

# Court grants third party access to confidential arbitration documents for disciplinary proceedings against arbitrator

30 May 2019 | Contributed by [Clifford Chance](#)

## Introduction

### Facts

### Issues

### Decision

### Comment

## Introduction

In *Chartered Institute of Arbitrators v (1) B (2) C (3) D*,<sup>(1)</sup> the High Court held that, notwithstanding the obligation of confidentiality that would otherwise apply, it should:

- grant the Chartered Institute of Arbitrators (CIArb) (a third party to the arbitration) permission pursuant to Rule 5.4C(2) of the Civil Procedure Rules to obtain certain documents relating to an arbitrator's appointment for the purpose of disciplinary proceedings against him; and
- make certain declarations concerning the use of those documents in the disciplinary proceedings.

## Facts

On 4 February 2013 CIArb appointed B (a fellow of CIArb) as the arbitrator in a dispute between C and D. Following queries by C about B's relationship with D, B convened a hearing in April 2015 to determine whether the arbitral tribunal had been properly constituted. Following the hearing, B confirmed that the arbitral tribunal had been properly constituted and that he had no conflict of interest.

C subsequently applied to the court pursuant to Section 24 of the Arbitration Act 1996 for an order for the removal of B as arbitrator on the grounds that circumstances gave rise to justifiable doubts as to his impartiality (the Section 24 Application). In February 2016 Justice Hamblen concluded that there was a real possibility of apparent bias and that B should be removed. B subsequently resigned as arbitrator.<sup>(2)</sup>

CIArb's professional conduct committee brought several charges against B, claiming that he had:

- failed to disclose interests affecting his impartiality;
- conducted a meeting inappropriately; and
- questioned counsel in an aggressive manner.

In the context of these disciplinary proceedings, CIArb sought certain arbitration documents and declarations.

## Issues

CIArb made two applications:

- The first application sought an order under Rule 5.4C(2) of the Civil Procedure Rules for copies of documents from the Section 24 Application (ie, the statements of case, witness statements (including exhibits) and written submissions and skeleton arguments).
- The second application sought declarations that CIArb and B were entitled to refer to or rely on the documents and the circumstances of B's nomination and appointment as arbitrator in matters concerning D in the context of the disciplinary proceedings, and that the use of such documents was in the public interest.

## AUTHORS

[Marie Berard](#)



[James Dingley](#)



C acknowledged that:

- the transcript of the April 2015 hearing had been exhibited in one of the witness statements filed in the Section 24 Application;
- the Section 24 Application had been held in public;
- Hamblen had been taken to parts of the April 2015 hearing transcript in the course of the Section 24 Application; and
- lengthy oral submissions had been made by all parties in relation to the transcript.

C consented to CI Arb obtaining copies of documents from the Section 24 Application (to the extent that they were on the court file) and to CI Arb being entitled to rely on them. However, while C did not oppose CI Arb's application, it could not provide the documents without D's permission.

## **Decision**

### ***Discretion of the court to grant permission to obtain documents***

Justice Moulder decided, by reference to Rule 5.4C(2) of the Civil Procedure Rules and following *Cape Intermediate Holdings Ltd v Dring*, (3) that a non-party to the arbitration proceedings (such as CI Arb) is entitled to copies of the statement of case. However, access to the witness statements (including exhibits), written submissions and skeleton arguments was held to be a matter of discretion that required the court's permission. In the alternative, Moulder stated that documents which had been read out and/or read by the judge in open court could be provided under the court's inherent jurisdiction, provided that there was an effective public hearing in which the documents had been deployed.

In deciding whether to exercise his discretion in favour of providing the documents sought, Moulder noted that it was clear from *Cape* that the essential purpose of granting access to such documents was to provide open justice. The court must consider the non-party's reasons for seeking copies of the documents and, assuming that CI Arb had a legitimate purpose, balance that against the party to the proceedings' private interest in preserving their confidentiality.

The court concluded that CI Arb had sought the documents for a legitimate interest. While noting the general rule of an implied obligation of confidentiality arising from the nature of arbitration itself, the interest of justice constitutes an exception to this implied obligation.

Moulder held that there was a general public interest in maintaining the quality and standards of arbitrators that extended beyond the interests of the parties in a particular case to the wider section of the public who chose to refer their disputes to arbitration. No distinction was to be drawn between an institution which regulated all members of the profession and voluntary membership of an institution which regulated only a section of the profession. The general public is entitled to expect that arbitrators who belong to a recognised body meet certain minimum standards as laid down by that body and that those standards will be enforced. Moulder further stated that arbitration is a quasi-judicial process for the resolution of disputes and the interests of justice lie in supporting the integrity of this alternative dispute resolution mechanism.

Based on these considerations, the court granted CI Arb access to:

- the transcript of the April 2015 hearing (it had been referred to publicly in the context of the Section 24 Application and, accordingly, limited harm would be caused by granting access to it);
- the correspondence (it provided no information concerning the details of the underlying dispute and gave context to the April 2015 hearing); and
- the witness statements (they had been read by the judge and referred to in the transcript of the Section 24 Application).

However, the court declined access to the skeleton arguments because the disciplinary proceedings were not based on the findings in the Section 24 Application and were therefore unnecessary.

### ***Declaratory relief concerning documents***

The court first considered that it had the jurisdiction to make the declaration sought by a non-party, pursuant to Section 19 of the Senior Courts Act 1981.

As to the substance of the declarations sought, it would have to be in the public interest to override the confidentiality obligation in the underlying arbitration. The court concluded that CI Arb and B were entitled in the context of the disciplinary proceedings to refer to and/or rely on the documents which the court had ordered to be disclosed. However, the court refused to make a declaration in relation to the circumstances of B's nomination and appointment insofar as it extends to arbitration proceedings other than as between C and D; other parties to previous arbitrations in which B had

been nominated or appointed had not been notified of the application, so the court could not be satisfied that all sides of the argument would be fully and properly put.

## Comment

This case illustrates the limits to the implied duty of confidentiality arising out of arbitration proceedings in English law.

While the court was clearly supportive of the general principle that arbitration proceedings are to be treated as confidential, it also demonstrated its willingness to depart from this general principle should one of the identified exceptions apply – in this instance, that relating to the interests of justice.

The interest of justice exception will only apply if:

- a third party has a legitimate interest in being granted access to the confidential information; and
- the interest of justice outweighs the private interest of the parties to the arbitration in preserving their confidentiality.

In upholding this interest of justice exception to the general rule that arbitration proceedings are confidential – in the context of disciplinary proceedings brought by CI Arb – the court has nevertheless demonstrated its pro-arbitration stance by emphasising the public interest in maintaining the quality and standards of arbitrators.

*For further information on this topic please contact [Marie Berard](#) or [James Dingley](#) at Clifford Chance LLP by telephone (+44 20 7006 1000) or email ([marie.berard@cliffordchance.com](mailto:marie.berard@cliffordchance.com) or [james.dingley@cliffordchance.com](mailto:james.dingley@cliffordchance.com)). The Clifford Chance website can be accessed at [www.cliffordchance.com](http://www.cliffordchance.com).*

## Endnotes

(1) *Chartered Institute of Arbitrators v (1) B (2) C (3) D (2019)* [2019] EWHC 460 (Comm).

(2) *Cofley Limited v Anthony Bingham and Knowles Limited* [2016] EWHC 240 (Comm).

(3) *Cape Intermediate Holdings Ltd v Dring* [2018] EWCA Civ 795.

Tom Dopstadt, trainee solicitor, assisted in the preparation of this article.

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