

CHARTERED INSTITUTE OF ARBITRATORS

LONDON BRANCH

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PROPERTY ARBITRATION

CONFIDENTIALITY AGREEMENTS

CONFIDENTIALITY AGREEMENTS IN A RENT REVIEW CONTEXT

There is nothing sinister about confidentiality agreements. There is no particular reason why the Court should not enforce such an agreement. For example, arbitration proceedings are subject to an implied obligation of confidentiality, which is broken if documents generated in the arbitration are disclosed to a non-party.

In a poor market, landlords may be unwilling to reveal how far they have had to reduce rents or grant incentives in order to secure a letting. They will be concerned not to create a comparable that will adversely affect the rent reviews on their other properties. In a stronger market, a tenant may not wish it to be known the terms that he has had to agree in order to secure the premises.

The Court will uphold a freely negotiated confidentiality agreement, just as they would any other contract. However, public interest dictates that disputes, especially those affecting the economy, should be decided according to the real facts.

What happens if a party to arbitration proceedings finds himself under a duty to disclose relevant documents to the other party to those proceedings, but is precluded from doing so by a duty of confidentiality owed to a third party?

There is no principle in English law by which documents are protected from disclosure by reason of confidentiality alone. However, in deciding whether to order discovery, the Arbitrator should not ignore obligations of confidentiality. A balance has to be struck between the need for disclosure and the desirability of protecting confidences.

Express confidentiality agreements, and the implied obligation of confidentiality which applies to arbitrations, must therefore be taken into account by an Arbitrator when an application is made for disclosure. However, if the Arbitrator is satisfied that disclosure is necessary for the fair disposal of the matter, that consideration should prevail.

Competing interests must be weighed in the balance. The public interest in the administration of justice must be weighed against pledges to keep deals confidential.

A pledge to keep information confidential should be respected unless a breach of the obligation is necessary. An Arbitrator should consider the evidential significance of the documents, and investigate whether it is appropriate to preserve the confidentiality of the documents, by leaving it to

the parties to prove their case by alternative evidence, or to override the duty of confidentiality in the interests of disposing fairly of the cause or matter or saving costs.

SECTION 43, ARBITRATION ACT 1996

A party to an arbitration may use court procedures in order to secure the attendance before the Arbitrator of a witness in order to give oral testimony or to produce documents.

This can only be done with the permission of the Arbitrator, or the agreement of the other party to the arbitration.

CIVIL PROCEDURE RULES

Part 34 contains detailed provisions relating to the circumstances in which a person may be required to attend Court to give evidence or to produce a document. It is this procedure that the Arbitrator will be sanctioning.

Analogies can be drawn with Part 31, which deals with orders for disclosure against non-parties in the following terms:

The Court may make an order only if the documents in respect of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and disclosure is necessary in order to dispose fairly of the claim or to save costs.

SECTION 33, ARBITRATION ACT 1996

The Act contains no guidance as to how an Arbitrator should exercise his discretion. He must therefore act in accordance with his general duty under Section 33 by:

- acting fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent;
- adopting procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of matters falling to be determined.

WHAT ISSUES SHOULD AN ARBITRATOR CONSIDER?

An arbitrator should consider whether it has been shown that the information is sufficiently relevant to justify breaking the confidence.

Is the hurdle to be set low or high?

Some argue that it should be set low, so that the application for permission is a purely mechanical process, on the basis that if the prospective witness objects to having to produce his evidence to the Arbitrator, he can apply to the Court for an order setting aside the witness summons.

In my submission, this is not correct, for at least two reasons:

- (a) The issuing of a witness summons in Court is a purely mechanical process. No hearing before a Judge or Master is required. You simply go to the Court office with the summons, produce the Arbitrator's permission, pay a fee and come away with the issued summons, and then serve it. If the application to the Arbitrator is also mechanical, there is nothing to prevent defective, frivolous or vexatious witness summonses being issued.

- (b) Applying to the Court to set aside a witness summons is likely to be a costly exercise. Although the Court may award costs to someone who successfully sets aside a witness summons, why should he be put to the trouble and expense of making that application in the first place.

Others say that the hurdle should be set high, so that witnesses are not troubled unnecessarily. In my view, the Arbitrator should simply comply with his duties under the Act, consider the issues on their merits and make a decision accordingly.

The Arbitrator should consider...

- Whether the documents that the witness is being asked to produce are necessary in order to dispose of the arbitration fairly, or to save costs.

- Whether the documents are relevant.

- Whether the documents sought are sufficiently precisely described, such that the person applying for permission is not going on a fishing expedition, and so that the witness knows precisely what he is required to produce.
- Whether the evidence is confidential or otherwise protected from disclosure.
- If there are ample comparables, will one more comparable prove to be significant?
- Is the trouble, expense and irritation to which a stranger will be put necessary for the fair resolution of the issues?
- Are there other ways of obtaining the information?
- Can the party issuing the witness summons prove his case without involving any breach of the obligation of confidentiality.

A witness summons will be set aside if it is directed to obtaining material which would be inadmissible in evidence. An Arbitrator's award concerning another property had been held to be inadmissible. It therefore follows that a witness summons requiring the production of such a document should normally be set aside.

In Re Dickinson (1992) NZLR 43, the landlord of the comparable was attempting to prevent true market rents from being ascertained. The Judge stated:

- *“Whether or not protection of confidential information will provide a sufficient ground to allow evidence to be withheld will depend upon the circumstances in each particular case.*
- *It is necessary to balance the advantage of maintaining confidentiality against the competing advantage of openness where a public interest is to be served.*
- *There would need to be very strong reasons before one would be inclined to say that the public interest in the disclosure of that information would be outweighed by the need for confidentiality pursuant.”*

South Tyneside Borough Council v Wickes (2004) EWHC 2428 Comm

Tyneside and Wickes were parties to a disputed rent review, concerning premises in Alperton. Nearby in Acton, Allied Dunbar had entered into an agreement for lease with B&Q. B&Q and Wickes are competitors in the DIY market and had been rival bidders for Acton. B&Q were successful. The agreement between Allied Dunbar and B&Q contained a confidentiality clause.

In the Tyneside and Wickes arbitration concerning Alperton, Tyneside issued witness summonses addressed to B&Q and a director of Threadneedle Asset Management Limited, which acted for Allied Dunbar. The witness summonses required B&Q and Threadneedle to produce the following documents:

“the transaction documentation relating to the recent letting of premises on the West Five Centre, Acton to B&Q including any expert reports, heads of terms, lease and ancillary documentation in relation to the terms or rent”.

B&Q and Threadneedle both applied to the High Court to set aside the witness summonses. They resisted disclosure of any financial information to a competitor. Disclosure of the rent paid by B&Q for Acton would give Wickes a considerable insight into the running of B&Q’s business and the viability of the operation at Acton.

Threadneedle contended that perfect knowledge of potentially comparable transactions was not necessary for the negotiation of an open market rent. Also, Tyneside could have sought disclosure from Wickes of documents relating to its negotiations with Allied Dunbar for Acton.

The Judge decided that the witness summonses should be set aside. He found that their wording was too vague, but accepted an amended formulation of the wording. He decided that the documents sought were not necessary for the fair disposal of the arbitration: other comparables were available. He believed that the information sought, or much of it, could have been obtained by other means, and seemed influenced by the fact that Tyneside had not sought disclosure from Wickes of documents relating to its negotiations for Acton. On confidentiality, he was satisfied that the documents were confidential and acutely commercially sensitive.

The Judge said:

“...I see no particular difficulty in an order for the production of a lease or agreement, where there is no confidentiality clause and the document in question evidences a relevant comparable required for the fair disposal of a rent review arbitration. In some cases, a confidentiality clause may be overridden where, for example, a clear need for the documents is demonstrated and considerations of commercial sensitivity are not present or at least not present in the acute form to be found in the present case. In other cases, confidentiality will be a very relevant factor telling in favour of setting aside a witness summons... Here, I am satisfied that, on the ground of confidentiality, the witness summonses must be set aside. To do otherwise would be unjustifiably intrusive, having the effect of opening up B&Q’s commercially sensitive information to its rival, Wickes.”

CONFLICTING OBLIGATIONS

What is the position of the surveyor who is bound by a confidentiality agreement in respect of a previous transaction in which he has acted, and which constitutes relevant evidence. Without a Court Order, he could not breach the confidentiality. However, both the CPR and the RICS Practice Statement for Surveyors acting as Expert Witnesses require an expert to declare that he has included in his report all facts that he considers material to his expressed opinion, and he has drawn the Arbitrator’s attention to any matter affecting it.

The expert valuer has to tread a careful path. He cannot reveal the terms of the confidential transaction, but he should state that he has taken account of a transaction of which he is not at liberty to give details. A declaration along these lines will comply with his duties in both conflicting respects. The Arbitrator will, however, have to take the reliability of his opinion on trust, with regard to the effect of that transaction.

FREEDOM OF INFORMATION ACT 2000

There may be circumstances in which an Arbitrator has to consider the applicability of the Freedom of Information Act 2000. One of the parties to the arbitration may be a public authority, or evidence may be sought from a public authority. An Arbitrator may need to consider whether evidence obtained in this way is admissible.

- The Act came into force on 1 January 2005. The Act confers a general right of access to information held by public authorities. Public authorities include local authorities, government

departments, fire authorities, NHS Trusts, urban development corporations and bodies as such English Partnerships and the Arts Council.

- Where a public authority receives a request for information, the information must be disclosed, unless it is covered by one of the exemptions set out in the Act.
- There are two types of exemption, absolute and non-absolute.
- Absolute exemptions entitle the public authority to refuse access to information, and there is no balancing of the competing public interest. They include:
 - a. Information which is otherwise reasonably accessible to the applicant;
 - b. information relating to certain security matters;
 - c. information filed with a Court for the purposes of proceedings in a particular case;
 - d. information provided in confidence, disclosure of which would give the third party grounds for issuing court proceedings against the authority for an actionable breach. The information must be confidential in nature, i.e. it must not be in the public domain and it must be of some value.
 - e. information the disclosure of which would be prohibited by law or would constitute a contempt of Court.
- Non-absolute exemption applies to:
 - a. Information in respect of which a claim to legal professional privilege, or to confidentiality of communications, could be maintained in legal proceedings;
 - b. information where disclosure would or would be likely to prejudice the commercial interests of any person.

Detailed specialist advice should be sought before taking or refraining from taking any action based on the comments made above, which are only intended to provide a general guide to the subject.