AAY and others v AAZ
[2009] SGHC 142

Case Number : Suit [Y]

Decision Date : 15 June 2009

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Davinder Singh SC, Darius Bragassam and Bhavish Advani (Drew & Napier LLC), Chia Chor Leong (Citilegal LLC) for the plaintiffs; Michael Hwang SC and Katie Chung (Michael Hwang), Christopher Anand Daniel and Wong Yoke Cheng Leona (Allen & Gledhill LLP) for the defendant

Parties : AAY and others — AAZ

Arbitration

15 June 2009 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The defendant is a company incorporated in New Jersey, USA, with its principal place of business in Milpitas, California, USA. The first plaintiff joined the defendant's branch in Singapore, BBZ, around 1981 as a sales and service engineer. The second plaintiff joined BBZ around 1982, and the third plaintiff joined BBZ around 1985 as a financial controller. Subsequently, BBZ was incorporated and became known as CCZ, a wholly owned subsidiary of the defendant until 12 October 1992, and now known as DDZ. The first plaintiff became the managing director and an executive director of CCZ, the second plaintiff became the marketing manager and the third plaintiff remained as the financial controller. CCZ was in the business of marketing, distributing, producing and servicing equipment, including automated industrial cleaning systems and test equipment. Its business was divided into a third-party distributorship division and a production and Z division, to market and distribute products manufactured by third-party manufacturers and the defendant (as well as its related companies) respectively.

2 In late August 1992, XZ, the defendant's president, chief executive officer and representative in this suit, received an anonymous letter dated 22 August 1992 about an alleged scheme by the plaintiffs to destroy CCZ by diverting sales from CCZ to a new company set up by them for this purpose, EEZ. Acting upon the anonymous letter of 22 August 1992, XZ immediately sent CCZ's auditors to the premises of CCZ, without prior notice to any of the plaintiffs, to collect documents for immediate inspection to ascertain the truth of the allegations in the letter. No wrongdoings were uncovered from this inspection.

3 Upon further investigation, XZ discovered that the company EEZ had changed its name to FFZ. When XZ confronted the first plaintiff with the allegations in the anonymous letter, the first plaintiff denied any involvement in FFZ. XZ did not pursue the matter.

4 In September-October 1992, the plaintiffs suddenly resigned from their positions in CCZ. 19 employees from the third-party distributorship division of CCZ resigned en masse without prior notice. This prompted XZ to fly to Singapore on 2 October 1992, upon which he discovered that the third-

party distributorship division of CCZ was without a single employee. XZ then decided to sell CCZ's third-party distributorship division to the first and second plaintiffs, faxing them an offer in the morning of 7 October 1992, and faxing the first plaintiff a second offer that same afternoon. On 8 October 1992, XZ and the first and second plaintiffs recorded their agreement in a document titled "Heads of Agreement" by which the defendant agreed to sell to the first and second plaintiffs all its shares in the capital of CCZ and the first and second plaintiffs paid US$1m to GGZ as part payment of the purchase price. The defendant and the first two plaintiffs subsequently entered into a Sale and Purchase Agreement dated 12 October 1992 (the "SPA"). Under the SPA, the defendant agreed to sell the third-party distributorship division to the first and second plaintiffs by way of 1 million issued and fully paid-up ordinary shares in CCZ; the production and Z division of CCZ was to be transferred to the defendant and continued under a separate company owned by the defendant. The sale and purchase of the third-party distributorship division was completed on 4 November 1992 and the first and second plaintiffs transferred the business of the production and Z division to the defendant thereafter. Clause 18 of the SPA provided for any dispute arising out of or in connection with the SPA to be referred to and finally resolved by arbitration before an arbitrator whose decision would be final and binding on the parties.

5 Shortly after the SPA was signed, all the plaintiffs re-joined CCZ. The defendant, believing itself to be a victim of the plaintiffs' conspiracy to depress the net asset value of CCZ, started civil proceedings in the USA in July 1993 against the first and second plaintiffs and other parties, alleging *inter alia* fraud, conspiracy, negligent misrepresentation, conversion and federal securities fraud. A US District Court dismissed these proceedings on the grounds of *forum non conveniens* in December 1993and the motion for re-consideration was dismissed by a US Court of Appeal.

The 1994 Arbitration

6 The defendant then commenced arbitration proceedings in Singapore against the first and second plaintiffs on 29 August 1994 by issuing a notice of arbitration and nominating YZ of GGZ as the sole arbitrator. YZ accepted the appointment on 1 September 1994. However, the defendant then decided not to proceed with the arbitration because, *inter alia*, GGZ had been involved in the sale of the shares in CCZ; the arbitration clause in the Sale and Purchase Agreement would not encompass all the claims and remedies sought by the defendant; the third plaintiff was not a party to the Sale and Purchase Agreement and would thus not have been bound by the arbitration clause; and there was in the defendant's estimation insufficient evidence at that time to prove the defendant's suspicions as to the plaintiffs' wrongful behaviour.

Suit [X] and the 1998 Arbitration

7 In late February 1997, XZ received a second anonymous letter dated 16 February 1997 which supported his suspicions that the plaintiffs had committed various fraudulent acts in depressing the net asset value of CCZ. The letter also referred to one UZ who allegedly had information about the manner in which the plaintiffs had committed these fraudulent acts.

8 Having executed a deed of indemnity in favour of UZ in exchange for her testimony against the plaintiffs, the defendant thus commenced court proceedings against the plaintiffs, issuing a Writ of Summons on 10 October 1998 in Suit [X] against all the plaintiffs for fraudulent misrepresentation and conspiracy, and against the first plaintiff for breach of fiduciary duties owed to the defendant as sole shareholder of CCZ.

9 On 11 November 1998, the plaintiffs applied for an order that Suit [X] be dismissed or stayed pending the 1994 Arbitration. Following negotiations, the defendant offered to agree to the reference

to arbitration provided the third plaintiff, a non-party to the arbitration clause, agreed to be made a party to such arbitration. The parties agreed by Consent Order dated 23 February 1999 (the "Consent Order") to refer the entire dispute to arbitration (the "1998 Arbitration"). Order 1 of the Consent Order provided that:

> The whole of this action in Suit [X], and all of the issues and claims comprised or embraced in the Statement of Claim filed herein on the 10th day of October 1998, shall be referred to and be tried before an arbitrator in Singapore under the International Arbitration Act (Cap. 143A), and shall be determined and finally resolved by arbitration before such arbitrator under the said Act.

10 The parties also agreed that the 1994 Arbitration would be abandoned and that there would be no further proceedings in the US against the third plaintiff. A tribunal was constituted and TZ was appointed the sole arbitrator in the 1998 Arbitration. It is pertinent to note here that there was no express provision in the Consent Order concerning confidentiality in the arbitration.

11 On 30 June 2005, the tribunal issued its partial award on liability, finding the plaintiffs liable for fraudulent misrepresentation and conspiracy. The first plaintiff was also found liable for breach of fiduciary duties owed to the defendant as the sole shareholder of CCZ. Damages were to be assessed at a later date in the second phase of the arbitration.

12 On 19 August 2005, the plaintiffs took out an originating summons ("the OM"), against the defendant and the tribunal to set aside the partial award on the ground of apparent bias based on the manner in which the partial award was drafted and the tribunal's conduct during the evidentiary hearing of the liability phase of the arbitration. The hearing took place in open court before Justice V K Rajah in October 2005, and the parties were directed to furnish written submissions. In December 2005 Rajah J dismissed the plaintiffs' challenge with costs. The plaintiffs did not appeal against Rajah J's decision, and no written grounds of decision were delivered.

Sequence of events following the OM

13 The arbitration proceedings thus continued. By way of letter dated 13 February 2006, the defendant applied for specific discovery of the audited accounts of CCZ for the past 14 years from 4 November 1992. The tribunal allowed the discovery application on 9 May 2006, ordering the plaintiffs to furnish copies of its audited accounts for the period 2 November 1992 to 31 March 2006. On 19 June 2006, the plaintiffs provided copies of CCZ's audited accounts for 13 consecutive financial years from 1993 to 2005, the unaudited profit and loss account for 9 months ending 31 March 2006 and the unaudited balance sheet as at 31 March 2006.

14 On 8 August 2006, the defendant made a report to the Commercial Affairs Department of the Republic of Singapore Police Force (the "CAD"), providing in the course of the following week these documents:

(a) contact details of one [S];

(b) polygraph examination documents relating to a polygraph examination that XZ had undergone;

(c) the anonymous letters dated 22 August 1992 and 16 February 1997;

(d) a copy of the partial award issued by the tribunal on 30 June 2005; and

(e) a document obtained in discovery, being page 13 of the audited accounts of CCZ as of 30 June 1993 obtained by the defendant as a result of an order for disclosure issued by the tribunal on 9 May 2006.

15 On 11 August 2006, the defendant informed the first plaintiff in a letter dated 10 August 2006 that it had lodged a complaint against the plaintiffs with the CAD based on the information obtained in the 1998 Arbitration, and disclosed to the CAD portions of the partial award. The first plaintiff received a package containing the defendant's letter and the following documents:

(a) the credentials of police officer RZ;

(b) pages 97-106 of the partial award;

(c) a letter dated 20 January 2004 from one QZ setting out the results of a polygraph examination undergone by XZ; and

(d) an undated note from QZ on the polygraph examination.

16 The letter stated:

> Tuesday 8 August 2006 I met with the CAD group in Singapore. I have asked them to assist me in trying to figure out what happened in 1992 and over the years. I figure this will expedite the process as we don't have to make so many motions and wait months for your replies and extension. As you know we did not get certified financials for 1993 and 1996.
>
> Enclosed is the material that I gave them. Next I will give them the complete finding of the Arbitrator. After that we give them the rest of the material.
>
> I realise that getting CAD involved might delay the process but this has been in arbitration 8 years already so it is no big deal. The senior investigating officer I met with was very co-operative. I hope you and [the third plaintiff] will give your full co-operation with their investigation. The Inspector seemed anxious to get started but wanted more material which I am sending him.

17 On 28 September 2006, the first plaintiff received by fax from PZ a copy of an email which the CAD had sent to XZ:

> Dear Sir,
>
> I refer to your complaint at the Commercial Affairs Department on 8 August 2006, whereby you were attended by my colleague, [RZ].
>
> Pursuant to your complaint, we have also received some documents which were delivered by your staff, [PZ] on your behalf. Subsequent to that, I have also spoken to your counsel, [DSC] on the same matter as well.
>
> We are still in the midst of assessing your complaint. In the meantime, we would appreciate if you could appoint someone to lodge a police report in relation to the aforesaid complaint on your behalf in the event if you are not coming to Singapore for the time being. …[note: 1]

18 The plaintiffs were of the view that by the events and correspondence set out above, the defendant had repudiated the arbitration agreement; and by letter dated 29 September 2006 (set out below), the plaintiffs purported to accept the defendant's repudiation of the arbitration agreement:

> …
>
> We are instructed that on or about 11 August 2006, at your client's request, our clients collected a package from your client's office.
>
> The package consisted of a letter dated 10 August 2006 from your client to our clients which stated that on 8 August 2006, your client lodged a complaint against our clients with the Commercial Affairs Department ("CAD") based on information/documents obtained in the Arbitration and disclosed to the CAD portions of the Partial Award ("the Complaint"). Further, to intimidate our clients and pressure them into a settlement on your client's terms, the letter of 10 August 2006 contained an express threat that more confidential information will be disclosed and an implied threat to vigorously pursue criminal action.
>
> Your client has, by the Complaint and/or the disclosure of confidential information and/or the threats in and contents of the letter of 10 August 2006, evinced a clear and unequivocal intention not to be bound by the said agreement and Consent Order. The said conduct amounted to a wrongful repudiation of the said agreement and Consent Order.
>
> We hereby give you notice that our clients accept your client's said repudiation of the said agreement and Consent Order. In the result, our clients are discharged from any and all unperformed primary obligations or otherwise of parties under the said agreement and Consent Order and are no longer obliged to continue with the Arbitration.
>
> We hereby give you further notice that in pursuance thereof, our clients will be commencing proceedings *inter alia* for an order that the said agreement and Consent Order be set aside, a declaration that our clients are discharged from any obligation to continue with the Arbitration, an injunction restraining your client from proceeding further with the Arbitration, damages and costs.
>
> …

19 The defendant replied on 6 October 2006:

> …
>
> Our client does not agree that its actions in reporting your clients' conduct to the Commercial Affairs Department ("CAD") are improper in the circumstances of this case.
>
> In the circumstances, the arbitration will proceed and we will be presenting our claim for reliefs in due course.
>
> …

20 On 23 October 2006, PZ lodged a police report on behalf of XZ against the plaintiffs for cheating. The report enclosed a copy of an email from XZ to PZ to be forwarded to the CAD, which detailed XZ's version of events as well as his suggestions on how to "*break the case open on diversions and tax [avoidance]*"[note: 2] by questioning the right witnesses.

21 The plaintiffs commenced the present suit on 20 October 2006. In a letter dated 26 February 2007, the CAD informed XZ (via PZ) that it would not investigate his complaint:

> …
>
> We have reviewed the information you provided in support of your report and we considered all the evidence disclosed. Our review did not reveal sufficient evidence of falsification of accounts or criminal wrongdoings, to the extent that we can reasonably suspect the offences have been committed. For this reason, we will not be able to exercise our powers of investigation.
>
> We note that [the defendant] has obtained partial award against [the plaintiffs], although the assessment on the exact loss and damages involved has yet to be determined. In the circumstances, it was not an easy decision for us to make in this case. We hope you will understand that we need a basis to exercise our powers of investigation.

Issues arising in the present dispute

22 The plaintiffs brought the present suit against the defendant on the basis of breach of confidentiality, alleging that the defendant had, by the complaint to the CAD, the police report, wrongful disclosure of confidential information to non-parties to the arbitration (namely, one OZ and PZ), and the threats in the letter dated 10 August 2006, evinced a clear and unequivocal intention not to be bound by the arbitration agreement and thus repudiated it.[note: 3] The plaintiffs thus prayed for the following reliefs:

(a) An order to set aside the consent order and discharge the arbitration agreement;

(b) A declaration that the plaintiffs were from 29 September 2006 discharged from all their unperformed primary obligations under the arbitration agreement and consent order;

(c) An injunction to restrain the defendant from taking further steps in connection with the arbitration;

(d) Damages, interest and costs.[note: 4]

23 The defendant averred that the disclosure to the CAD was within the defendant's legal and legitimate rights, reasonably necessary to protect the defendant's legitimate interests, or justified in the public interest. Further or alternatively, the defendant submitted that the plaintiffs had waived any privacy or confidentiality by making such matters public in commencing the OM.

24 The issues before this court were:

(a) Whether there was a contractual or implied obligation of confidentiality in the 1998 Arbitration, and if so,

(b) Whether this obligation was breached and the nature of such breach,

(i) Whether the breach gave rise to the plaintiffs' right to terminate the arbitration agreement in the Consent Order,

(ii) Whether the breach was justified or excused in the public interest or the interests of

justice;

(c) Alternatively, whether confidence in the 1998 Arbitration was waived when the plaintiffs brought the OM;

(d) Whether the plaintiffs were in any case estopped from terminating the arbitration agreement, having continued in the proceedings after purporting to accept repudiation.

Whether confidentiality was a term of the 1998 arbitration agreement

25 The Departmental Advisory Committee on Arbitration Law, in its Report on the Arbitration Bill (February 1996) and Supplementary Report on the Arbitration Act 1996 (January 1997), noted that privacy and confidentiality had long been assumed as general principles in English commercial arbitration, subject to important exceptions, and it was only recently that the English courts had been "required to examine both the legal basis for such principles and the breadth of certain of these exceptions, without seriously questioning the existence of the general principles themselves."[note: 5] The advisory committee observed that there was "of course no statutory guidance to confidentiality in the UNCITRAL Model Law whatever; and indeed, in a different context, Lord Mustill [had] recently warned against an attempt to give in the abstract an accurate exposition of confidentiality at large (see *In re D (Adoption Reports: Confidentiality)* [1995] 3 WLR 483 [at 496D])". Heeding Lord Mustill's sound warning, as well as the advisory committee's firm view that disputes as to the breadth and existence of exceptions to confidentiality and privacy should be resolved "on a pragmatic case-by-case basis", I do not propose to expound on confidentiality in arbitration beyond the issues raised by the present case.

26 The plaintiffs argued that confidentiality was an express term of the arbitration agreement by virtue of the parties' adoption of the SIAC Rules in the conduct of the reference to arbitration. Rule 34.6 provides that parties shall at all times treat all matters relating to the arbitration, including the existence of the arbitration proceedings, as well as any awards, as confidential. The plaintiffs relied on the tribunal's decision dated 15 December 1999 in respect of the plaintiffs' application for security for costs, where the arbitrator stated:[note: 6]

> Rule 27.3 of the Arbitration Rules of the SIAC (2nd Edition 1997) which applies to this arbitration further provides that the Tribunal shall have the power to order any party to provide security for the legal or other costs of any other party by way of a deposit or bank guarantee or in any other manner the Tribunal thinks fit.
>
> It is further provided in Rule 27.5 that in the event that orders under Rule 27.3 are not complied with, the Tribunal may refuse to hear the claims.

27 The consent order provided for the arbitration to be held under the International Arbitration Act (Cap 143A) ("IAA"), which adopts the UNCITRAL Model Law on International Commercial Arbitration (see s 3 IAA). Under Article 19 of the UNCITRAL Model Law, the tribunal has the power to determine the applicable rules of procedure absent agreement by the parties:

> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the

arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

28 This decision by the arbitrator thus indicated that he had decided, absent parties' agreement, that the SIAC Rules applied; and in coming to his decision on security for costs he had in fact applied the SIAC Rules. Neither party took issue with the arbitrator's adoption of the SIAC Rules until the present suit was commenced. Before me, the defendant denied that the SIAC Rules applied to the arbitration, pointing to a letter that it had written to the arbitrator dated 25 January 2007 (after the present proceedings had commenced) in which it formally denied that the SIAC Rules applied:

> The [defendant] cannot now recall why it made no comment earlier on the [phrase "which applies to this arbitration"], but it may have been because there was no appeal against the Tribunal's Decision, so any comment made by the [defendant] would have been academic.
>
> The [defendant] respectfully submits that the Tribunal is at liberty to refer to the SIAC Rules as evidence of common arbitral practice in Singapore, but the SIAC Rules cannot bind the Parties unless the Parties have agreed to its adoption in this Arbitration, which they have not done.

29 This letter came very late in the day, to say the least, more than seven years after the ruling and after the present proceedings had been commenced. It was clearly written as an afterthought once confidentiality became a crucial issue in dispute. The plaintiffs argued that the defendant must have waived its objection to the applicability of the SIAC Rules since it failed to object until more than seven years after the ruling of 15 December 1999 was made (see Articles 4 and 19(1) of the Model Law).

30 If, as the defendant asserted, the SIAC Rules did not apply, then what rules did? The defendant did not point to any alternative rules which the parties had adopted by agreement, suggesting that the SIAC Rules were referred to for the security for costs application, but that other rules might be adopted at a subsequent stage of the hearing. To begin with, the language in the arbitrator's decision ("Rule 27.3 of the Arbitration Rules of the SIAC (2nd Edition 1997) *which applies to this arbitration* further provides that …") was quite unequivocal in adopting the SIAC Rules as the applicable rules rather than a mere guide. Second, to refer to the SIAC Rules merely as evidence of common arbitral practice in Singapore would be quite unfeasible as multiple and protracted disputes might arise when one party or the other objects to the application of a particular rule. I found little assistance in the tribunal's response dated 26 January 2007[note: 7] that it had

> proceeded on the basis that the Parties are agreed that the SIAC Rules is persuasive authority to which reference was made by the [plaintiffs] when the application was made for security for costs and again when reference was made to Rule 34 when submitting on proceedings being confidential.

31 The tribunal took this surprisingly diffident position perhaps to appease both parties, though ultimately it was quite unhelpful. Either the SIAC Rules applied or some other rules agreed by the parties did. The defendant, while pointing out that the plaintiffs had also relied on the Rules of Court in their submissions to the tribunal dated 7 March 2006,[note: 8] nevertheless did not submit that the Rules of Court were the procedural rules that applied to the arbitration, and were content merely to raise the "logical difficulty about an arbitration making both these sets of rules applicable in view of the many inconsistencies between them."[note: 9] This submission begged the question of what rules did apply, if any, and the simple fact of the matter is that, on a plain reading of its decision on

security for costs, the tribunal decided on the SIAC Rules in the absence of the parties' agreement; and neither party objected to the adoption of the SIAC Rules until more than seven years later. The arbitration proceedings having been concluded as to liability and the partial award having been delivered on 30 June 2005 before the defendant's extremely belated objection was raised, it would appear that the parties did implicitly agree to the application of the SIAC Rules and that these rules were in fact applied by the tribunal in the course of the proceedings including the making of the partial award. Pursuant to the SIAC Rules, therefore, confidentiality would appear to have been a term of the arbitration. However, a reading of the partial award itself revealed a different set of rules applicable to the arbitration.

32 Surprisingly, this was not referred to in either party's submissions. Indeed, while the defendant did not point this out, in the partial award at page 30 para 10, the arbitrator noted that at a meeting held on 30 April 1998 it was "by consent ordered that the Model Law set out in the First Schedule to the International Arbitration Act (Cap. 143A) would be referred to as the 'Rules'." At page 32 para 18 of the partial award the arbitrator referred to "the Model Law which the parties had accepted as the applicable Rules to this arbitration." This is in itself puzzling. The Model Law is a part of the *lex arbitri*, the substantive law governing the arbitration. It has been largely adopted and implemented as domestic legislation via the IAA. While its scope encompasses everything from the arbitration agreement to enforcement of the award, it is not a set of procedural rules like the UNCITRAL Rules, or for that matter the SIAC Rules, although there are some broad procedural provisions in the Model Law. This is made clear in article 19 of the Model Law which provides for the rules of procedure to be determined by parties' agreement or failing such agreement by the arbitral tribunal. Citing article 19, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th ed, Sweet & Maxwell 2004) at p80 observe that the Model Law does "not purport to lay down any detailed procedural rules as to the actual conduct of an arbitration – such rules, for example, as the submission and exchange of witness statements, the order in which witnesses are to be called, the time to be allotted for the questioning and cross-questioning of witnesses and so forth." Yet it would have been entirely redundant and superfluous for the parties to agree to adopt the Model Law as the *lex arbitri* because it would already be applicable by virtue of the arbitration agreement specifying that the IAA (which incorporates the Model Law) would apply. At the meeting on 30 April 1998, the parties had apparently also adopted the Model Law as "Rules", indicating that they additionally intended questions of procedure to be governed entirely by the Model Law. The Model Law's lack of detailed procedural provisions aside, since the parties adopted the Model Law as "Rules" by consent on 30 April 1998, I therefore have to find that the arbitrator was mistaken in stating that the SIAC Rules applied to the entire arbitration in his 15 December 1999 decision on security for costs. Indeed, the arbitrator's letter in response to the defendant's belated objection bears this out. While reference would have to be had to other procedural rules for more specific matters not addressed by the Model Law, it cannot be said, in light of the parties' agreement, that the SIAC rules applied *to the entire arbitration exclusively*. If anything, the parties agreed that the Model Law would apply, presumably supplemented where necessary by other procedural rules. Accordingly, as the Model Law is silent on confidentiality in arbitration, confidentiality was not an express term of the arbitration agreement, and I must turn now to consider the nature, scope and application of an implied obligation of confidentiality in arbitration.

The implied obligation of confidentiality in arbitration

33 In the recent case of *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 ("*Emmott*"), the English Court of Appeal summarised the common law position on confidentiality in arbitration. The court noted at [81] that it was clear that apart from confidentiality in the sense of the inherent confidentiality of trade secrets or other information in documents deployed in arbitration, there was

> …an implied obligation (arising out of the nature of arbitration itself) 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 not to disclose in any other way what evidence has been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court: *Dolling-Baker v Merrett* at 1213-1214; *Hassneh Insurance Co of Israel v Mew* at 246; *London and Leeds Estates Ltd v Paribas Ltd (No 2)* at 106; *Ali Shipping Corporation v Shipyard Trogir* at 326 (where the defendants had conceded the existence of the implied term: see at 328). The obligation is not limited to documents which contain material which is confidential, such as trade secrets. The obligation arises, not as a matter of business efficacy, but is implied as a matter of law: *Ali Shipping Corporation v Shipyard Trogir* at 326, disapproving *Hassneh Insurance Co of Israel v Mew* on this point.

34 Lawrence Collins LJ characterised the obligation as a substantive rule of arbitration law, describing its principal features at [105]-[107]:

> …case law over the last 20 years has established that there is an obligation, implied by law and arising out of the nature of arbitration, 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 not to disclose in any other way what evidence has been given by any witness in the arbitration. The obligation is not limited to commercially confidential information in the traditional sense.
>
> As I have said above, this is in reality a substantive rule of arbitration law reached through the device of an implied term. That approach has led to difficulties of formulation and reliance (perhaps, over-reliance) on the banking principles in *Tournier*.
>
> In my judgment the content of the obligation may depend on the context in which it arises and on the nature of the information or documents at issue. The limits of that obligation are still in the process of development on a case-by-case basis. On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure.

35 Lawrence Collins LJ decided in *Emmott* that on the facts disclosure was required in the interests of justice, adding at [111] that the "interest of justice are not confined to the interests of justice in England. The international dimension of the present case demands a broader view."

The nature of the obligation of confidentiality in arbitration

36 The existence of an obligation of confidentiality in arbitration has been emphatically recognised by the English courts, though with some ambivalence over its precise legal basis, scope and exceptions. In *Dolling-Baker v Merrett* [1990] 1 WLR 1205 ("*Dolling-Baker*") at 1213, Parker LJ characterised the obligation of confidentiality as "an implied obligation arising out of the nature of arbitration itself":

What is relied upon is, in effect, the essentially private nature of an arbitration, 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. 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, in my judgment, 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 witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer.

It will be appreciated that I do not intend in the foregoing to give a precise definition of the extent of the obligation. It is unnecessary to do so in the present case. It must be perfectly apparent that, for example, the fact that a document is used in an arbitration does not *confer* on it any confidentiality or privilege which can be availed of in subsequent proceedings. If it is a relevant document, its relevance remains. For 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 nature of arbitration itself. When a question arises as to production of documents or indeed discovery by list or affidavit, the court must, it appears to me, 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 the 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.

37 Citing this passage with approval in *Hassneh Insurance Co. of Israel v Steuart J Mew* [1993] 2 Ll LR 243 ("*Hassneh*") at 246, Colman J added:

It is to be observed that Lord Justice Parker identifies an "implied obligation" as the basis for the confidentiality attaching to documents used in or engendered in the course of an arbitration. Such an obligation can exist only because it is implied in the agreement to arbitrate and like any other implied term must be capable of reasonably precise definition. The implication of the term must be based on *custom or business efficacy*. [emphasis added]

38 Colman J pointed also to:

…important distinctions between the reasoned award and the other documents [in the arbitration].

First, the reasoned award, containing the arbitrator's determination of the issues between the parties which have been referred, identifies the rights and duties of the parties inter se in relation to which they have been in dispute. In so far as it awards that one party shall pay, or do something for the benefit of the other, it gives rise to an independent contractual obligation to perform the award…. In as much as it contains the arbitrator's reasons it explains how that obligation arises.

Second, the award by reason of the Arbitration Acts, 1950 and 1979 is subject to the supervisory jurisdiction of the English Courts. It can be set aside or remitted to the arbitrator, for example, for misconduct. It can be the subject of an appeal on a point of law. For these purposes the

award may have to be brought into open Court and the consequence of that will usually be that its contents are reproduced in the judgment which will be public and may well be published in the law reports.

Thirdly, awards can be enforced in the English Courts by the summary procedure provided for by s. 26 of the Arbitration Act 1950 or by an action on the award. If the latter course is adopted the award will be opened to the Court in open Court and may therefore, be the subject of a law report which anybody can read.

Accordingly these three factors invest an award with two characteristics not associated with the other documents. First, an award is an identification of the parties' respective rights and obligations and secondly it is at least potentially a public document for the purposes of supervision by the Courts or enforcement in them.

It follows, in my judgment, that *any definition of the scope of the duty of confidence which attaches to an arbitration award – and I include the reasons – which omitted to take account of such significant characteristics would be defective*. … [emphasis added]

39 Colman J thus distinguished the confidential nature of an arbitration award from that of the documents produced in the course of arbitration (whether or not they were *per se* confidential). There is some force to the argument that the award may be of a different confidential nature from other documents, but I would observe here that the enforcement of arbitration awards and the development of arbitration law in the jurisprudence need not be at the expense of maintaining confidentiality. Parties' names could be redacted and the courts' supervisory jurisdiction could be exercised in private and with due regard to confidentiality. If even the fact of a party's involvement in arbitration would be confidential, the existence and terms of the award must be too.

40 In *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314 ("*Ali Shipping*"), Potter LJ disagreed with Colman J's characterisation of the obligation of confidentiality as an implied term based on custom or business efficacy, holding that it arose as a matter of law:

So far as the juridical nature of that implied term is concerned, while I note that in *Hassneh Insurance Co v Mew* [1993] 2 Lloyd's Rep 243 at 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] A.C. 239, 254F and *Lister v. Romford Ice and Cold Storage Co. Ltd*. [1957] A.C. 555, 576-577, *per* Viscount Simonds. As Lord Bridge of Harwich observed in *Scally v. Southern Health and Social Services Board* [1992] 1 A.C. 294, 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 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's case 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* (cf. *Hyundai Engineering & Construction Co. Ltd. v. Active Building & Civil Construction Co. Ltd*. (unreported), 9 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*.[emphasis added]

41 In *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 ("*Associated Electric*") (which involved the construction of an express confidentiality agreement) at [20], Lord Hobhouse however expressed some reservations about the analysis of the duty of confidentiality as an implied term:

> The present case involves the construction of an express confidentiality agreement and whether the later use of the award to support an issue estoppel comes within the scope of enforcement. For this reason more general statements concerning the privacy of arbitration proceedings and the duty of one party to respect the confidentiality of the other are of less assistance and relevance. The *Ali Shipping* case, like the present case, concerned the use in one arbitration of material obtained in an earlier arbitration with a view to supporting a plea of issue estoppel in the later arbitration. The parties were not however the same and the decision of the Court of Appeal to grant an injunction restraining the use of the material was based upon the view that the plea was clearly unsustainable. However Potter LJ, who delivered the leading judgment, having followed *Dolling- Baker v Merrett* [1990] 1 WLR 1205 affirming the privacy of arbitration proceedings, went on to characterise a duty of confidentiality as an implied term and then to formulate exceptions to which it would be subject: [1999] 1 WLR 314, 326 –327. *Their Lordships have reservations about the desirability or merit of adopting this approach. It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality. Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain. This may mean that the implied restrictions on the use of material obtained in arbitration proceedings may have a greater impact than those applying in litigation. But when it comes to the award, the same logic cannot be applied. An award may have to be referred to for accounting purposes or for the purpose of legal proceedings (as Aegis referred to it for the purposes of the present injunction proceedings) or for the purposes of enforcing the rights which the award confers (as European Re seek to do in the Rowe arbitration). Generalisations and the formulation of detailed implied terms are not appropriate*. [emphasis added]

42 In a marked departure from the evolving English position, the High Court of Australia rejected an implied duty of confidentiality in arbitration in *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] ALR 391 ("*Esso Australia*"). Mason CJ recognised that arbitrations are private "in the sense that [they are] not open to the public," describing "the private character of the hearing as something that inheres in the subject matter of the agreement to submit disputes to arbitration" (at p 398). As for confidentiality, Mason CJ appeared to acknowledge that:

> …the efficacy of a private arbitration as an expeditious and commercially attractive form of dispute resolution depends, at least in part, upon its private nature. Hence the efficacy of a private arbitration will be damaged, even defeated, if proceedings in the arbitration are made

public by the disclosure of documents relating to the arbitration. As [Bernstein, *Handbook of Arbitration Practice* (1987) at para 13.6.3] has observed:

> There would be little point in excluding the public from an arbitration hearing if it were open to a party to make public, for example in the press, or on television, an account of what was said or done at the hearing. It is suggested that a party would be entitled to an injunction to restrain the other party from such publication. And the same principle must apply to the arbitration as a whole, including the pleadings or statements of case, expert reports or witness proofs that have been exchanged, as well as to evidence given orally at a hearing.

43 However, Mason CJ also considered at 400-401 that:

… in Australia and the United States, there is no support in the decided cases for the existence of such an obligation of confidence. Indeed, in the United States, the decided cases are inconsistent with the proposition that confidentiality is a characteristic of arbitration proceedings [see *Industrotech Constructors Inc v Duke University* (1984) 314 SE 2d 272 at 274; *Giacobazzi Grandi Vini SpA v Renfield Corp* [1987] US Dist Lexis 1783; *USA v Panhandle Eastern Corp* (1988) 118 FRD 346] and, in Australia, there is a decision implicitly denying the existence of an obligation of confidentiality. And members of the profession with experience in the field of arbitration have expressed in this very case conflicting views on the question whether the parties come under an obligation not to disclose the proceedings. To that may be added the comment that, if such an obligation had formed part of the law, one would have expected it to have been recognised and enforced by judicial decision long before *Dolling-Baker*.

Moreover, it has to be acknowledged that, for various reasons, complete confidentiality of the proceedings in an arbitration cannot be achieved. First, it is common ground between the parties that no obligation of confidence attaches to witnesses who are therefore at liberty to disclose to third parties what they know of the proceedings. Secondly, there are various circumstances in which an award made in an arbitration, or the proceedings in an arbitration, may come before a court involving disclosure to the court by a party to the arbitration and publication of the court proceedings. Thus, by leave of the Supreme Court, an award made under an arbitration agreement may be enforced in the same manner as a judgment or order of that court to the same effect. An award may become subject to judicial review. The Supreme Court may determine a preliminary point of law arising in the arbitration, and may remove an arbitrator or umpire. And the court has the same power to make interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the court. Thirdly, there are other circumstances in which an arbitrating party must be entitled to disclose to a third party the existence and details of the proceedings and the award. An arbitrating party may be bound under a policy of insurance to disclose to the insurer matters involved in the arbitration proceedings which are material to the risk insured against. …

…Granted the various circumstances in which disclosure can legitimately take place, two questions necessarily arise. First, is there a legal basis for holding that there is an obligation not to disclose? Secondly, if so, how is the obligation to be defined and what are the exceptions to it?

An obligation not to disclose may arise from an express contractual provision. …

Absent such a provision, it is difficult to resist the conclusion that, historically, an agreement to arbitrate gave rise to an arbitration which was private in the sense that strangers were not entitled to attend the hearing. Privacy in that sense went some distance in bringing about

confidentiality because strangers were not in a position to publish the proceedings or any part of them. *That confidentiality, though it was not grounded initially in any legal right or obligation, was a consequential benefit or advantage attaching to arbitration which made it an attractive mode of dispute resolution. There is, accordingly, a case for saying that, in the course of evolution, the private arbitration has advanced to the stage where confidentiality has become one of its essential attributes so that confidentiality is a characteristic or quality that inheres in arbitration*.

Despite the view taken in *Dolling-Baker* and subsequently by Colman J in *Hassneh Insurance*, I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration. [emphasis added]

44 The Australian High Court thus recognised privacy in arbitration but rejected a general duty of confidence except in relation to documents compulsorily produced (at 403-404), and added that in any event such a duty of confidence might be subject to a "public interest" exception, the precise scope of which remained unclear (at 402). I have already noted the utility of practical measures to prevent confidentiality being lost upon challenge in court, though as far as the award is a factual statement of the parties' rights and obligations there are other circumstances in which it would have to be disclosed, such as the third type of reason described by Mason CJ, and I would agree that the confidential nature of the award may often differ from that of the other documents. Bearing in mind also that *Esso Australia* was decided in 1995, I think the more recent English cases have shown that private arbitration has reached that stage where confidentiality has undoubtedly become an essential attribute.

4 5 *Esso Australia* has been criticised by Patrick Neill QC ("Neill") in his article, *Confidentiality in Arbitration*. Neill is unconvinced by the supposed distinction drawn between privacy and confidentiality, preferring Toohey J's reasoning in the High Court's judgment at 411:

While clearly it is not possible to say that every aspect of an arbitration is confidential in every circumstance, no sharp distinction can be drawn between privacy and confidentiality in this context. They are, to a considerable extent, two sides of the same coin. The privacy of an arbitration hearing is not an end in itself; surely it exists only in order to maintain the confidentiality of the dispute which the parties have agreed to submit to arbitration.

46 While privacy and confidentiality may, in the abstract, be conceptually distinct, for the purposes of parties to an arbitration seeking to protect the dispute and proceedings from the knowledge of third parties and the public at large, they must be of the same practical import. Interestingly, however, similar reservations were expressed by the court in *Associated Electric* (*per* Lord Hobhouse, above) and *Emmott*. In *Emmott* Thomas LJ noted at [129] that *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2005] QB 207 ("*City of Moscow*") indicated a move to greater privacy but that the obligations of privacy are not absolute. Thomas LJ also noted that as the obligations of privacy and confidentiality, "whether express or implied, are contractual, the parties may modify them by subsequent agreement."

47 Thomas LJ said:

It seems to me that the task of the decision maker, whether it be a judge or arbitral tribunal, is to identify with precision the issue involved and then determine the application of the obligations of privacy and confidentiality that attach to the documentation or information which it is sought

to use outside the arbitration. I agree with Lawrence Collins LJ that the difficulties that have arisen in approaching this task may in part be due to reliance on the analogy with banking confidentiality (through *Tournier*) and in part because the obligations of privacy and confidentiality may differ. *In this respect the law relating to arbitrations may need to parallel the distinction in the general law where the law relating to privacy and confidentiality are distinct*: see for example *Campbell v MGN Ltd* [2004] 2 AC 457 at paragraphs 13 and 14 of the speech of Lord Nicholls of Birkenhead. [emphasis added]

48 In *Campbell v MGN Ltd*, Lord Nicholls observed at [13]-[14]:

> The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. A breach of confidence was restrained as a form of unconscionable conduct, akin to a breach of trust. Today this nomenclature is misleading. The breach of confidence label harks back to the time when the cause of action was based on improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of a confidential nature. But the gist of the cause of action was that information of this character had been disclosed by one person to another in circumstances "importing an obligation of confidence" even though no contract of non-disclosure existed: see the classic exposition by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47-48. The confidence referred to in the phrase "breach of confidence" was the confidence arising out of a confidential relationship.
>
> This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281. Now the law imposes a "duty of confidence" whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase "duty of confidence" and the description of the information as "confidential" is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called "confidential". The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.

49 With this jurisprudential context in mind, I now consider the position (to the extent that it has been articulated, and, beyond that, as it should be) in Singapore.

The position in Singapore

50 Like the UK Arbitration Act 1996, the Singapore Arbitration Act ("AA") and International Arbitration Act ("IAA") do not provide specifically for confidentiality in arbitration, though ss 56-57 AA and ss 22-23 IAA allude to this by providing for any party's application as of right to have hearings otherwise than in open court, as well as measures to preserve the confidentiality of the proceedings, award and decisions by the court in relation to the arbitration. In *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* ("*Myanma*") [2003] 2 SLR 547, Kan Ting Chiu J adopted the English position over the Australian position in *Esso Australia*. However, *Myanma* was decided before *Emmott*, and Kan J was not referred to the Privy Council's reservations in *Associated Electric* in relation to Lord Potter's formulation in *Ali Shipping* of confidentiality as a term implied by law.

51 More recently, in *International Coal Pte Ltd v Kristle Trading Ltd* ("*Kristle Trading*") [2009] 1 SLR 945 Lai Siu Chiu J considered at [82]-[84] that:

As a matter of law, an obligation of confidentiality is to be implied in arbitration proceedings due to the private nature of such proceedings. Oft-cited English authorities like *Dolling-Baker v Merrett* [1990] 1 WLR 1205; *Hassneh Insurance Co of Israel v Steuart J Mew* [1993] 2 Lloyd's Rep 243; *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314 and *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 as well as the local case *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* [2003] 2 SLR 547 reinforces the point. In this regard, I prefer the English position to Australia's where the High Court (see *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 128 ALR 391) adopted a contrary interpretation. I therefore reject the defendants' contention that there would be no room for a duty to be implied in the face of an express provision in the Confidentiality Rule (see [18] above). Nor do I accept their interpretation that once the arbitration had concluded and the Award was issued, the Confidentiality Rule no longer applied.

The implied rule is not in dispute; it is the exceptions to the duty of confidentiality both under common law and under the Confidentiality Rule that give rise to controversy and which in this case will determine the fate of the first suit.

The principles that can be extracted from the last English authority cited above, *viz*, the Privy Council decision in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* ([82] *supra*) were that (unlike the approach taken by Potter LJ in *Ali Shipping Corporation v Shipyard Trogir* ([82] *supra*)) there should be no generalisations of what the duty of confidentiality encompassed as each case should be evaluated in the context of its circumstances. Further, following the approach taken by Colman J in *Hassneh Insurance Co of Israel v Steuart J Mew*, a distinction has to be drawn between different types of confidentiality attaching to different types of documents. Arbitration awards were also to be treated differently from the materials used or disclosed in the course of arbitration proceedings.

52 Lai J thus appeared to adopt the general principle in *Associated Electric* that the duty of confidentiality should be evaluated in the context of the circumstances of each case, bearing in mind also that different types of confidentiality would apply to different types of documents.

53 The court in *Emmott* similarly noted that in different contexts the obligation of confidentiality would operate to result in different consequences. For example, confidentiality would not be an absolute bar to a party to litigation seeking discovery of documents generated in an arbitration. In that case the court would compel disclosure only if it considered it relevant and necessary for the fair disposal of the case. Second, should a party to an arbitration seek the court's assistance to obtain through a witness summons material deployed in another arbitration (see *London and Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102), the court would take into account the strong policy in favour of confidentiality in an arbitration, though confidentiality would not necessarily be an absolute bar either. Third, with regard to issues arising about the disclosure of documents on the court file relating to an arbitration, or whether the judgment of a court given in relation to an arbitration should be published, the privacy of arbitration would be an important but not decisive factor. The court would therefore exercise its discretion with privacy or confidentiality being "an important factor in the balance."[note: 10] As for the fourth kind of case in which a party to an arbitration might have an interest, commercial or otherwise, in disclosing documents generated in an arbitration (including the award) to third parties (as in *Hassneh* and *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272) or in another arbitration (as in *Ali Shipping* and *Associated Electric*), disclosure would be permissible to the extent to which it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party to found a cause of action or defend a claim.

54 It thus appears that the discussion has come almost a full circle, the obligation having been

characterised in turn as an implied term based on custom or the officious bystander test, then as an implied term in law, and finally as a substantive rule of arbitration law masquerading as an implied term, whose scope, nature and application must be determined in the context of each case and the nature of the information or documents at issue. Perhaps, and this finds some support from the Departmental Advisory Committee's declining to legislate on confidentiality in the English Arbitration Act in favour of a pragmatic case-by-case approach, the proper characterisation of the obligation of confidentiality is as a *general principle or doctrine of arbitration law developed through the common law* (as opposed to arbitration statutes). Certainly the obligation of confidentiality does not find expression in the statutes because of its somewhat amorphous scope and exceptions as well as its elusive juridical basis. The Departmental Advisory Committee was also right to point out that parties in doubt should specify the obligation of confidentiality in their arbitration agreements, rather than leaving it to chance that the curial court would be in a jurisdiction that recognises the obligation as a rule of substantive arbitration law. Further, it appears from *Esso Australia* and *USA v Panhandle Eastern Corp* (1988) 118 FRD 346 ("*Panhandle*") (though see Neill's caution in *Confidentiality in Arbitration*, [45] *supra*, that *Panhandle* should be limited to its facts) respectively that the Australian and American courts might not enforce such an obligation. Thus parties would do well to heed the caution raised by Lawrence Collins LJ in *Emmott* at [70], noting that important and widely used arbitral rules such as the ICC Rules and the UNCITRAL Rules are silent on confidentiality:

> But the UNCITRAL Notes on Organising Arbitral Proceedings, in Redfern and Hunter, *International Commercial Arbitration* (4th ed. 2004), App D, say (at para 31) that it is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration; there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case; and parties who have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognise an implied commitment to confidentiality. The Notes conclude that an arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

55 In summary, therefore, I would characterise the obligation of confidentiality in arbitration as a doctrine of arbitration law developed through the common law rather than the wider corpus of international arbitration law; as has been pointed out, the position in other civil law jurisdictions and indeed even in some other common law jurisdictions such as Australia (as well as the US) may differ significantly. Thus as a principle of arbitration law at least in Singapore and England, the obligation of confidentiality in arbitration will apply as a default to arbitrations where the parties have not specified expressly the private and/or confidential nature of the arbitration. While parties anticipating international arbitration would remain well advised to agree prospectively on the obligation of confidentiality, there is no need to do so where Singapore is to be the seat of the arbitration because confidentiality will apply as a substantive rule of arbitration law, not through the IAA or the AA, but from the common law. As Professor Merkin notes in *The Effect of Arbitration on Third Parties*, AL Service Issue No 49 at para 17.38, while very few decisions in which express confidentiality agreements have fallen to be construed, "the cases to date have operated on the basis that a confidentiality agreement should in principle be construed as reflecting the common law rules."

56 I also find support for this characterisation in ss 22-23 of the IAA and ss 56-57 of the AA, which by conferring on parties the power to ensure and maintain confidentiality over challenges in court *as of right*, reflect the underlying *general principle* in Singapore's arbitration law that arbitrations are not only private but also confidential. Of course, this confidentiality may be lost by parties' agreement, or if for example a party chooses not to exercise its rights under s 22 IAA by making an application when appropriate.

57 Quentin Loh SC and Edwin Lee, *Confidentiality in Arbitration: How Far does it Extend?* (Academy Publishing, 2007) ("Loh and Lee") suggest at p 109 that the "elements necessary for a cause of action for breach of confidence… fit well with those for breach of arbitration confidentiality." Their characterisation of this doctrine (at p 113) as one "rooted in equity", and "a class on its own, lying side by side with commercially confidential information and protection of private information" is not unpersuasive. Nevertheless, whether the doctrine be grounded in equity or tort, or developed independently in the context of arbitration albeit by analogy to other principles (though such analogies to banking law principles and even the *Riddick* principle have proved to be quite imperfect), it will continue to develop on a case-by-case basis, measured always against the "good yardstick" (as Loh and Lee put it at p110, citing *Dunford & Elliott Ltd v Johnson and Firth Brown Ltd* [1978] FSR 143 at 148) that the court will recognise and enforce confidentiality only to the extent that it is reasonable to do so.

58 Finally, while privacy and confidentiality may remain conceptually distinct, given my holding that confidentiality is a substantive common law-developed doctrine of arbitration in Singapore, it would be for parties to submit in appropriate cases where the practical import and consequences of breach of privacy and confidentiality diverge, if at all.

Exceptions to confidentiality – whether the defendant breached confidentiality by making the report and disclosure to the CAD

59 The courts have been at least as ready to accept that there are exceptions to confidentiality as they have been to accept the existence of the obligation of confidentiality itself. As with the obligation proper, however, the scope and nature of its exceptions have not been exhaustively and precisely identified, and some ink has been spilt equivocating over whether and how they should be categorised. In *Ali Shipping* at 326-328, Potter LJ recognised four categories of exceptions to the obligation of confidentiality:

> As to those exceptions, it seems to me that, on the basis of present decisions, English law has recognised the following exceptions to the broad rule of confidentiality: (i) consent, that is, where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the court, 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, that is, 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-à-vis a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by the third party: see *Hassneh Insurance Co. of Israel v. Mew* [1993] 2 Lloyd's Rep. 243.
>
> 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 v. Merrett* [1990] 1 W.L.R. 1205. 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 [1995] 1 Lloyd's Rep. 272, 275-276 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 (No. 2)* [1995] 1 E.G.L.R. 102 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, at p. 109:

> "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 *Esso Australia Resources Ltd. v. Plowman*, 183 C.L.R. 10. 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.

60 However in *Associated Electric*, the Privy Council (*per* Lord Hobhouse) questioned the categories enunciated in *Ali Shipping*, cautioning that these categories failed to distinguish between the confidentiality of the award and the confidentiality of the evidence presented in the proceedings. In *Emmott*, the court echoed Lord Hobhouse's admonition against generalisations and the formulation of detailed implied terms, as well as over-reliance on banking principles as in *Tournier*.

61 The Court of Appeal in *Emmott* nevertheless considered two exceptions laid down in *Tournier*: compulsion by law and duty to the public requiring disclosure (*Tournier* provided for two other exceptions, where it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action or defend a claim, and consent: see *Emmott* at [101]-[102]). As Merkin notes,[note: 11] despite the warnings in *Associated Electric* and *Emmott*, the cases have recognised a series of exceptions to confidentiality as modified from *Ali Shipping* or illustrated by later cases: consent, order or permission of court, protection of a party's legitimate interests and the interests of justice. As for confidentiality in relation to the award,

Merkin suggests at para 17.34.1 that "the true rule may be that the award itself can be regarded as a factual statement of the respective legal rights and liabilities of the parties." What is required for disclosure of the award, therefore, is "a link between the two sets of proceedings."

62 Thomas LJ distinguished at [127]-[128] the analysis where the issue was whether a party to an arbitration agreement had to disclose the arbitration documents in litigation with a stranger to the arbitration, as in *Dolling-Baker v Merrett*, and where the issue was whether as between the parties to an arbitration the obligations of privacy and confidentiality affected one party's ability to use pleadings and arguments produced in the arbitration in specific litigation outside the arbitration. In the former case, the court would employ

> …a balancing exercise in which the exercise of the court's judgment (often referred to as a discretion) may ultimately turn on balancing the obligations of privacy and confidentiality between the parties to the arbitration as against the public interest of disclosure of documents in litigation. Similar principles are applicable to applications for third party orders relating to witnesses: see *London and Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102; and to applications for the examination of court files relating to arbitrations: see *Glidepath BV v John Thompson*.
>
> In this case, however, Mr Emmott was seeking to have determined as between the parties to the arbitration whether the obligations of privacy and confidentiality affected his ability to use pleadings and a skeleton argument produced in the arbitration in specific litigation outside the arbitration. The tribunal deciding the issue was not making a balancing exercise of the type conducted in *Dolling-Baker* as between one party to the arbitration agreement and a stranger to the arbitration; it was determining the scope of the obligations of privacy and confidentiality as between the parties to the arbitration agreement during the currency of the agreement. Very similar considerations will arise, but the task is different as it is only necessary to determine the scope of the obligation and the balancing exercise does not arise.

63 There is thus no comprehensive list of exceptions to the obligation of confidentiality; but neither does the court have a general discretion to lift confidentiality. Indeed while the court in *Emmott* recognised that there were limits to the obligation of confidentiality, it stressed that the possible exceptions to confidentiality must also be discussed in their appropriate context. Specifically (at [87]):

> it does not follow from the fact that a court refers to the possibility of an exception for the order of the court or leave of the court in a case where it has the power to make the order or give leave (as in *Dolling-Baker v Merrett* [1990] 1 WLR 1205 or *Glidepath BV v Thompson* [2005] 2 All ER (Comm) 833) that the court has a general and unlimited jurisdiction to consider whether an exception to confidentiality exists and applies.

64 In sum, an examination of exceptions to confidentiality would probably still begin with a reference to the established categories, taking into account the context and circumstances of the case, including the nature of the document(s) sought to be disclosed, to whom disclosure is sought to be made, and for what purpose. Lawrence Collins LJ accepted at [107]:

> On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitration party; fourth, where the interests of justice require

disclosure, and also (perhaps) where the public interest requires disclosure.

65 In the present case, the plaintiffs argued that the defendant had breached confidentiality by disclosing the partial award and other documents in making the report to the CAD. They submitted that this disclosure should be proscribed as it undermined the public interest in encouraging and protecting arbitrations and their confidentiality, citing Matthews & Malek, *Disclosure* (2007, 3rd ed):[note: 12]

> … the exposure of wrongdoing revealed by documents disclosed on discovery to the appropriate law enforcement authorities amounts to a breach of the undertaking, and accordingly leave of the court is required before so doing. … there is a risk that an opposing party may use the threat of him providing copies of documents to the authorities as an improper bargaining tool in the litigation.

66 The defendant in turn referred to *Clerk & Lindsell on Torts* (19th ed, 2006) at para 28-32, emphasising that there could be no equity in the disclosure of iniquity:

> (i) Disclosure of matters of real public concern
>
> There is a clearly established defence of disclosure of matters of public interest in the action for breach of confidence. A much quoted dictum is: "The true doctrine is that there is no equity in the disclosure of iniquity." Although this has never been doubted, it is merely an example of the broader principle that the disclosure of confidential information will not be restrained where there is a just cause or excuse for disclosing it. It does not extend only to the detection or prevention of wrongdoing. The defence of public interest certainly covers "matters carried out or contemplated in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public: and doubtless other misdeeds of similar gravity" but it is not limited to these categories. The general principle is that disclosure should be made to the one who has a proper interest in receiving the information. The question is whether the information is such that it ought to be disclosed to a competent authority, or whether it ought to be made available to the public at large through the media. … In all these cases there is a conflict between two public interests: that of maintaining confidentiality and that of making matters of public interest known to those with a proper interest. A balancing act has to be performed….

67 Similarly, in *Initial Services Ltd v Putterill* ("*Initial Services*") [1968] 1 QB 396 Lord Denning cited Wood V-C's "vivid phrase: 'There is no confidence as to the disclosure of iniquity'" and extended the exception to:

> …crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always – and this is essential – that the disclosure is justified in the public interest. The reason is because "no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare." See *Annesley v Earl of Anglesed*. The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act, 1956, to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press.

68 The defendant thus submitted that the public interest pointed to excepting from confidentiality

obligations a report to the law enforcement authorities based on materials obtained in arbitration which revealed *prima facie* commission of criminal offences.

69 It is apposite to clarify here the distinction between an exception to confidentiality and a defence to a breach of confidentiality. Toulson and Phipps, *Confidentiality* (2nd ed. 2006) at paras 22-033 to 22-034, appears to conflate the two:[note: 13]

> Disclosure in the public interest
>
> In *London and Leeds Estates Ltd v Paribas Ltd (No. 2)*, the question arose whether an expert witness giving evidence in a rent review arbitration should be compelled to produce a proof of evidence provided by him in an earlier separate arbitration. Mance J held:
>
> > It does not seem to me that [the witness] has a legitimate ground to object to cross-examination about his previous statements on the general subject of West End property market conditions in 1991. 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.
>
> In *Ali Shipping* Potter LJ endorsed Mance J's view, while commenting:
>
> > As a matter of terminology, I would prefer to recognise such an exception under the heading 'interests of justice' rather than 'the public interest'… 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.
>
> The precise scope of the 'public interest defence' has long been a vexed question in the jurisprudence of confidentiality. However, it is suggested that there is no good reason why the general law on this topic should not be applied also in the context of arbitration proceedings.

70 Thus the cases cited characterise disclosure to the appropriate authorities as an exception, but the learned authors termed it the "public interest *defence*". The question is whether disclosure of confidential information arising out of arbitration to the *relevant authorities* where there is reasonable suspicion of criminal conduct, would be a breach of confidentiality at all – in other words, does the disclosure fall within an exception to confidentiality or does it operate as a defence? If it were an exception, then the scope of the obligation of confidentiality would not even extend to cover disclosure to the proper authorities and the plaintiffs would not be able to establish a prima facie case of breach without showing that the exception did not apply. If it were a defence, then the burden would be on the defendant to prove the defence and justify the disclosure which would not be in *breach* of the obligation of confidentiality. I consider here, therefore, whether disclosure to the proper authorities where there is reasonable suspicion of criminal conduct is an *exception* to confidentiality.

71 I adopt the standard of reasonable suspicion of criminal conduct from the ordinary standard for anyone to make a police report. Reasonable suspicion is of course a lower standard than the standard of being "aware" of the commission or intention to commit a seizable offence under s 22 of the Criminal Procedure Code, but it is echoed in s 39 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act Cap.65A, discussed in greater detail below; see clause 6 of the Explanatory Statement of the Amendment Act 2007, imposing an obligation to make a report "if a person (for example) reasonably suspects the property to be the proceeds of any offence, so long as the possibility that they may be the proceeds of a drug trafficking offence, serious offence, foreign

drug trafficking offence or foreign serious offence cannot be ruled out." Reasonable suspicion is also the standard applied to justify an arrest without warrant by a police officer under s 32(1)(a) CPC; see *Zainal bin Kuning v Chan Sin Mian Michael* [1996] 3 SLR 121. This is an objective standard that encourages the public to report suspected criminal acts but does not condone frivolous complaints. Making a police report on reasonable suspicion of criminal conduct is one aspect of an exception in the public interest (as opposed to the "interests of justice" exception concerned with preserving the integrity of judicial proceedings), though not all acts in the public interest would necessarily warrant an exception to confidentiality. The correct characterisation of disclosure to the relevant authorities must be that of an exception, as the jurisprudence has reflected. Lawrence Collins LJ put it beyond doubt in *Emmott* at [103]:

> It is clear that where the public interest reasonably requires it, there is *no obligation* to keep a matter private. In *Ali Shipping*, Potter LJ considered that in addition to the legitimate private interest of the parties, matters required in the "interests of justice" could form an exception to the implied terms. [emphasis added]

72 While the English courts have not had to consider whether an exception exists for disclosure in the public interest in the wider sense of *Esso Australia*, Lawrence Collins LJ in *Emmott* noted that it might be a potential fifth category of exceptions. I would venture to suggest that where disclosure to the public *at large* is sought to be justified on the grounds of public interest, this justification should instead operate as a defence, and the court would have to undertake a balancing exercise weighing the interest in protecting confidentiality against the public interest in disclosure to the public at large. The burden would then be on the defendant to show that such disclosure is necessary in the public interest to the extent that it should be excused from breaching confidentiality. Disclosure to the public at large (for example to the press or over the internet) would completely destroy confidentiality and the defendant must show a compelling public interest to justify such disclosure. It cannot be said that there is *no obligation* of confidentiality where the information in question is of public interest. A balancing exercise must be undertaken to weigh the importance of this public interest against the interest of protecting confidentiality and it must be for the defendant to convince the court that disclosure is justified. It is clear from *Initial Services* that there can be no liability for disclosure of wrongdoing to the appropriate authorities. The basis for this is that confidentiality is a lesser interest than the public interest of having criminal wrongdoing revealed to the relevant authorities for their investigation. Disclosure to the appropriate authorities where there is reasonable suspicion of criminal conduct is thus an exception to the obligation of confidentiality which can be broadly categorised as falling within the public interest, though this is not to say that there exists (or should exist) a general public interest exception. The development of other aspects of public interest exceptions will have to be considered as appropriate cases arise. I will now consider whether the defendant's disclosures fall within this exception.

The defendant's disclosures to the CAD, PZ and OZ

73 It is undisputed that the defendant disclosed the following documents to the CAD:

(a) the complete partial award;

(b) a letter dated 20 January 2004 from one QZ setting out the results of a polygraph examination that XZ had undergone on some issues that arose in the arbitration, and an undated note, also from QZ, setting out the steps involved in a polygraph examination;

(c) an anonymous letter dated 22 August 1992 describing what the plaintiffs had allegedly done;

(d) a second anonymous letter dated 16 February 1997 setting out more of what the plaintiffs had allegedly done;

(e) a computer print-out from XZ's secretary's computer of the contact details of one SZ; and

(f) page 13 of DDZ's audited accounts as of 30 June 1993.[note: 14]

74 The defendant also disclosed documents relating to the arbitration to one PZ and one OZ. XZ stated in his affidavit of evidence-in-chief that he had instructed OZ to send a copy of the entire partial award to the CAD[note: 15]

75 The plaintiffs alleged that the complaint to the CAD and the defendant's letter of 10 August 2006 notifying the plaintiffs of this complaint constituted "an attempt by the defendant to intimidate and apply illegitimate and improper pressure on the plaintiffs to settle the defendant's claim on the latter's terms."[note: 16] The plaintiffs also alleged that the defendant made wrongful disclosure of confidential information to PZ and OZ, being non-parties to the arbitration. They further submitted that items (a) and (f) were of "particular concern,"[note: 17] item (f) having been disclosed to the defendant pursuant to the arbitrator's discovery order and therefore "subject to the same implied undertaking as in court proceedings not to be used for a collateral purpose."

76 The defendant pleaded that the documents from QZ, both anonymous letters and the computer print-out of the contact details of SZ were the defendant's own documents, and that page 13 of DDZ's audited accounts as of 30 June 1993 had been disclosed inadvertently. Further, the defendant pleaded that:[note: 18]

(a) the disclosures to the CAD were reasonably necessary to protect the defendant's legitimate interests;

(b) the disclosures to the CAD were justified in the public interest;

(c) the disclosure to OZ was necessary or reasonable to enable the defendant to prepare for the arbitration and to make the disclosures to the CAD;

(d) the disclosure to PZ was necessary or reasonable to enable the defendant to make the disclosures to the CAD.

Disclosure to the CAD and the defendant's motives

77 The plaintiffs submitted in their closing submissions that the defendant's reasons for making the disclosures were irrelevant since it was strictly liable for its contractual breach.[note: 19] They continued to argue, however, that "the evidence is clear that the complaint was made by the defendant for one reason, and one reason only: to coerce the plaintiffs into a settlement on the defendant's terms."[note: 20] I agree with the plaintiffs that the defendant's reasons for making the disclosures to the CAD ("CAD report") are irrelevant. It is somewhat puzzling that the plaintiffs then devoted a significant part of their submissions to arguing at length that the defendant's complaint was "actuated by an improper and illegitimate motive – to coerce the plaintiffs into a settlement on the defendant's terms."[note: 21] In their reply closing submissions, the plaintiffs then changed their

tune and submitted instead that the defendant's motives for making the CAD report were *relevant* to the determination of the present action.[note: 22]

78 The plaintiffs also cited *Beckkett Pte Ltd v Deutsche Bank AG* [2005] 3 SLR 555, in which the Court of Appeal considered at [37] the conduct and motives of disclosure which were aimed at securing a resolution of the dispute by exerting pressure on the other party, and held that the risk that disclosure of documents would subject the other party to criminal prosecution weighed against allowing the other party to make disclosure. In the present case, the plaintiffs asserted that XZ had improper motives in making the CAD report, stating that threatening people to get his way was "part and parcel of XZ's *modus operandi*. In fact, it has become a reflex,"[note: 23] and "XZ is a master at using threats to get what he wants. He has had a lot of practice."[note: 24]

79 The significance of disclosure to the relevant authorities being an exception rather than a defence, apart from the difference in the burdens of proof, is also that the defendant's motives cannot have been relevant. If confidentiality did not extend to prevent disclosure to the CAD, then the defendant (via XZ) was well within its legal rights in making the report to the CAD, and whether XZ hoped to cause the plaintiffs anxiety or prompt them to propose a settlement of the arbitration dispute is quite immaterial as long as he did not seek to *extort* from or blackmail them – that is, as long as he did not in making the disclosure himself commit an offence. In this case, the public interest would simply be that of having suspected criminal conduct reported and investigated, rather than the public's interest in knowing the confidential information. Since disclosure to the appropriate authorities is an exception and not a defence to confidentiality, the defendant's alleged motive must be irrelevant. What is relevant is that factually a report was made to CAD with reasonable suspicion of commission of an offence.

80 Further, as the defendant points out, the tort of malicious prosecution is a cause of action available to a party against whom bad-faith police complaints have been made, but an element of the tort of malicious prosecution is that there was no reasonable cause for the police complaint.[note: 25] In *Robin v Sunrise Investments (Pte) Ltd* [1991] SLR 436 ("*Robin*") Chao Hick Tin J (as he then was) set out the elements of malicious prosecution: (a) prosecution by the defendant of a criminal charge against the plaintiff before a tribunal into whose proceedings the criminal courts were competent to inquire; (b) that the proceedings terminated in the plaintiff's favour; (c) that the defendant instituted or carried on the proceedings maliciously; (d) that there was an absence of reasonable and probable cause for the proceedings; and (e) that the plaintiff suffered damage. Here, the plaintiffs did not plead malicious prosecution at all and therefore did not submit on the five elements of the tort. In any case, Chao J held in *Robin* that mere acquittal did not mean that the criminal proceedings were without reasonable and probable cause, and if reasonable cause was established as a matter of fact based on all the circumstances, it did not matter whether there was malice or not. Reasonable and probable cause was (*Robin* at [43], citing *Hicks v Faulkner* (1878) 8 QBD 167 at 171):

> an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

81 Even if it is true that the defendant made the CAD report to prompt the plaintiffs to settle, this cannot found any liability on the defendant's part. Nor can it render inapplicable the public interest exception of making a police report on reasonable suspicion of criminal conduct. The defendant had ample legitimate grounds to make a complaint based on the arbitrator's finding in the partial award that the plaintiffs had committed such dishonest and fraudulent acts as setting up FFZ to compete

with CCZ while still employed by CCZ, diverting business and staff resources from CCZ to FFZ, removing documents and confidential records from CCZ around July 1992, procuring breaches of CCZ's exclusive distributorship agreements and the resignation of employees of the marketing and distribution division of CCZ. In addition, the arbitrator found that the plaintiffs had fabricated evidence, which the arbitrator noted was potentially an offence under s 192 of the Penal Code.[note: 26] A report disclosing fabrication of evidence would thus also be considered within the "interests of justice" exception, as well as the general public interest exception of reporting reasonably suspected criminal conduct; the two exceptions are discrete but not mutually exclusive.

82 In this case, I am of the opinion that the defendant did have reasonable and probable cause based on the arbitrator's findings in the partial award. It would suffice to complete the point with the following extract from *Clerk & Lindsell on Torts* (19th ed, 2006) at pp31-32:

> The motive of causing harm will not generally give rise to liability in the absence of other unlawful conduct. There is no overarching principle of liability for ill-motivated and intentionally harmful acts. In *Allen v Flood* Lord Herschell declared that the 'existence of a bad motive, in the case of an act which is not otherwise illegal, will not convert that act into a civil wrong.' The classic illustration of this proposition is *Bradford v Pickles*. There the defendant abstracted water running through undefined channels on his own land thus preventing that water reaching the claimant's adjoining reservoir. He did so out of spite, in revenge for the claimant's refusal to purchase his land at the price he demanded. In effect he set out to harm the claimant's business simply because it would not do as he wished. The House of Lords held no tort was committed. The claimant had no right to the water supply sufficient to render the defendant's actions on his own property unlawful. Motive was irrelevant: "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious."

83 *Bradford v Pickles* [1895] AC 587 and *Allen v Flood* [1989] AC 1 were both cited with approval in *Remus Innovation Forschungs-Und Abgasanlagen-Produktionsgesellschaft mbH v Hong Boon Siong* [1999] 1 SLR 179 in the context of parallel import sales made with improper motive: "damage alone is insufficient to found a cause of action even if it results from an evil motive of the defendant. An additional element is necessary, namely, the conduct must be unlawful: in this case a deception must be practised." Thus the law would not leave the plaintiffs completely without recourse should they indeed be harassed by malicious prosecution, but that was quite rightly not pleaded here. The defendant's motives, improper or otherwise, are therefore irrelevant to its exercise of its legal right to make a police report based on the arbitrator's findings in the partial award. I find that the CAD report (including the disclosure of the partial award to the CAD) fell within the exception of disclosure to the appropriate authorities where there was reasonable cause to suspect criminal conduct. The obligation of confidentiality therefore did not apply to proscribe this disclosure.

Disclosure to OZ and PZ

84 The exception in the public interest of disclosure to the appropriate investigative authorities based on reasonable suspicion of criminal conduct clearly did not apply to the disclosures made to OZ and PZ. OZ was an employee of HHZ, a related company of the defendant, and an executive secretary to the Board of Directors of JJZ, another related company of the defendant.[note: 27] OZ was a witness in the arbitration and was also XZ's personal secretary in Asia. PZ was a director and an employee of CCZ, a related company of the defendant, and was assisting XZ (who was not resident in Singapore) in making the police report in Singapore. The defendant pleaded that XZ, OZ and PZ were acting as agents of the defendant to carry out its instructions in relation to the

arbitration and the police report, as was reasonably necessary in light of the fact that the defendant is a corporate entity.

85 The plaintiffs submitted that since OZ had to leave the room after giving her evidence in the arbitration, XZ "had full knowledge that matters relating to the arbitration could not be disclosed" to her, much less to PZ who was in no way involved in the arbitration.

86 Having heard OZ's evidence, it was amply clear that she was XZ's personal secretary and in charge of filing, printing and organising his papers from her office in Malaysia. I find that the disclosure made to OZ did not result in a breach of confidentiality as she was acting purely in the capacity of XZ's secretary as the defendant's agent, even though technically she was employed by a related company of the defendant rather than the defendant itself.

87 PZ was a director of CCZ along with XZ himself. He testified that he had merely delivered the package containing the documents listed above to the CAD and lodged the police report, and that he did not open the package and did not know what it contained. I have no reason to doubt his evidence. In any case, even if he did have some knowledge of the arbitration award and the documents in the package, I also find that PZ acted as an agent of the defendant in making the police report on XZ's behalf. The correspondence from the CAD clearly shows that he held himself out and was treated in this capacity as XZ's representative. I therefore find that there was also no breach of confidentiality in disclosing documents to PZ in relation to the CAD report.

88 There is no issue in the present case of any disclosure to the press or the public at large; the report and disclosure made to the CAD were kept confidential, and there is no allegation that either OZ or PZ disseminated the information that they obtained in acting as the defendant's agents for the purposes of making the CAD report. Lord Denning's essential proviso that the disclosure must be justified in the public interest (see *Initial Services* above) is therefore not offended. Put another way, the disclosure cannot be disproportionate or excessive; and in this case it was not. Thus there was no breach of confidentiality in the defendant making the disclosures to OZ and PZ.

Nature and consequences of the defendant's disclosure absent the application of an exception to confidentiality

89 Assuming *arguendo* that the obligation of confidentiality extended to prohibit disclosure of the award to the CAD and the defendant was consequently in breach of the arbitration agreement, I turn now to consider the nature and consequences of such breach – specifically, whether it had the effect, as the plaintiffs alleged, of repudiating the arbitration agreement and releasing the plaintiffs from all future performance of the agreement including the assessment of damages pursuant to the partial award.

Whether the defendant's breach was repudiatory

90 It is trite law that an arbitration agreement, like any contract, can be repudiated: see *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation* [1981] AC 910 at 980; *Al Thani v Steven Steel Company Incorporated* 1996 QB (hearing date: 28 June 1996):[note: 28]

> Like any other agreement, an agreement to arbitrate is capable of being repudiated. … There are statements in Chitty which summarise the effect of the cases that I have been referred to as follows.
>
> > There is no principle that requires arbitration proceedings to terminate if a party to the

> arbitration resorts to court proceedings nor does resort to court proceedings by a party of itself constitute a repudiation of the arbitration agreement, although it might do so if he thereby unequivocally demonstrates an intention to renounce or abandon the agreement.

There is a reference in Chitty to Mustill and Boyd where at p507, in discussing circumstances in which one party to an arbitration agreement may regard it as having been repudiated by conduct, it says:

> This is most likely to occur in a case where one party behaves in relation to a particular reference in such a way as to show that he has lost interest in the whole idea of arbitration so as to justify the inference that the obligations under the… agreement… to refer had been fully renounced. … the act relied upon as a repudiation must unequivocally show an intention not to pursue the arbitration.

91 The plaintiffs submitted that a breach of confidentiality would repudiate the arbitration agreement because confidentiality was a *condition* of the arbitration; alternatively, it was a term "the breach of which deprived the [plaintiffs] of substantially the whole of the benefit they sought to derive from" the arbitration agreement.[note: 29]

Whether confidentiality was a condition of the arbitration agreement

92 It is clear that the breach of a condition entitles the innocent party to treat himself as discharged from the contract. Whether a term is a condition of a contract in turn depends on whether it has been so categorised by statute or jurisprudence, or whether the parties have agreed in the contract expressly or by necessary implication that the term is to be a condition: see Chitty at 24-039.[note: 30] I have found that the parties were subject to a duty of confidentiality as a doctrine of arbitration law in Singapore. Assuming *arguendo* that this duty of confidentiality *did* extend to prohibit disclosure to the appropriate authorities where there was reasonable cause to suspect criminal conduct, I nevertheless find that confidentiality was not a condition of the arbitration agreement. Confidentiality was not an express term of the arbitration agreement since the SIAC Rules did not apply; and the parties certainly did not agree that it was to be a *condition* of the arbitration agreement. Confidentiality was also not a condition by virtue of any statute or case authority, and I do not find that XZ's acknowledgement that confidentiality was a *feature* of the arbitration amounted to an admission that it was a condition of the arbitration agreement. I therefore reject the plaintiffs' submissions on this point.

Whether the plaintiffs were deprived of substantially all the benefit of the arbitration agreement

93 The plaintiffs also strenuously asserted that the arbitration agreement had been repudiated as they had been deprived of substantially all the benefit of the arbitration agreement; confidentiality was very important to protect their reputation with their customers, and because of the confidential nature of documents that would have to be produced in the arbitration.[note: 31]

94 In *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 66 Diplock LJ framed the question as such:

> …does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

95 Again, I am not convinced that the plaintiffs entered into the arbitration agreement with confidentiality as the paramount consideration. The defendant pointed to testimony by the third plaintiff that she had been quite indifferent to the issue of confidentiality when she agreed to be party to the arbitration. Certainly the defendant did not share such a concern, desiring only to have the claim settled so that he could recover any damages as soon as possible. As the aggrieved party, the defendant would have been happy for proceedings to be public and in court, but for the possibility of delay due to potential concurrent criminal proceedings. The consent order to transfer proceedings to arbitration in order to join the third plaintiff was a compromise reached in the light of the plaintiffs' application for a stay of Suit [X] since the 1994 arbitration was still pending.

96 Furthermore, the defendant's act did not amount to a breach so serious and fundamental that it "struck at the heart of the plaintiffs' legitimate expectations."[note: 32] Had the defendant for example procured the dissemination of the partial award in the newspapers or on the internet to all the plaintiffs' customers and business associates, this conduct could well have deprived the plaintiffs of substantially the whole benefit of the arbitration agreement as it would have completely undermined both confidentiality and privacy in the arbitration. However, the defendant's disclosure to the CAD did not have this effect since the CAD would have kept both the documents disclosed to them and their investigations into the matter confidential. In this case, the defendant's disclosure did not even result in any further investigations as the CAD decided not to pursue the defendant's complaint.

97 The plaintiffs also cited *Heyman v Darwins* [1942] AC 356 where Lord Wright held at 379:[note: 33]

> …perhaps the commonest application of the word "repudiation" is to what is often called the anticipatory breach of a contract where the party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission but only as far as concerns future performance.

98 I do not accept the plaintiffs' submission that the defendant's conduct evinced an intention to no longer be bound by the terms of the arbitration agreement. The defendant had already obtained an award on liability and was eager to proceed to the assessment of damages stage of the arbitration. There was no reason for the defendant to terminate the arbitration agreement and lose what it had fought hard to secure in the form of the partial award. After the CAD wrote to XZ on 26 February 2007 informing him that they were unable to investigate, the defendant took no further action with regard to the complaint.

99 I therefore do not find that the defendant's conduct amounted to repudiation of the arbitration agreement. The disclosure and complaint to the CAD were not such that the plaintiffs were deprived of substantially all the benefit of the arbitration agreement; nor did the defendant objectively evince an intention to no longer be bound by the arbitration agreement. On the contrary, it was applying pressure to speed the arbitration along to the stage of assessment, and the bona fides of its complaint must be evaluated on the strength of the grounds it had to believe that the plaintiffs had committed an offence.

100 The plaintiffs argued that they were "discharged from all unperformed obligations still existing under the arbitration agreement" since they had accepted the defendant's alleged repudiatory breach. They relied on *Bremer Vulkan* where the House of Lords held at 980-I that:[note: 34]

> …the unperformed primary obligations of the parties under an arbitration agreement, like other

> contracts, may be brought to an end by frustration, or at the election of one party where there has been a repudiatory breach of that agreement by the other party. … I would also accept that when, upon the commission of such a breach, the party to an arbitration agreement who is not in default has lawfully elected to bring to an end the unperformed primary obligations of both parties to continue with the arbitration up to the issue of an award, the High Court has jurisdiction, in protection of that party's legal right to do so, to grant him an injunction to restrain the other party from proceeding further with the arbitration. The reason for such an injunction is to prevent his being harassed by the making of a purported award against him which on the face of it will be enforceable against him in England and many foreign countries, thus forcing him to incur the costs of resisting its enforcement.

101 Having found that the defendant did not repudiate the arbitration agreement by making the complaint and disclosures to the CAD, I would just note that this extract from *Bremer Vulkan* was concerned with a supervening event or breach prior to the issue of an award, and may be distinguishable from the present case, where liability had already been determined pursuant to the partial award *before* the alleged breach of confidentiality. The plaintiffs had already challenged and failed to set aside the award, and I do not take *Bremer Vulkan* as support for the proposition that subsequent breach of confidentiality by a party would invalidate, *ex post facto*, the award. As the defendant also pointed out, the irony of the relief sought by the plaintiffs is that if the arbitration were to be terminated without a conclusive determination of the dispute, the defendant would certainly seek to pursue its claims against the plaintiffs in the ordinary course of litigation. That would leave the plaintiffs without any of the desired privacy and confidentiality afforded by arbitration.

Whether the defendant's breach could be excused or justified

102 For completeness, having analysed the consequences of the disclosure absent the exceptions which I have articulated above, I will now briefly address the issue of whether the defendant's putative breach of confidentiality could be excused or justified. The plaintiffs stressed in their further reply closing submissions (at para 26) that the court must consider all the relevant facts in the case and all the countervailing public interests in issue before deciding whether the defendant's breach of its obligation of confidence could be excused. The plaintiffs alleged that the defendant (a) had conducted itself in bad faith; (b) did not need to breach its obligation of confidence in order to report the alleged wrongdoing; (c) attempted to circumvent the discovery process in the arbitration; (d) attempted to use the criminal authorities for its own private interests; and (e) caused the plaintiffs distress. Counsel for the plaintiffs also emphasised that the court should approach the question of whether the defendant's breach could be excused from the perspective of whether it would have been sanctioned had the defendant applied to court for leave to make the disclosure.

Application of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A)

103 The defendant argued, alternatively, that it was compelled to make the disclosure and complaint to the CAD because it had reasonable grounds to suspect the plaintiffs of having committed serious offences within the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A) ("SCA"). S 39 of the SCA provides:

> **Duty to disclose knowledge or suspicion**
>
> **39**. – (1) Where a person knows or has reasonable grounds to suspect that any property –
>
> (a) in whole or in part, directly or indirectly, represents the proceeds of;

(b) was used in connection with; or

(c) is intended to be used in connection with,

drug trafficking or criminal conduct, as the case may be, and the information or matter on which the knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, he shall disclose the knowledge or suspicion or the information or other matter on which that knowledge or suspicion is based to a Suspicious Transaction Reporting Officer as soon as is reasonably practicable after it comes to his attention.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $20,000.

104 The defendant argued that it was not necessary to be apprised of all the facts of a suspicious transaction to establish reasonable grounds for reporting it under the SCA, citing the parliamentary debates (Parliamentary Reports vol 83, 19 September 2007) where Senior Minister of State for Home Affairs, Associate Professor Ho Peng Kee said:[note: 35]

In 1999, section 39 was created in the [SCA] to make it mandatory for all persons, including financial and non-financial institutions, to report suspicious financial transactions, as long as the person knows or has reason to suspect that any property is directly or indirectly connected to criminal conduct, and the knowledge or suspicion arose during the course of the person's trade, profession, business or employment. However, some have misinterpreted this section to mean that the suspicion must relate to a specific predicate offence under the [SCA] before it is reportable. This is not necessary. A suspicious transaction report should be made when there is knowledge or reason to suspect that something is amiss with a particular transaction, and there is no requirement to link this to a specific [SCA] predicate offence. A suspicious transaction report is not a specific complaint or allegation of criminal wrongdoing.

To correct this misinterpretation, clause 6 will amend section 39 to clarify that the reporting obligation would be triggered so long as there are reasonable grounds to suspect that any property represents the proceeds of, or was or is intended to be used in connection with, any act which may constitute drug trafficking or criminal conduct. Thus, the duty to make a report under the section will arise if, for example, a person reasonably suspects the property to be the proceeds of any offence, so long as the possibility that they may be the proceeds of a drug trafficking offence, serious offence, foreign drug trafficking offence or foreign serious offence cannot be ruled out.

105 Stressing that there was no need for the suspicion to relate to a specific predicate offence under the SCA before it was reportable, the defendant argued that it had reasonable grounds to suspect that the shares of CCZ after 4 November 1992 and its commissions, represented the proceeds of criminal conduct by the plaintiffs, and the monthly management accounts for 1989-1992 were used in connection with such criminal conduct.

106 The plaintiffs argued that the defendant could not invoke a common law exception should the statutory exception not be available to it,[note: 36] as this would make a mockery of parliament's intent in passing the SCA with its attendant preconditions for excusing breaches of civil obligations of confidence if looser criteria applied to lesser offences for which parliament did not compel disclosure. According to the plaintiffs, the SCA must regulate the manner in which any public interest exception applied, so that at least the same requirements must be met before civil obligations could be excused

in relation to lesser offences than those scheduled in the SCA and s 22 of the Criminal Procedure Code. I do not accept this submission. The SCA imposes an obligation to report knowledge of certain serious crimes, and the failure to do so invites a criminal sanction. It does not substitute the general right of those who have knowledge of other offences to make police reports. Since the defendant wanted additionally to rely on s 39 of the SCA, I will now proceed to determine whether the alleged offences reasonably suspected to have been committed by the plaintiffs fall within the serious crimes which must be reported under the SCA. To this end, the defendant did not specifically point to any serious crimes listed in the second schedule to the SCA, apart from adopting the arbitrator's remarks in the partial award. More fundamentally, the second schedule to the SCA was added only by Amendment Act 25 of 1999 and included such crimes as cheating under s 420 of the Penal Code *with effect from 1999*, and the remarks by the Senior Minister of State for Home Affairs were made in 2007. These remarks would not have retrospective effect to impose an obligation on the defendant to report suspected criminal conduct by the plaintiffs in 1989-1992. Such suspected criminal conduct did not even fall within the scope of the SCA until 1999. Thus while I am not persuaded that the SCA applies to the present case since the defendant did not show that the alleged crimes fell within the scope of the SCA when they were committed, the defendant's disclosure to the CAD was nevertheless excepted from the obligation of confidentiality because the defendant had reasonable grounds to suspect criminal behaviour by the plaintiffs.

Whether the disclosure was necessary for the CAD report to be made

107 Relying on XZ's testimony that based on what two persons had told him he believed there was sufficient evidence to mount an action in the US, the plaintiffs argued that XZ could equally have made the CAD report alleging fraud and conspiracy by the plaintiffs without disclosing the partial award and other documents. The short answer to this submission is that any person making a good faith report to the police, obviously with the intention that the police commence investigations, would disclose the grounds of his complaint and the reasons for his belief that a crime had been committed. Thus the defendant could well have made a bare complaint without more, but ironically that might have called into question its bona fides. If the defendant wanted the plaintiffs to be brought to justice, why would it omit to disclose findings of the plaintiffs' conduct already made by an impartial arbitrator, who had seen, heard and evaluated all the relevant evidence placed before him?

Whether the defendant made the disclosures in bad faith

108 In response to the plaintiffs' submission that the defendant's complaint to the CAD was "actuated by an improper motive – to coerce the plaintiffs into a settlement on the defendant's terms," the defendant relied on *Re a Company's application* [1989] 1 Ch 477, where Scott J held at 481-482 that disclosure of the plaintiff's documents by the defendant to the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA), even if motivated by malice, was not a breach of confidence in the defendant's employment contract:

> It may be the case that the information proposed to be given, the allegations proposed to be made by the defendant to FIMBRA, and for that matter by the defendant to the Inland Revenue, are allegations made out of malice and based upon fiction or invention.
>
> But, if that is so, then I ask myself what harm will be done. FIMBRA may decide that the allegations are not worth investigating. In that case, no harm will have been done. Or FIMBRA may decide that an investigation is necessary. In that case, if the allegations turn out to be baseless, nothing will follow the investigation. And, if harm is caused by the investigation itself, it is harm which is implicit in the regulatory role of FIMBRA. It may be that what is put before FIMBRA includes some confidential information. But that information would, as it seems to me, be

information which FIMBRA could at any time obtain by the spot checks that it is entitled to carry out. I doubt whether an employee of a financial services company such as the plaintiff owes a duty of confidence which extends to an obligation not to disclose information to the regulatory authority FIMBRA.

109 It goes without saying that a wrongdoer may be subject to both criminal and civil liability for the same wrongful act, if indeed the wrong committed is both an offence and a breach of contract or a tort. Similarly, the scope of the obligation of confidentiality in arbitration would not extend to prevent disclosure to the authorities on the basis of reasonably suspected criminal conduct. As I have explained above, all that is required to justify such disclosure is reasonable suspicion of criminal conduct; the motives or spiteful intent of the party making the disclosure to the *relevant authority*, and not the world at large, are irrelevant and cannot alone result in the disclosure being a breach of confidentiality.

Whether confidentiality was waived by the plaintiffs' challenge in the OM

110 I turn now to an argument raised by the defendant that the plaintiffs, by commencing and prosecuting in open court the OM to challenge the arbitrator's impartiality, had waived their right to insist on confidentiality over the award and other documents disclosed in the OM. According to the defendant, the affidavits filed in the course of the OM totalled 2997 pages, and the entire transcript of the arbitration, running to 2832 pages, was also tendered.[note: 37]

111 It is not disputed that proceedings in open court are accessible generally to the public. Singapore Court Practice 2006 at para 38/1/1 explains the effect of Order 38 rule 1 of the Rules of Court, s 8(1) of the Supreme Court of Judicature Act and s 7(1) of the Subordinate Courts Act thus:

> It is a fundamental principle that justice be administered in open court so that it may be seen to be done. … It is therefore provided by statute that "the place in which any court is held for the purposes of trying any cause or matter shall be deemed an open and public court to which the public generally may have access."

112 There are of course exceptions to this general position where confidential or sensitive matters are involved which should not be heard in open court. In the case of arbitration, any party may make an application under the IAA for *in camera* proceedings. The relevant provisions state:

> **Proceedings to be heard otherwise than in open court**
>
> **22**. Proceedings under this Act in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court.
>
> **Restrictions on reporting of proceedings heard otherwise than in open court**
>
> **23**. – (1) This section shall apply to proceedings under this Act in any court heard otherwise than in open court.
>
> (2) A court hearing any proceedings to which this section applies shall, on the application of any party to the proceedings, give directions as to whether any and, if so, what information relating to the proceedings may be published.
>
> (3) A court shall not give a direction under subsection (2) permitting information to be published unless –

(a) all parties to the proceedings agree that such information may be published; or

(b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.

(4) Notwithstanding subsection (3), where a court gives grounds of decision for a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall –

(a) give directions as to the action that shall be taken to conceal that matter in those reports; and

(b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate.

113 The plaintiffs quite rightly summarised the position under the IAA to be that any party may as of right be allowed to have the proceedings and judgment remain confidential. However, it is also obvious from ss 22 and 23 of the IAA that such a party desirous of keeping proceedings confidential must actually make an application to do so; proceedings concerning arbitrations under the IAA will not be *automatically* held *in camera* and open court proceedings remain the default under the IAA. Hence, where a party fails to make the application, then the statutory requirement of open court hearings, where all the documents and evidence tendered before the court will not be confidential, automatically overrides the doctrine of confidentiality in arbitration, and that includes overriding also any express or implied contractual obligation of confidentiality under the arbitration agreement, or any choice of arbitral rules that explicitly provide for the arbitration to be confidential, in so far as those documents and evidence placed before the court are concerned. This is quite unlike s 62.10 of the 1996 English Arbitration Act, which provides:

62.10 Hearings

(1) The court may order that an arbitration claim be heard either in public or in private.

(2) Rule 39.2 [which provides that all hearings are to be heard in public] does not apply.

(3) Subject to any order made under paragraph (1) –

(a) the determination of –

(i) a preliminary point of law under section 45 of the 1996 Act; or

(ii) an appeal under section 69 of the 1996 Act on a question of law arising out of an award, will be heard in public; and

(b) all other arbitration claims will be heard in private.

114 One difference between s 62.10 of the English Arbitration Act and s 22 of the IAA is that the English court may exercise its discretion in deciding whether an arbitration claim should be heard in

public or in private, whereas the Singapore court may not, since confidential proceedings under s 22 of the IAA are a matter of the applicant's right. More pertinent to the present case is the default provision in s 62.10(3)(b) that arbitration claims involving other than points of law will be heard in private, without the need for any party to make such an application. In Singapore, the default is, on the contrary, open court proceedings as provided for in O 38, and parties must exercise their rights under s 22 IAA to have proceedings heard otherwise than in open court. The plaintiffs' assertion that s 62.10 contained "less stringent language"[note: 38] than the IAA is therefore not correct; the relevant provisions of the two Acts are not *in pari materia* and their differences cannot be accurately reflected with such simplistic gloss.

115 The plaintiffs relied on Mance LJ's judgment in *City of Moscow* at [32]:

> The rule makers clearly deduced from the principles of the Arbitration Act 1996 that any court hearing should take place, so far as possible, without undermining the reasons of, inter alia, privacy and confidentiality for which parties choose to arbitrate in England. Their conclusion in this regard has not been challenged. It may be justified on the simple basis that arbitration represents a special case, in relation to which there has been very considerable development during recent years. An alternative and overlapping consideration is that parties may be deterred from arbitrating or at any rate from invoking the court's supervisory role in relation to arbitration if their understanding regarding arbitral confidentiality and privacy is ignored. I would personally doubt whether it can be said without any positive evidence that the publication that has in the past frequently followed applications to set aside arbitration awards, eg for misconduct, has itself been likely to be detrimental to parties' keenness or otherwise to agree to arbitrate in London. But I find it easier to accept that, having arbitrated unsuccessfully here, a party could well be deterred from making an arbitration claim in court if there was a risk that by doing so really confidential matters might be disclosed.

116 The import of this passage must be secondary to the plaintiffs' actual conduct when faced with the option of exercising their statutory right to maintain confidentiality by applying for proceedings otherwise than in open court. Mance LJ's reasoning at [34]-[36] further highlights how the regime under the English Rule 62.10 differs from ss 22-23 of the IAA:

> The consideration that parties have elected to arbitrate confidentially and privately cannot dictate the position in respect of arbitration claims brought to court under rule 62.10. Rule 62.10 therefore only represents a starting point. Such proceedings are no longer consensual. The possibility of pursuing them exists in the public interest. The courts, when called upon to exercise the supervisory role assigned to them under the Arbitration Act 1996, are acting as a branch of the state, not as a mere extension of the consensual arbitral process. Nevertheless, they are acting in the public interest to facilitate the fairness and well-being of a consensual method of dispute resolution, and both the Rule Committee and the courts can still take into account the parties' expectations regarding privacy and confidentiality when agreeing to arbitrate.
>
> We were referred by Mr Dunning to *Television New Zealand Ltd v Langley Productions Ltd* [2000] 2 NZLR 250. The dispute centred on a contract for the provision by Langley of television news presentation services by a Mr Hawkesby. In court proceedings, he had insisted on the need for resolution of the dispute in court, to preserve his reputation and Television New Zealand Ltd ("TVNZ") strongly resisted this. But all three parties then agreed arbitration under an agreement confirming its strict confidentiality, something for which section 14 of the New Zealand arbitration law would, absent contrary agreement, anyway have replied. There was however no New Zealand equivalent of rule 60.10. After an award in Langley's favour, TVNZ applied to appeal and Langley to enforce the award. TVNZ applied for the court proceedings to be public and Mr Hawkesby now

resisted this. The judge rejected any suggestion that the agreed confidentiality "automatically" or "necessarily" extended to subsequent High Court proceedings. The question was whether in the particular circumstances the proceedings should be subject to "normal open process". He concluded, at p256, para 42, that they should, because of the "serious and public interest" in the nature of the contract, because it is "in the long run the public's money which is at stake and one can understand a real interest in knowing the remuneration received by those that read the news" and because "these parties have adopted a view about the right of others to know which changes with the seasons". He went on, at p256, para 42:

> There may be some cases where the court, in having to exercise a discretion as to whether to order suppression of some material in a particular case, might have regard to the fact that the proceeding in the court had its genesis in an arbitral process in which confidentiality was an essential ingredient. Considering the way in which the parties have blown 'hot and cold' from time to time no such concern arises in this case.

The last passage is relevant to the issue on this appeal, although delivered in a context lacking the added impetus of rule 62.10. In contrast, in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041, 1047, para 10 the Privy Council mentioned Bermudan arbitration legislation, which expressly empowers courts to hear proceedings under such legislation in private and to restrict reporting or publication of the proceedings, and commented that this enabled "the rights of privacy of the parties to be protected notwithstanding the court proceedings". There is no such legislation in England, but rule 62.10 represents a step in that direction.

Under rule 62.10, the Rule Committee considered that, in cases where permission to appeal is appropriate (eg because an award raises some point of general legal importance or is clearly wrong), the starting point was to treat the public interest in a public hearing as outweighing any wish on the parties' part for continuing privacy and confidentiality. In the case of other arbitration claims, the committee saw the starting point as reversed. …

117 Indeed the above passage might not be relevant to the present case, but the observations of Mance LJ are nevertheless instructive. While ss 22 and 23 of the IAA represent a bolder and more unequivocal starting point by giving parties the right to choose to maintain confidentiality in court proceedings and judgments, the conduct of the parties in the light of these rights must have consequences on the confidentiality of the arbitration, as was illustrated in the *Television New Zealand Ltd* case. The general importance of confidentiality aside, it is therefore far more significant what was actually done at the commencement of the OM proceedings by the plaintiffs, who are now asserting confidentiality as well as inadequacy of damages as compensation for the defendant's breach of confidentiality. More precisely, did the plaintiffs by commencing the OM without making any such application under s 22 of the IAA *waive* their right to confidentiality be it under the common law-developed doctrine of arbitration law or under an alleged implied term in the arbitration agreement?

118 The plaintiffs argued that they were "permitted to disclose the Partial Award in the OM in order to challenge it." Rule 34.6 of the SIAC Rules provides for disclosure "for the purpose of making an application to any competent court". This rule operates to except disclosure of the partial award from a breach of confidentiality under the SIAC Rules. Thus any party challenging the award need not first obtain the consent of the other parties before making an application to the court to challenge it: see also *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314. I have found that the SIAC Rules did not apply to the arbitration, but as the defendant has not disputed that the plaintiffs were permitted to disclose the partial award in the course of the OM, there is no issue as to whether the plaintiffs themselves breached confidentiality by commencing the OM. Indeed the defendant could have, but

did not, make any application under s 22 IAA either. The plaintiffs further submitted that the defendant was under a continuing obligation of confidentiality, and that since the plaintiffs had not breached any term in the arbitration agreement, the defendant could not be excused from this continuing obligation.[note: 39] This submission completely ignores the defendant's argument that the plaintiffs waived confidentiality (to the extent of the documents and other evidence disclosed in open court). If the plaintiffs wanted to ensure that the partial award was kept confidential, they ought to have applied under s 22 of the IAA for the hearing of the OM to be otherwise than in open court. However, the plaintiffs failed to do so. Their omission to do so would not mean that they were in breach of the obligation of confidentiality, but that they had chosen not to assert their right to have the award (tendered in open court) kept confidential.

119 In *Chip Thye Enterprises Pte Ltd v Development Bank of Singapore Ltd* [1994] 1 SLR 164, Goh Joon Seng J held that a contractual term for the sole benefit of one party could be waived by that party:

> It is obvious on the face of the said agreement that the condition as to obtaining extension of the written permission was for the exclusive benefit of the plaintiffs. As such they might waive this condition. *Chitty on Contracts, General Principles* (26th Ed) para 1611 states:
>
> > Where the terms of a contract include a provision which has been inserted solely for the benefit of one party, he may, without the assent of the other party, waive compliance with that provision and enforce the contract as if the provision had been omitted.

120 In *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 ("*Verwayen*"), Brennan J who was part of the minority made the uncontroversial observation at 426-427 that while a right "introduced solely for the benefit of a defendant" was capable of waiver by a defendant, "waiver does not apply to an element in a plaintiffs' cause of action. An element in a cause of action simply does not answer the description of a right which has been introduced solely for the benefit of a defendant." The question here is whether confidentiality as a term of the arbitration agreement or as a common law-developed doctrine of arbitration law is a right solely for the benefit of one party, or whether both parties must continue to obey this term regardless of the prior conduct of the other.

121 Spencer and Bower define unilateral waiver as "the informed voluntary decision to abandon or suspend a right." The defendant argued that the "hallmark of a waiver is an adoption by one party of a course of conduct that is inconsistent with a particular right," and that this was not limited to contractual rights but also applied where the right arose from a rule of substantive law. The defendant cited Piers Feltham, Daniel Hochberg and Tom Leech, *Spencer Bower on the Law Relating to Estoppel by Representation* (4th ed, 2006) at 401:[note: 40]

> Where one party becomes entitled either under the terms of a contract or under the general law to exercise alternative rights inconsistent with one another and where with knowledge of the relevant facts he has acted in a manner which is consistent only with his having chosen one of the two alternatives he is held to have made his election accordingly.

122 Whether one regards confidentiality in arbitration as a contractual right arising from a term in the arbitration agreement or a right arising from a substantive common law-developed doctrine of arbitration law, it is not one that is created exclusively for the benefit of either party individually and independently. Purported waiver by either party would constitute breach, but to the extent that the breaching party can then not subsequently assert its right to confidentiality in the arbitration, the breaching party would simultaneously have waived its corresponding right at the time of its breach.

123 The plaintiffs stressed that the doctrine of pure or unilateral waiver has never been clearly and unequivocally accepted by either the local or the English courts. Spencer Bower also caution that "there is a danger that [the] widespread application of [the decision of the House of Lords in *Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd*] would undermine not only the contractual requirement for consideration but also the doctrine of promissory estoppel."

124 As for the requirements of waiver and the scope and limits of its doctrine, the plaintiffs cited Spencer Bower, *The Law Relating to Estoppel by Representation* (4 ed, 2004)[50]:

> It is now accepted that the doctrines of election and promissory estoppel involve distinct principles of law. The differences and similarities between the two doctrines have been comprehensively stated and explained by Lord Goff in the leading case of *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India (the 'Kanchenjunga')*… It is more useful to use [the term 'waiver'] in a narrow sense to describe an end result or consequence, namely the abandonment of a right, rather than the process by which that result is achieved or brought about. For this reason it is best used in conjunction with the terms election and estoppel to mean the abandonment of a right as a consequence either of a binding election or of a finding of promissory estoppel, as in the phrases 'waiver by election' or 'elective waiver' or 'waiver by estoppel'. The question when and how the term 'waiver' can or should be used is one of terminology rather than substantive law but this (perhaps arid) debate can obscure a genuine issue of law namely whether it is possible to waive a contractual or statutory right unilaterally in the sense of abandoning or giving it up in circumstances where there is no variation of the contract, no consideration for the waiver, no election between alternative rights and no detrimental reliance or inequitable circumstances giving rise to a promissory estoppel.

125 The plaintiffs also cited *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India (the 'Kanchenjunga')* [1990] 1 Lloyd's Rep 391 *per* Lord Goff, stressing the differences between election and estoppel and arguing that any waiver of confidentiality in the OM based on estoppel would only be suspensory:

> There is an important similarity between the two principles, election and equitable estoppel, in that each requires an unequivocal representation, perhaps because each may involve a loss, permanent or temporary, of the relevant party's rights. But there are important differences as well. In the context of a contract, the principle of election applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise that right or not. His election generally has to be an informed choice, made with knowledge of the facts giving rise to the right. His election once made is final; it is not dependent upon reliance on it by the other party. On the other hand, equitable estoppel requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representor to go back upon his representation. No question arises of any particular knowledge on the part of the representor, and the estoppel may be suspensory only. Furthermore, the representation itself is different in character in the two cases. The party making his election is communicating his choice whether or not to exercise a right which has become available to him. The party to an equitable estoppel is representing that he will not in future enforce his legal rights. His representation is therefore in the nature of a promise which, though unsupported by consideration, can have legal consequences; hence it is sometimes referred to as promissory estoppel.

126 The plaintiffs also emphasised that the defendant's arguments were based on pure waiver rather than on waiver by election. Indeed there was perhaps some confusion in the defendant's

submissions over pure waiver and waiver by election, but the general principle is quite simple (see *Verwayen per* Brennan J at p13):[note: 41]

The general principle was stated by Alderson B in Graham v Ingleby (1848) 1 Ex 651 at p657:

> It is evident that a party who has a benefit given him by statute, may waive it if he thinks fit. There are many cases in which no action can be commenced except after certain notice of action. That is a requirement by statute; but if a plaintiff went to trial, and the defendant did not then object to the want of notice, could he afterwards set aside the whole proceedings because no notice was given? It is clear that he could not.

127 The significance of the term in question having been inserted into the contract for the *exclusive* benefit of one party is that otherwise it would not be able to elect to dispense with the satisfaction of that term *without the other party's assent* (see also *Transvic Investment Pte Ltd v Amva Investment Pte Ltd* [1995] 1 SLR 120; *Loh Wee Tin v Transvic Investment Pte Ltd* [1995] 2 SLR 724). It does not follow that a term inserted in the contract for the mutual benefit of both parties cannot be waived at all – it simply cannot be waived unilaterally by one party without the other party's consent. Here, the obligation of confidentiality applied equally to both the plaintiffs and the defendant, and either party could assert it by making an application under s 22 of the IAA, which gives the parties practically complete autonomy on that front, with a *preference* towards confidentiality (because the court does not have discretion to order proceedings to be heard in open court, and because *any* party may make such an application) *not amounting to a default* of *in camera* proceedings. This position may have the added advantage of addressing the concern raised by Mason CJ and Colman J in *Hassneh* that an arbitration award should perhaps not be protected to the same extent as documents and pleadings in the arbitration proceedings, because it would be subject to the supervisory jurisdiction of the court.

128 Had the defendant objected to the OM hearing being in open court, it could have made an application under s 22 of the IAA. However, neither party did so. Thus the plaintiffs elected to bring a challenge in open court and the defendant consented tacitly by also omitting to make an application under s 22 of the IAA. The parties effectively *agreed* by their conduct, therefore, that confidentiality would be waived in respect of the OM documents (or for that matter also in respect of the other evidence tendered in open court for the OM hearing). The defendant had equally "waived" its right to assert confidentiality over the OM documents, by acquiescing and similarly choosing not to make an application under s 22 of the IAA. Thus the analogy to unilateral waiver is indeed imperfect; what really happened when the plaintiffs chose to commence the OM and the defendant defended it with neither side making an application under s 22 IAA, was that the parties agreed that confidentiality would be lifted over the OM documents.

129 Indeed, it is somewhat ironic that the plaintiffs sought to rely on ss 22 and 23 of the IAA to argue that confidentiality was a condition of the arbitration when they chose not to make any application under the IAA to preserve confidentiality during the hearing of the OM. Even in the present suit, the application under s 22 of the IAA was made only one day before the trial, and heard on the first day of trial. Once this was done, though, the plaintiffs were quite vigilant about the hearing being in camera and ensured that the case name was not published on the electronic notice board outside the courtroom. However, after checking with the Supreme Court Registry on 4 June 2009, I note that the court file for this present Suit [Y] remains unsealed and neither the defendant nor the plaintiffs (who claim to have regarded confidentiality in the arbitration to be of paramount importance to them) have ever applied to the court to have the file sealed to prevent other lawyers and members of the public including the press from inspecting the file and all the court papers filed therein. Hence, any person applying to the court and given permission to inspect the unsealed file will

readily obtain all the information on the entire case and its proceedings, including the certified verbatim transcript of the entire hearing before me. I thus agree with the defendant's argument that the plaintiffs' behaviour indicated an indifference to confidentiality in the arbitration and the OM, and even in the course of preparing for the present suit, until they realised that it would only be consistent to insist on confidentiality in the present suit since their claim was for repudiation by reason of breach of confidentiality. I also accept the defendant's submission that the plaintiffs themselves did not consider confidentiality important in the arbitration, and the third plaintiff made this quite clear when she stated in cross-examination during the arbitration hearing that "whether it is heard in public or private is irrelevant," and that she had "no fear of this being in the press."[note: 42] The plaintiffs' conduct has shown disingenuousness and cynical calculation in asserting confidentiality in arbitration to thwart the proceedings in assessment of damages by the tribunal.

130 The plaintiffs submitted that there was a difference between the issue of whether the material disclosed in the course of the OM remained confidential, and the issue of whether the plaintiffs had waived the right to confidentiality. I agree. Just because the material disclosed in the OM was not in fact picked up by any third party during the hearing of the OM by dint only of the fact that no one actually turned up to observe the proceedings, did not mean that the plaintiffs had not waived the right to confidentiality. Waiver is voluntary, legally significant conduct by a party, signalling that it does not intend to rely on its rights. Whether or not the consequence of waiving the right in question manifests, that is, whether a member of the public actually attended the hearing of the OM and observed the references made to the partial award in the course of argument, is another issue and not a necessary element of waiver.

131 The plaintiffs submitted, in particular, that "just because materials have been relied on in open court does not mean that they can no longer be confidential."[note: 43] Instead, the plaintiffs argued that the contractual obligation of confidentiality was of "unlimited duration"[note: 44] and that the materials disclosed in the course of the OM in fact remained confidential because the defendant admitted that no one apart from the parties and their counsel was present at the hearing of the OM. The plaintiffs relied on a statement in *Franchi v Franchi* [1967] RPC 149 *per* Cross J:

> Clearly, a claim that the disclosure of some information would be a breach of confidence is not to be defeated simply by proving that there are other people in the world who know the facts in question besides the man as to whom it is said that his disclosure would be a breach of confidence and those to whom he has disclosed them.

132 I have no quarrel with the reasoning in this sentence. The conclusion the plaintiffs draw from it, however, requires a few leaps in logic. To say that one can still be liable for breach of confidence despite the information in question being already known to some other parties (whose knowledge is not the basis of the claim for breach), is entirely different from saying that just because it has not been shown that anyone obtained the information from the open court hearing, it still remains confidential. The point remains that the fact alone of knowledge by third parties is not determinative of whether there has been breach of confidence or waiver of confidence.

133 A simple application (indeed, a mere formality since it was as of right) under the IAA would have sufficed to preserve what the plaintiffs claim was *the* priority and paramount concern in choosing arbitration in the first place. If confidentiality was so important to the plaintiffs, counsel for the plaintiffs must have been aware of the availability of an application under s 22 of the IAA and advised them to make it. I find it hard to believe that they would have been so careless and cavalier as to take their chances that no member of the public would step into the courtroom. The plaintiffs submitted that, "[a]s it turned out, there was no need for the plaintiffs' lawyers to make an

application under section 22 of the IAA because, as admitted by the defendant, no member of the public walked in on the proceedings."[note: 45] This submission is completely incredible. An application under s 22 IAA was in fact not made. Surely the plaintiffs' solicitors are not saying that they were waiting for a member of the public to walk in before they would have made the application. I would think that the failure to make a s 22 IAA application in the OM was either an oversight, or it was indicative of the plaintiffs' actually *not* valuing confidentiality as the paramount priority in the proceedings, or a bit of both. If they were indeed "acutely aware"[note: 46] of arbitration's advantage of confidentiality, they would have ensured that this confidentiality was preserved in the OM and not just in the hearing of the present suit. In the same vein, the plaintiffs' counsel must be aware that an application can also be made to the court to seal the court file for this suit to prevent file inspection by non-parties and members of the public, and yet none was made by the plaintiffs. Again, the plaintiffs appear to be taking their chances that over the long period of some two and a half years (from the date the writ was first filed on 30 October 2006 to date) no one will apply to inspect the file and so there is no need to have the file sealed. The overall conduct of the plaintiffs indicates the true extent to which confidentiality is valued by them. It does not appear to me that confidentiality in the arbitration is an important consideration, if at all, in the order of priorities of the plaintiffs.

134 The plaintiffs cited *Home Office v Harman* [1983] 1 AC 280 *per* Lord Keith at 308, rejecting the submission that once a document made available under discovery had been read out in open court the obligation not to use it for any other purpose automatically disappeared:[note: 47]

> Discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant's affairs. It forms part of English legal procedure because the public interest in securing that justice is done between parties is considered to outweigh the private and public interest in the maintenance of confidentiality. But the process should not be allowed to place on the litigant any harsher or more oppressive burden than is strictly required for the purpose of securing that justice is done. In so far as that must necessarily involve a certain degree of publicity being given to private documents, the result has to be accepted as part of the price of achieving justice. But the fact that a certain inevitable degree of publicity has been brought about does not, in my opinion, warrant the conclusion that the door should therefore be opened to widespread dissemination of the material by the other party or his legal advisers, for any ulterior purpose whatsoever, whether altruistic or aimed at financial gain. The degree of publicity resulting from a document being read out in open court is not necessarily very great. There may be nobody present apart from the parties and their legal advisers.

135 Again, the present case is quite different. Any degree of publicity that might have resulted from the OM being heard in open court would certainly not have been "inevitable" because it was entirely within the plaintiffs' control to ensure that the OM was heard in camera. As for whether the defendant's disclosure of the partial award was improper, I have already found that it was not, since it was made only to the CAD on reasonable cause.

136 More importantly, the plaintiffs' case "has always been that it was *unnecessary* for them to have made an application under section 22 of the IAA for the OM to be heard otherwise than in open court because no member of the public had walked in on the OM proceedings."[note: 48] This is a surprising and wholly unconvincing argument. Furthermore, this means that the omission was also a conscious choice rather than an oversight. When the plaintiffs commenced the OM, the time came for them to make a decision whether to preserve confidentiality by making an application under s 22 IAA, or whether to be content with the default of open court proceedings. I do not think the plaintiffs' counsel would have intentionally omitted to make the relevant application until a member of the public or the media in fact appeared to observe the proceedings. Not only would this disrupt the hearing,

but considering that the foremost concern and advantage of arbitration was confidentiality, no competent lawyer would leave so paramount a concern as the privacy of the hearing (given their submission that the defendant's disclosure deprived them substantially of the whole of the benefit that they sought to derive from the arbitration agreement) to the chances that nobody would come to court. Certainly the plaintiffs' lawyers took a much less nonchalant approach in the present proceedings, taking care to ensure that no unauthorised persons entered the court room to observe the proceedings and that the case name was not publicised on the noticeboard outside the court room.

137 I therefore find as a further ground to my primary holding that the disclosure to the CAD fell within an exception to the confidentiality obligation, that the parties agreed by their conduct not to insist on confidentiality in the arbitration from the time the OM was commenced, and that the plaintiffs did not then again assert their right to confidentiality until the commencement of the present suit. Indeed, this mutual waiver would also fall within the category of exceptions to confidentiality based on consent (see [63] above). Thus even if the mutual waiver was only suspensory, the defendant's disclosure fell within this suspensory period and was thus not in breach of confidentiality.

Disclosure of non-OM documents

138 Apart from the documents already disclosed in the OM, the defendant also disclosed page 13 of DDZ's audited accounts as of 30 June 1993 to the CAD.[note: 49] In the absence of any applicable exception to confidentiality, this might have been a technical breach but I accept that it was disclosed inadvertently and did not result in any harm to the plaintiffs whatsoever. Thus I would not award damages for the *de minimis* breach resulting from the accidental disclosure of the single page of DDZ's audited accounts as of 30 June 1993 to the CAD.

Whether the plaintiffs are estopped from terminating the arbitration agreement

139 As an alternative to the argument based on waiver of confidentiality, the defendant argued that the plaintiffs were precluded from insisting on their right of confidentiality on the basis of waiver by estoppel or promissory estoppel because they had filed arbitration-related documents in open court proceedings.[note: 50] John McGhee QC ed., *Snell's Equity* (31st ed) at para 10-08 states the established doctrine of promissory estoppel:

> Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and, before it is withdrawn, the other party acts upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it.

140 The defendant submitted that by commencing the OM without making a s22 application, the plaintiffs by their conduct made a clear and unequivocal assurance that they would not enforce their strict legal rights to confidentiality; this assurance was intended to affect the pre-existing legal relationship between the parties by giving up confidentiality of the documents disclosed in the OM; and the defendant relied on this assurance and altered its position reasonably in making the disclosure to the CAD. Since the defendant could not undo the disclosure to the CAD, the assurance by the plaintiffs had to be irrevocable with respect to the disclosed documents.

141 These submissions are persuasive but as my primary finding remains that the disclosure to the

CAD fell within an exception to confidentiality because it was a disclosure to the appropriate authorities on reasonable suspicion of criminal conduct by the plaintiffs, and I have also found that the parties mutually agreed by conduct to waive confidentiality between the commencement of the OM and the commencement of the present suit, it is unnecessary for me to make a finding based on estoppel.

Conclusion

142 In *Emmott*, the Court of Appeal held at [84] that the obligation of confidentiality in arbitration was

> really a rule of substantive law masquerading as an implied term. But if the implied agreement of the parties is to be taken as the basis of the obligation of confidentiality (at any rate where English law is the law governing the arbitration agreement) it ought to follow that disputes about its limits are within the scope of the arbitration agreement and should be determined by the arbitral tribunal. On the evidence of the reported cases, however, it seems that whenever a dispute has arisen as between the parties as to the applicability and extent of confidentiality it has been resolved by an application to the court for an injunction to restrain disclosure….

143 The court in *Emmott* also noted that if the confidentiality rule had developed as an implied term of the arbitration agreement, then any dispute as to its scope would fall within the scope of the arbitration agreement (*per* Lawrence Collins LJ at [110], *per* Thomas LJ at [119]-[124]). However, there, as here, the defendant did not seek a stay on the ground that this issue was properly a matter for the tribunal to determine. Since both parties submitted themselves to the court's jurisdiction, and considering the possibility that any finding by the arbitrator on this issue might subsequently be challenged in court in any event, it fell to me to examine the law on confidentiality in arbitration and the relevant defences or excuses. Like Lawrence Collins LJ, therefore, I do not find it necessary to explore this issue further – though the views expressed by Thomas LJ at [123] are not unpersuasive:

> As a stay was not sought, the issue of the court's intervention did not arise before the judge. If it had arisen, it is difficult to see why the court should not have made it clear that this was an issue for the arbitration tribunal, as it arose in a pending arbitration. The fact that a court's power may be invoked in certain circumstances … to obtain an injunction to restrain a threatened breach of confidentiality would not generally, in my view, provide a sufficient ground to justify the intervention of the court in an issue which should normally be one for the arbitrator to determine: see *Cetelem SA v Roust Holdings SA* [2005] 1 WLR 3555 at paragraphs 45-47 and the useful analysis of Aikens J in *Elektrim v Vivendi Universal No 2* [2007] EWHC 571 Comm at paragraphs 67-71.

144 The plaintiffs insisted on focusing on one part of the picture. The complete picture is that they brought the present action in an attempt to escape their obligations and liability under the arbitration. I find that there was an obligation of confidentiality as a substantive doctrine of arbitration law as developed in the English jurisprudence and accepted in Singapore. However, I find that there cannot have been any breach by XZ's disclosure of documents to his secretary, OZ, and to PZ who made the CAD report on his behalf. As for the report and disclosure to the CAD, I find that these fell within an exception to confidentiality in the public interest, being disclosure to the appropriate investigative authorities on the basis of a reasonable suspicion of criminal wrongdoing. The CAD report was also kept confidential, and whether it led to any investigations or not, it was not an illegitimate threat or attempt to extort from the plaintiffs. Further, I find that the parties, by their conduct in proceeding with the OM in open court without making any application under s 22 of the IAA, mutually agreed to waive confidentiality in the arbitration until the plaintiffs asserted it again at the beginning of the trial

of the present suit. The obligation of confidentiality (in so far as the documents disclosed in the open court hearing of the OM were concerned) was therefore suspended and none of the disclosures complained of resulted in a breach of the arbitration agreement because the exception of consent would also have applied.

145 The plaintiffs are no innocent victims. They themselves challenged the arbitrator's impartiality and sought to stymie the arbitration. Worse, they disclosed documents related to the arbitration, including transcripts of the arbitration proceedings, to non-parties such as a Minnesota company KKZ, its Chief Administration Officer NZ, one MZ and one LZ.[note: 51] In doing so, they never insisted on or even appeared to give thought to what they now claim is the primary priority of going to arbitration (at the price of giving up their right to appeal). Quite to the contrary, they showed complete disregard for any confidentiality over the arbitration, breaching the very rule they now insist was a *condition* of the arbitration agreement. The defendant quite rightly argued,[note: 52] citing *Bremer Vulkan per* Lord Diplock at 988, that since confidentiality was a mutual obligation on both the plaintiffs and the defendant, neither could "rely upon the other's breach as giving him a right to treat the primary obligations of each to continue with the reference as brought to an end." The present suit is a blatant attempt to escape liability already determined in the arbitration and handed down in the partial award. It would do much more harm to Singapore's standing as an arbitration hub, a factor the plaintiffs repeatedly highlighted as an important public policy concern, for the court to allow the plaintiff's unmeritorious claim to completely undermine the arbitration proceedings already underway and, so far as liability is concerned, concluded.

146 As the plaintiffs impressed upon this court, all the circumstances and facts must be considered in determining the consequences of the defendant's disclosure of the documents in the arbitration. Having carefully considered the law, the submissions and the facts, including the parties' conduct, I come to the irresistible conclusion that there was no breach of confidentiality in the present case, much less a repudiatory breach. The plaintiffs' claim is therefore dismissed. If parties do not wish to be heard on costs, then the usual order on costs will follow.

[note: 1]Agreed bundle of documents vol 22 p 6256, Plaintiffs' bundle of documents tab 25.

[note: 2]Plaintiffs' bundle of documents tab 29.

[note: 3]Statement of claim (amendment no. 1) at para 29.

[note: 4]Statement of claim (amendment no. 1) at para 31.

[note: 5]Appendix to Defendant's skeleton notes of argument for oral closing submissions tab 4 at para 11.

[note: 6]Plaintiffs' bundle of documents tab 36 at [4]-[5]. Agreed bundle of documents vol 4 p1041.

[note: 7]Plaintiffs' bundle of documents tab 39 at [3].

[note: 8]Defendant's closing submissions at paras 15-16.

[note: 9]Defendant's closing submissions at para 17.

[note: 10] *Emmott* at [77].

[note: 11] *The Effect of Arbitration on Third Parties*, Arbitration Law Service Issue No 49 at para 17.30.

[note: 12] Plaintiffs' further reply closing submissions at para 10.

[note: 13] Cited in Defendant's closing submissions at para 222.

[note: 14] Plaintiffs' closing submissions at para 112.

[note: 15] XZ's AEIC at paras 29-32.

[note: 16] Statement of claim (amendment no. 1) at para 28.

[note: 17] Plaintiffs' closing submissions at para 113.

[note: 18] Defence (amendment no. 3) at para 21.

[note: 19] Plaintiffs' closing submissions at para 121.

[note: 20] Plaintiffs' closing submissions at para 124.

[note: 21] Plaintiffs' closing submissions at paras 125-184.

[note: 22] Plaintiffs' supplemental closing submissions at para 50.

[note: 23] Plaintiffs' reply closing submissions at para 101.

[note: 24] Plaintiffs' reply closing submissions at para 102.

[note: 25] Defendant's closing submissions at para 235.

[note: 26] Partial Award at p46.

[note: 27] Defence (amendment no. 3) at para 26A.

[note: 28] Plaintiffs' closing submissions at p 243.

[note: 29] Plaintiffs' closing submissions at para 185.

[note: 30] Plaintiffs' closing submissions at para 247.

[note: 31] Plaintiffs' closing submissions at p88; transcript for 8 August 2007 at p26.

[note: 32] Plaintiffs' closing submissions at para 250.

[note: 33]Plaintiffs' closing submissions at para 259.

[note: 34]Plaintiffs' closing submissions at 261.

[note: 35]Defendant's Closing Submissions at para 314.

[note: 36]Plaintiffs' further reply closing submissions at paras 38-39.

[note: 37]Defendant's closing submissions at para 121.

[note: 38]Plaintiffs' closing submissions at para 210.

[note: 39]Plaintiffs' reply closing submissions at paras 352-354.

[note: 40]Defendant's closing submissions at para 124.

[note: 41]Defendant's closing submissions at para 127.

[note: 42]Transcript 5 January 2004 at p51; Defendant's closing submissions at para103.

[note: 43]Plaintiffs' reply closing submissions at para 357.

[note: 44]Plaintiffs' further reply closing submissions at paras 132-142.

[note: 45]Plaintiffs' reply closing submissions at para 378.

[note: 46]Plaintiffs' closing submissions at para 226.

[note: 47]Plaintiffs' reply closing submissions at para 367.

[note: 48]Plaintiffs' reply closing submissions at para 440, referring to Reply (amendment no. 2) at para 6(e).

[note: 49]Plaintiffs' reply closing submissions at para 577, referring to first plaintiff's AEIC at paras 65-68.

[note: 50]Defendant's closing submissions at paras 169-190.

[note: 51]Defendant's Reply Closing Submissions at pp84-94.

[note: 52]Defendant's Reply Closing Submissions at p131, para 249.

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