguish clearly between (1) whether the judge was wrong to have held the case management conference in private and (2) whether the forthcoming privity application should be heard in public or in private. In opening the appeal orally, however, Mr Nathan Pillow QC made clear that the claimants' case extended to both issues and (subject to any material change of circumstances between now and the hearing of the privity application) invited us to determine both. Mr Lawrence Rabinowitz QC for the defendants and X Co supported that course.

21. In my judgment, despite this invitation by the parties, we must focus on the order which the judge actually made. Appeals are against orders and not against the contents of judgments. The role of this court is to review decisions made at first instance, and not (with limited exceptions) to undertake a decision for the first time. The judge below did not in the end decide whether the privity application should be heard in public or in private and we do not have the benefit of a reasoned decision by the Commercial Court on that issue.

22. Accordingly I propose to consider whether the judge was wrong (1) to hold the case management conference in private and (2) to make the orders which he made to ensure

that the award would not become public as a result of these proceedings until the court had determined that it should.

The hearing of the appeal

23. The question arose whether the appeal before us should be heard in public or in private. As any public reference to the identity of the parties, the facts of the case or the existence of the award would inevitably enable any interested observer to deduce the contents of the award, and because it would not be possible for the appeal to be argued without reference to all of these matters, I made the following directions:

> "(1) The names of the parties should be anonymised and the appeal should be listed accordingly.
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> (2) The respondent's application for the hearing of the appeal to be in private will be dealt with in public at the outset of the appeal hearing. There must be no reference to the names of the parties or the contents of the award.
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> (3) Notice should be given to the media in the following terms:
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> > 'An appeal is to be heard on 2nd December 2021 which concerns a confidential arbitration award. A judge in the Commercial Court has ordered that for the time being no party shall, at any hearing in these proceedings not taking place in private, rely on or refer to any part of the contents of the award without first seeking a determination from the Court as to whether and to what extent those proceedings ought to be conducted in private. The respondent to the appeal has made an application that the appeal should be heard in private and the parties' names should be anonymised on the ground that if the appeal were held in public, the contents of the award would be revealed. The Court of Appeal has ordered that the case should be listed anonymously and proposes to deal with that application at the outset of the appeal. The purpose of this notification is to enable any media representative who wishes to make representations on that issue to do so.'
>
> (4) The appeal should not be live streamed.
>
> (5) In another case where a similar issue of arbitral confidentiality was raised, the Court permitted a media representative to attend a hearing in private on the basis that no report of proceedings should be published without a further order of the court. The Court may wish to consider a similar procedure in this case."

24. In the event no media representative attended and no representations from the media were received.

25. At the outset of the hearing Mr Rabinowitz for the defendants and X Co made his application that the court should sit in private, which Mr Pillow for the claimants did not oppose. It would have been impossible to conduct the appeal without referring to the matters whose confidentiality was in issue. It would not have been practicable to do so using anonymised names or taking other measures short of sitting in private. Too much information about the case is already in the public domain for this to have been effective. This was clearly a case where sitting in public would have defeated the object of the hearing and it was necessary to sit in private to secure the proper administration of justice (see CPR 39.2(3)(a)). We ruled accordingly and the hearing continued in private. We ordered in addition that until judgment or further order in the meanwhile the identity of the parties must not be disclosed, there should be no public access to the documents filed in support of the application to sit in private and there should be no reporting of the proceedings in private. Our order has been published on the judiciary website in accordance with CPR 39.2(5).

CPR 39.2, CPR 62.10 and arbitral confidentiality

26. The framework in which this appeal must be decided is set out in CPR 39.2. The current version of this rule, in force since 2019, provides so far as relevant as follows:

> "(1) The general rule is that a hearing is to be in public. A hearing may not be held in private, irrespective of the parties' consent, unless and to the extent that the court decides that it must be held in private, applying the provisions of paragraph (3).
>
> (2) In deciding whether to hold a hearing in private, the court must consider any duty to protect or have regard to a right to freedom of expression which may be affected.
>
> (2A) The court shall take reasonable steps to ensure that all hearings are of an open and public character, save when a hearing is held in private.
>
> (3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice—
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> (a) publicity would defeat the object of the hearing;
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> (b) it involves matters relating to national security;
>
> (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
>
> (d) a private hearing is necessary to protect the interests of any child or protected party;
>
> (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

> (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or
>
> (g) the court for any other reason considers this to be necessary to secure the proper administration of justice. …"

27. Thus a hearing *must* be in public unless (1) one of the sub-paragraphs in paragraph (3) applies *and* (2) it is necessary to sit in private to secure the proper administration of justice. In the present case the only sub-paragraph relied on by the defendants and X Co for conducting the privity application in private is sub-paragraph (c), their case being that the hearing involves confidential information (i.e. the contents of the award) and that sitting in public would damage that confidentiality.

28. CPR 62.10 provides that CPR 39.2 does not apply to the hearing of an "arbitration claim" that is to say the hearing of a claim of the kind described in CPR 62.2, namely:

> "(a) any application to the court under the [Arbitration Act 1996];
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> (b) a claim to determine—
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> (i) whether there is a valid arbitration agreement;
>
> (ii) whether an arbitration tribunal is properly constituted; or
>
> (iii) what matters have been submitted to arbitration in accordance with an arbitration agreement;
>
> (c) a claim to declare that an award by an arbitral tribunal is not binding on a party; and
>
> (d) any other application affecting—(i) arbitration proceedings (whether started or not); or (ii) an arbitration agreement."

29. These are the claims which the court may need to hear when exercising its supervisory jurisdiction over arbitrations conducted in England and Wales. It is not suggested that the present action (or the privity application) falls within the definition of "arbitration claim". Accordingly the applicable rule is CPR 39.2 and not CPR 62.10, although the latter rule, providing as it does a starting point that arbitration claims other than those for the determination of a question of law under sections 45 or 69 of the Arbitration Act 1996 will be heard in private, gives some legislative recognition to the concept of arbitral confidentiality. Moreover, in the cases to which it does apply, CPR 62.10 is only a starting point and, even if a hearing is held in private, it will often be necessary for a public judgment to be given (see *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207 and *Manchester City Football Club v Football Association Premier League Ltd* [2021] EWCA Civ 1110).

30. In other respects the question of arbitral confidentiality was deliberately left to the common law when the 1996 Act was passed (see paragraphs 10 to 17 of the February 1996 Departmental Advisory Committee Report on what was then the Arbitration Bill).

31. It is unnecessary in this judgment to explore the way in which the common law has developed. It is sufficient to refer to the summary given by Lord Justice Lawrence Collins in *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [129], including his first principle that:

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

32. Here there is an express agreement, contained in Article 30 of the LCIA Rules pursuant to which the arbitration was conducted. Article 30 of the Rules provides:

> "30.1 The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.
>
> …
>
> 30.3 The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal."

33. However, it is worth noting that the issue which arose in two of the cases on arbitral confidentiality, *Ali Shipping Corpn v Shipyard Trogir* [1999] 1 WLR 314 and *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 WLR 1041, does not arise here. In those cases the issue was whether an award made by one private arbitral tribunal could be disclosed to a subsequent private arbitral tribunal for the purpose of an issue estoppel argument. Here, as already explained, the defendants accept that it is necessary for the arbitrators' award to be before the judge hearing the privity application.

Submissions on appeal

34. For the claimants Mr Pillow submitted first that the judge failed to apply the test in CPR 39.2 which reflects the fundamental constitutional principle of open justice. Instead he started from the principle of arbitral confidentiality recognised in CPR 62.10, even though this rule did not apply. Second, Mr Pillow submitted that what the claimants were seeking to do in the privity application was to enforce the award by relying on an issue estoppel (cf. the *AEGIS* case) or at least to pursue a legal right, both of which fell within the exception to confidentiality recognised in Article 30.1 of the LCIA Rules; accordingly there would be no question of any breach of confidentiality if the hearing was held in public. Third, Mr Pillow submitted that the judge gave no or insufficient weight to a number of factors, namely that: (1) the presumption of privacy in CPR 62.10 does not apply to this case; (2) any derogation from open justice must be no more than

is strictly necessary to secure the proper administration of justice; (3) significant parts of the arbitration are already public knowledge; (4) disclosure of all the arbitration materials save for the award has already been given in this action and (where it helps them) the defendants have relied on that material in their pleadings; (5) publication of the award would cause no prejudice to X Co, there being no evidence that it carries on any business; and (6) there is a public interest in the findings of the award entering the public domain. Fourth, Mr Pillow submitted that the judge was wrong to hold the case management conference in private in order to "hold the ring" and to take account of the interests of the defendants, who were not parties to the arbitration. Finally, Mr Pillow submitted that the judge had been wrong to anonymise the proceedings in circumstances where the identity of the parties to the arbitration proceedings was already public knowledge.

35. Mr Pillow submitted that, even if the judge's order went no further than to hold that the case management conference should be held in private, without determining what should happen at the hearing of the privity application, this was wrong in principle – not only because that should not have happened but also because it meant that a hearing in private would be the starting point for any further consideration of the issue by the judge hearing the privity application, with the onus being on the claimants to justify a hearing in public. Accordingly the judge's order was likely in practice to control the position in future even if it did not do so on its strict wording.

36. For the defendants and X Co Mr Rabinowitz submitted that the decision actually made by the judge was limited to preserving the confidentiality of the award at the case management conference and until the hearing of the privity application, when the question of public or private would be looked at again. This was a case management decision involving an evaluation of various factors with which this court should be slow to interfere. He submitted that although the principle of open justice including the general rule that hearings should be in public is important, the exceptions to public hearings listed in CPR 39.2 are equally important. Here, the parties to the arbitration have agreed to keep the award confidential and that confidentiality would be lost if there is reference to the award at a public hearing. In this case, unlike others, because of the publicity which the dispute has received, the loss of confidentiality could not be managed or mitigated by (for example) avoiding reading out loud particular passages of the award in open court or anonymising the parties: any identification of the parties or reference to the facts of the dispute would inevitably identify the case and disclose what the arbitrators had decided. This was, therefore, a case which involved confidential information recognised by the law (i.e. the confidentiality of an arbitral award) where holding the hearing in public would damage that confidentiality. It was necessary to sit in private to secure the proper administration of justice, not only at the case management conference, but also at the hearing of the privity application: if the defendants' case at that application succeeds, the consequence will be that the award is irrelevant and inadmissible in these proceedings. So far as Article 30.1 of the LCIA Rules is concerned, while disclosure of the award to the judge hearing the privity application is necessary to enable the claimants to make their application, disclosure to the public is not necessary and should not occur when the question whether the claimants have a legal right to pursue against the defendants depends on the outcome of the application.

Was the judge wrong to hold the case management conference in private?

37. The general rule, as CPR 39.2 states, is that a court hearing is to be in public. This reflects the long-standing and well-established principle of open justice going back to the leading case of *Scott v Scott* [1913] AC 417. More recently, the reasons for this general rule were summarised by Lord Woolf MR in *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 at 977:

> "The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. …"

38. Any departure from the general rule, leaving aside arbitration cases to which CPR 62.10 applies, must be justified within the framework set out in CPR 39.2. Thus a hearing may only take place in private if, and even then only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) of paragraph 3 *and* that it is necessary to sit in private to secure the proper administration of justice. Necessity is a demanding test.

39. I would accept that the case management conference involved confidential information. Arbitral confidentiality is recognised by English law as significant and worthy of protection. It engages a public interest as well as the private interests of the parties. That is apparent from the common law principles to which I have referred and from the terms of CPR 62.10. There was here an express obligation of confidence in Article 30.1 of the LCIA Rules undertaken by the parties to the arbitration. The award was confidential regardless of whether its disclosure would cause harm over and above the fact of disclosure itself. As Lord Justice Mance explained in *City of Moscow* at [46], a party inviting the court to protect confidential information about a dispute need not necessarily prove positive detriment, beyond the undermining of its expectation that the subject matter would be confidential. The fact that the arbitration and/or the award is confidential is sufficient to demonstrate confidentiality. At the later stage, however, when the court comes to consider whether it is necessary to sit in private to secure the proper administration of justice, I would accept that the absence of other detriment may be relevant.

40. The purpose of the case management conference was to give directions for the further conduct of the proceedings. Inevitably this required reference to the claimants' application to amend their pleadings to rely on the award and their stated intention to make an application for summary judgment as a result. Although the application had not yet been issued, any consideration of the future course of the case needed to take into account that this would be the next stage of the proceedings. To have discussed

these matters in public would inevitably have revealed what the arbitrators had decided which, despite previous publicity about the case and despite what had been said in (for example) the defendants' pleadings, was not public knowledge. It was, therefore, a case where sub-paragraph (c) applied: the hearing involved confidential information and publicity would damage that confidentiality. However, as CPR 39.2 makes clear, confidentiality is not a trump card.

41. The critical question, therefore, was whether it was necessary to sit in private to secure the proper administration of justice. This is a question to which various factors may be relevant, and what is relevant may vary according to which of the interests protected by sub-paragraphs (a) to (g) is engaged. However, the court must have in mind the reasons why proceedings are in general required to be subject to "the full glare of a public hearing", as summarised by Lord Woolf in *Kaim Todner* in the passage set out above.

42. In considering this question, it is relevant and necessary to take account of the stage which proceedings have reached and the nature of the hearing. As Mr Rabinowitz submitted, there is a spectrum, with the trial at one end and an early procedural hearing at which there is to be no adjudication on the merits at the other. A case management conference concerned with such matters as amendment of pleadings, the scope of disclosure and directions for service of evidence is less likely (at least in general) to involve matters of public interest or to require public scrutiny of the court's conduct of the proceedings and decision-making processes (cf. *Kaim Todner* at 978C-D and *City of Moscow* at [20]). This is not to say that such hearings should not be conducted in public. Plainly they should. Rather, it means that in an exceptional case where the necessity to sit in private for one of the reasons listed in sub-paragraphs (a) to (g) is made good, and where (as here) no measure short of sitting in private is likely to be effective to protect the interests which those sub-paragraphs serve, a court may more readily conclude that to sit in private will secure the proper administration of justice.

43. In the present case, once it was shown that sub-paragraph (c) applied, it is apparent that there was a debate to be had about whether the court should sit in private at the case management conference. The tension between the principle of open justice and the confidentiality of the award needed to be addressed. In the circumstances of this case, because of the publicity which had occurred, that debate could only take place in private. Otherwise the confidential information would be disclosed and the debate would be pointless, whatever the court decided. I would hold, therefore, that it was necessary for the judge to sit in private to secure the proper administration of justice while dealing with the question whether the award should be made public by being referred to at a public hearing of the case management conference in these proceedings.

44. The judge did not, in his brief *ex tempore* judgment, focus on the stages of the analysis which CPR 39.2 requires the court to undertake. Nevertheless, he said that he had considered the claimants' submissions "against the very important framework of CPR 39.2". I see no reason to doubt this. In any event, the conclusion which he reached, limited to deciding that the case management conference should be held in private, was, subject to one qualification, clearly right. It is therefore unnecessary to invoke the principle that this court will not interfere with an evaluative decision by a first instance judge unless the judge has exceeded the generous ambit within which reasonable disagreement is possible.

45. The qualification is that once the debate about the award had concluded and the hearing went on to consider other more routine topics, it was no longer necessary for the court to sit in private and that part of the hearing should have continued in public. As I have indicated, this appears to have been overlooked, not only by the judge but also by the parties. Third-party rights of access to information about court proceedings should not, as a matter of principle, turn on considerations such as these. I would have wished to be able to correct the position by varying paragraph 1 of the judge's order to provide that the case management conference was heard in private to the extent it referred to the award or its contents and not otherwise; and to add a direction pursuant to CPR 39.9(4) that the rights of access to a transcript conferred by CPR 39.9(3) should apply to that part of the hearing that was not held in private. That could and should have been done at the time. Unfortunately, however, if we were to make this order now, it would be all too easy for the parties to this appeal to be identified and therefore for the outcome of the award to be publicly known.

Was the judge wrong to make orders to ensure that the award would not become public until the court had determined that it should?

46. As I have explained, the judge did not in the end decide that the privity application should be heard in private. He postponed that decision. It follows, in my judgment, that he was right to make orders designed to ensure that the award did not become public as a result of references being made to it in publicly available documents until such time as the question had been decided – in all likelihood by the judge who would hear the privity application. That was a necessary and sensible course to take in circumstances where it was apparent that there were already references to the award in documents such as pleadings and skeleton arguments which, in the absence of any order, were likely to become public.

47. That said, however, I would accept Mr Pillow's submission that paragraph 2 of the judge's order, at any rate when read with his judgment, may suggest that the starting point for any further consideration of the matter should be the confidentiality of the award. That would be wrong in principle. The starting point is that the hearing of the privity application should be in public and any derogation from that position needs to be justified in accordance with the provisions of CPR 39.2. This may be what the judge had in mind, but it is desirable to put the position beyond doubt. I would therefore set aside paragraph 2 and replace it by making clear that it will be for the defendants to satisfy the court that a hearing in private is required in accordance with those provisions.

Should the privity application be heard in private?

48. For the reasons given earlier, I would decline the parties' invitation to this court to decide whether the privity application should be heard in private. That will depend on the circumstances as they then exist. The judge hearing the application will be better placed than we currently are to make the decision. He or she will know much more than we do about the application and its strengths and weaknesses. We have been told very little about the issues which will arise, concerning privity and abuse of process, other than that it is accepted by the defendants that the application raises serious questions which need to be addressed.

49. Moreover, the position concerning publicity for the award appears to be developing. We were told that the claimants have applied to enforce the award in another

jurisdiction and that this fact is public knowledge in the sense of being posted on a publicly available website. The claimants are of course entitled to take steps to enforce the award and, if legitimate steps taken before state courts result in the award becoming public or are likely to do so within the near future, any possible necessity for holding the privity application in private is likely to disappear. There is no evidence before us about such matters, but they are plainly relevant to any decision about holding the privity application in private. It would be unsatisfactory to make this decision now on incomplete information.

50. That said, we make clear that the considerations which have led us to conclude that the judge was right to hold the case management conference in private will not apply, or at least will not apply with anything like the same force, to the privity application. That will be an application for summary judgment at which the court will be required to adjudicate on the merits of the dispute. Moreover, if the court holds that the hearing should be held in public, there will be no question of any breach of Article 30.1 of the LCIA Rules. That rule entitles a party to put the award in evidence before a state court in order to protect or pursue a legal right. That is what the claimants will do. If the applicable procedural rules mean that the court will sit in public to hear that application, there is no breach of Article 30.1.

Disposal

51. Accordingly I would dismiss the appeal so far as it relates to paragraphs 1 and 3 to 5 of the judge's order. I would set aside paragraph 2 and order in its place that if the defendants or X Co wish the privity application to be heard in private they must issue an application accordingly; that application should be dealt with by the judge hearing the privity application and should be determined in accordance with the provisions of CPR 39.2. For obvious reasons, that application itself will need to be heard in private, just as this appeal has been.

52. Finally, Mr Rabinowitz was no doubt right to observe that the claimants do not come before this court as the disinterested champions of open justice. Rather, they wish the award to become public in order to serve their own private interests in their dispute with the defendants. That, however, is beside the point. The principle of open justice exists in the public interest in order to ensure the proper administration of justice regardless of the wishes or motives of the parties.

Lord Justice Popplewell:

53. I agree.

Lord Justice Warby:

54. I also agree.

ORDER

UPON the Appellants' Appeal

AND UPON hearing from Leading Counsel for the Appellants and Leading Counsel for the Respondent

IT IS ORDERED THAT:

1. Save that paragraph 2 of Mr Justice Robin Knowles CBE's order sealed on 6 August 2021 (**"the Order**") is set aside, the appeal is dismissed.

2. Paragraph 2 of the Order shall be replaced with the following: *"if the Defendants or X Co wish the privity application to be heard in private they must issue an application accordingly, and that application shall be dealt with by the judge hearing the privity application and shall be determined in accordance with the provisions of CPR 39.2."*

3. The Appellants shall pay the Respondents' costs of the Appeal, which shall be subject to detailed assessment on the standard basis if not agreed.