JUDGMENT : The Vice-Chancellor : Chancery Division. 31st January 2002

Introduction

1. The claimants are incorporated in, respectively, China, Malaysia, Canada and Sudan. They are the members of a consortium ("the Consortium") engaged in the Muglad Basin Oil Development Project in the Sudan. In July 1997 Claimants engaged OGP Technical Services Sdn Bhd ("OGP"), a firm of consulting engineers, to act for them in the management of the Project as project management consultants.

2. The second defendant ("Techint") is a company incorporated in the Bahamas with its principal place of business in Buenos Aires, Argentina. It carries on business as an international contractor, particularly in oil, gas, water supply and pipeline industries. On 21st February 1998 Techint entered into two contracts with the Consortium for the construction, as part of the Project, of a marine terminal, pumping stations and a telecommunications and control system.

3. The construction contracts between the Consortium and Techint are governed by Sudanese law. They make provision for increases in the contract price in the light of changes in the scope or nature of the work to be done by a system called the change order system; but they make no provision for OGP or any architect or engineer to certify appropriate increases. In addition they contain arbitration clauses for the resolution of disputes under ICC Rules.

4. Differences arose between the Consortium and Techint with regard to the proper working of the change order system. Techint claimed substantial sums for additional work done. Efforts to compromise the differences failed and on 13th July and 21st September 2000 Techint referred its claims to arbitration. For the most part they are claims for additional remuneration on the grounds that the nature and scope of the contract works have changed. Originally the claims were for US$110m, they have now increased to US$1530m.

5. The first defendant ("FE") is the firm of solicitors acting for Techint in the arbitration. In the course of doing so, on 16th October 2001, FE wrote a letter to the solicitors for the Consortium, Masons, which, the Consortium claims, revealed that Techint or FE must have received confidential documents or information belonging to the Consortium.

6. On 17th October 2001 and on several subsequent occasions Masons asked FE to reveal how, when and from whom it had received such documents or information. On 27th November 2001, no answer satisfactory to Masons having been received, these proceedings were commenced by the Consortium against FE and Techint. The Consortium claims injunctions restraining the use or disclosure of such documents or information, delivery up of such confidential documents as either of them have, and an order requiring both defendants to disclose the source of such documents and information. On 28th November 2001 the Consortium obtained permission to serve the proceedings on Techint in the Bahamas; this was done on 11th December 2001.

7. There are three applications before me, namely:

   a) the application dated 27th November 2001 of the Consortium for orders (i) restraining FE and Techint from using or disclosing confidential information (ii) delivery up of all confidential information and (iii) disclosure on oath of how when and from whom such documents or information were obtained;

   b) the application dated 3rd December 2001 of FE for an order, pursuant to CPR Rule 3.4, Part 24 or the inherent jurisdiction of the Court, that the claim be struck out, dismissed or stayed; and

   c) the application dated 14th January 2002 of Techint for an order setting aside the order granting permission to serve Techint out of the jurisdiction and setting aside, staying or dismissing these proceedings against Techint.

   Those, in summary, are the issues I have to determine, but to explain the submissions made to me and my conclusions it is necessary to describe the facts in greater detail.

The Facts

8. As I have indicated, the arbitrations were commenced in July and September 2000. The Arbitral Tribunal consists of a chairman, Professor John Uff QC, and two others. The issues requiring the decision of the Tribunal include what are described as Tranche I. These concern the questions who was responsible for certain delays and whether Techint is entitled to be paid for the changes which resulted therefrom.

9. On 23rd August 2001 FE wrote to the Chairman of the Tribunal concerning the formulation of the Tranche I issues and seeking a hearing in respect of them over the two weeks following 10th December 2001. In addition they sought disclosure of all documents containing advice or recommendations of OGP to the Consortium with regard to each change order proposal. They asked the Tribunal to make a direction that such documents be disclosed on or before 31st August 2001. FE also sought directions for the Consortium to provide oral evidence from OGP.

10. On 7th September 2001 Masons wrote to the Chairman of the Tribunal. They indicated that the Consortium were considering whether they had any documents in the category sought by Techint and if so whether they were relevant and disclosable. With regard to oral evidence from OGP they said that the Consortium would call personnel from OGP to give comprehensive and balanced evidence. They added *"If [Techint] wishes to call OGP witnesses as well, this is entirely a matter for it."*

11. On 13th September 2001 the Chairman of the Tribunal directed the Consortium to respond to Techint's request for the specific disclosure sought in the letter from FE dated 23rd August within 7 days. On 1st October 2001, following a procedural meeting with the parties' representatives at which FE sought a peremptory order for specific disclosure of all OGP's written recommendations, the Chairman of the Tribunal directed that the

Consortium provide responses to the requests for specific disclosure which had by then been made. He allowed a further 7 days in respect of the request made on 23rd August.

12. On 8th October 2001 Masons wrote to FE, referring to the directions given on 1st October, and stating

"*We are continuing to review the large number of files provided to us by the [Consortium] and have now located some of the documents requested in your letter dated 23rd August 2001. These documents are as follows:*

[there follows a description of a letter from OGP to the Consortium containing an assessment of change order proposals for four separate aspects of the project]

The review of the project documentation is continuing and we will be forwarding to you copies of documents (as they are located) that meet the request for specific disclosure contained in your letter dated 23rd August 2001."

This crossed with a letter written by FE to Masons on the same day complaining that the Consortium had not complied with the directions for responses within the period allowed by the Chairman of the Tribunal.

13. On 16th October 2001 FE wrote the letter to the Chairman of the Tribunal which has given rise to these proceedings. They raised again the question of disclosure orders. They wrote:

"*That leaves finally the outstanding disclosure of the OGP advice and other matters sought in our letter of 23rd August and 21st September, in respect of which you made a disclosure order on 1st October. So far, only a very small part of this documentation has been disclosed; by their letter of 8th October the Respondents disclosed OGP's advice of 21st August 1999 in relation to four Change Order Proposal* (none of them in themselves Tranche 1 issues).

We believe that some of these documents, ***such as OGP's recommendation that the Owner pay $40 million in respect of Change Orders not formalised****, will be of general background assistance for the Tribunal in relation to Tranche 1 issues. Other recommendations, particularly in relation to the number and optimisation throughput of the Pumping Stations and the capacity of the Marine Terminal, will be of direct relevance. We invite the Tribunal to make a peremptory order in respect of those matters.*" (emphasis added)

14. The Consortium claims that the passage I have quoted, in particular the highlighted subordinate clause, demonstrates three important matters. They submit that the description of the OGP recommendation shows that the issue in respect of which the recommendation was made was fundamental and not just as to the amount of the extra charge, that a dispute had arisen between Techint and the Consortium by the time the recommendation was made and that the recommendation constituted advice how that dispute might be compromised. The Consortium claims that the document containing such advice must have been both confidential and privileged and that such a status must have been obvious to FE. The Consortium maintains that the letter indicates that there was and perhaps still is a "mole" in the Consortium's camp which it is entitled to require FE and Techint to reveal.

15. On 17th October 2001 Masons wrote to both FE and the Chairman of the Tribunal in the following terms:

"*Any communication between OGP and the Owners is confidential, whether oral or written. It may also be privileged. Since the Respondents have not disclosed to you or to your clients in these arbitral proceedings any recommendation from OGP to the Owners to pay US$40 million, we require to know by return*

(i) How and when the information to which you refer was received into the possession of the Claimant?

(ii) How and when the information to which you refer was received into the possession of the Claimant's advisers, including, but not limited to Fenwick Elliott, James R. Knowles and Derek Jerram?

(iii) Who gave the Claimant or Fenwick Elliott permission or authority to publish the information to which you refer?

We should be grateful if you would also send us a copy of any document evidencing OGP's alleged recommendation in relation to the Change Orders to which you refer. It goes without saying that a copy of any such document should not be disclosed to the Tribunal.

Our clients reserve their rights against the Claimant and any of its advisers who may be found to have been in breach of any duty of confidence."

16. FE responded on the same day. They pointed out that documents disclosed in the arbitration remained confidential outside it. They continued: "*We see no basis upon which OGP's advice to the Respondents could possibly be privileged. Firstly, it predates any contemplation of litigation or arbitration. Secondly, it arises pursuant to OGP's role under the EPC contracts to provide management and monitoring of the project. Thirdly, the Tribunal has already made an order for disclosure of OGP's advice by paragraph 8(1) of the Chairman's letter of 1st October 2001. No objection was raised by you at that time on the ground of privilege. Fourthly, by your letter of 8th October you wrote to us to say that you were continuing to review your files to locate the documents requested, and you disclosed one piece of advice requested, namely OGP's letter of 21st August 1999. No doubt you were prepared to disclose that piece of advice because you did not think it particularly prejudicial to your client's case. You are not entitled to pick and chose as to which documents to disclose according to your own judgment as to which documents are harmful to your client's case. Fifthly, in your letter of 8th October, you said that the review of the project documentation was continuing and that you will forward to us copies of documents as they are located that meet the 23rd August request. This amounts to a waiver of any privilege that could conceivably have existed.*"

17. Thereafter there was much, increasingly acrimonious, correspondence between Masons and FE, the former repeating the three questions first asked on 17th October 2001, the latter refraining from answering them. I do not propose to deal with this correspondence in any detail. But it is necessary to record some matters referred to in it.

18. On 1st November 2001 there was a telephone conversation between Mr Fenwick Elliott and Mr Black of Masons in the course of which reference was made to a mole. Mr Black said that there was no such document as that to which FE had referred in their letter of 16th October. Mr Fenwick Elliott claimed to be extraordinarily well informed about the case and indicated that he *"would fall off his perch if the document* [sc. that referred to in the letter of 16th October 2001] *did not exist"*. Mr Black reiterated that so far as he knew there was no such document. Mr Black threatened proceedings. According to his note *"Fenwick Elliott asked what the nature any application would be and I said we wanted what we had asked for in our letters. He said "You want to know who your mole is." He then went on to say that he would not tell us. I said that he might have to. He then said "We will not tell you and I will tell you why. He would be killed. Your clients kill people - they wiped out half the cabinet." I was dismissive of the suggestion....."*

19. On 5th November 2001 FE applied to the Chairman of the Tribunal for a peremptory order for specific disclosure. In a very long and somewhat intemperate letter dated 12th November 2001 Mr Fenwick Elliott stated that Techint's information *"about [OGP]'s recommendations and valuations is oral. If we had the complete set of [OGP]'s recommendations and valuations in documentary form we would not be seeking disclosure of them..."*

20. On 15th November 2001 the Consortium requested the members of the Tribunal to excuse themselves and applied to ICC to remove them. The ground, in each case, was that the disclosure by FE of the amount at which OGP had advised the Consortium to settle the claims of Techint precluded the conduct of a fair arbitration because it might affect the Tribunal in deciding what sum to award to Techint. Both applications were refused on the grounds that whatever figure had been advised by OGP was irrelevant to the conclusions of the Tribunal.

21. In responding to the Consortium's application to ICC FE wrote

"Masons are quite wrong in inferring that we have knowledge of a single document containing OGP's global recommendation. We would not be surprised if there were such a document; Masons seem to be suggesting that there is.

Where, as here, a recalcitrant party is in breach of a disclosure obligation, it is entirely legitimate for the other party to "smoke out" the documents in the way we have. Masons' suspicion of a single mole is unfounded: rather we have tuned into the "Khartoum grapevine" that is entirely typical of large projects at a variety of points and times."

22. As I have already recorded the Consortium commenced these proceedings on 27th November 2001. In the Particulars of Claim it is alleged that OGP made reports to the Consortium both orally and in writing (para 4), that the information contained in such reports was confidential (para 5), that Techint and FE were in possession of such information (para 7), that it had not, as they both must have known, been obtained by legitimate means, that on behalf of Techint FE had used such information for improper means by revealing the recommended amount (para 9) and that unless restrained both defendants would continue to make improper use of such information (para 10).

23. In his witness statement made in support of the application of the Consortium for interlocutory relief Mr Black said:

"14. On 16 October 2001 Messrs Fenwick Elliot (the First Defendants) wrote to the Tribunal in support of a request for disclosure. In that letter they referred to the existence of a document in which it was alleged that OGP had recommended to the Claimants a substantial lump sum settlement in respect of the Second Defendant's claims. The claimants are still seeking to identify the document referred to. What is plain, however, is that such a document, and the information which it contains, would be plainly confidential to the Claimants, and would almost certainly be covered by privilege, since advice as to global settlement can only have come into being after relations between the parties had entered the arbitral/dispute stage. Its sensitive nature, relating as it apparently does to the level at which the Claimants' advisers were advising the settlement of a substantial existing dispute, hardly needs emphasising.

15. The Claimants are at a loss to understand how such information came into the hands of the Second Defendants and their solicitors. They have not communicated that information to the Defendants, and they have not authorised its dissemination. The inevitable inference is that the Second defendants obtained it by unauthorised and improper means, and it is inconceivable that they did not understand its confidential nature. Equally, the First Defendants must have comprehended the confidential nature of the information, and either shut their eyes to its origin or, if informed thereof by their clients, were prepared nevertheless to make use of it.

16. If the Defendants are in possession of one piece of confidential information obtained by improper means, it would appear likely that they are in possession of further such information, and their past actions demonstrate that they will not scruple to use it to obtain tactical or forensic advantages. It is my belief that the Second Defendants have had access to a 'mole' within the Claimants' organisations, and that unless they are restrained they will continue to obtain and abuse confidential information of the Claimants."

24. On 3rd December 2001 Mr Fenwick Elliott made a witness statement in response to that of Mr Black. Amongst other matters he said:

"24. The claim in these proceedings derives, it seems, entirely from my firm's letter of 16 October 2001 and the reference to OGP's recommendation to pay $40 million, in respect of Change Orders not formalised. I would confirm the following points:

(a) my firm does not have the original or copies of any documentary communication between OGP and the [Consortium], save as disclosed by the [Consortium] in the arbitration proceedings;

(b) in the course of my firm's conduct of the litigation, we have been collecting evidence from potential witnesses. A number of sources have suggested the existence of recommendations from OGP as to Change Orders and delays. One such person I have caused to be interviewed suggested the figure of $40 million. None of these people has shown us or referred us to any specific documents in support of the information. The information has been given orally, and not from within this jurisdiction;

(c) Techint claims legal professional privilege in relation to the information given and my firm cannot waive that privilege;

(d) To the best of my knowledge (from all the information provided to me to enable my firm to deal with the arbitrations) there is not so much a "mole" within the [Consortium]'s organisation as a fairly widespread grapevine, typical, in my experience, of all large projects, especially where, as here, one of the parties is a consortium of very different entities. Mr. Black is wrong when he suggest otherwise in paragraph 16 of his witness statement;

(e) I know of no reason why the information to which I have referred at (b) above should have been obtained by improper means as Mr. Black suggests in paragraph 15 of his witness statement. In the light of the disclosure obligations already debated before and determined by the Tribunal, it had not occurred to me when I drafted my firm's letter of 16 October 2001 that any confidentiality attached to any OGP recommendations as regards Techint in the arbitrations; nor had any claim been made to privilege and I had no reason to think any such claim could be made. Given the [Consortium]'s failure, even now, to particularise their assertion of confidentiality and/or privilege despite repeated requests and several opportunities to do so, I would still challenge that assertion. The inferences of impropriety which Mr. Black seeks to draw in paragraph 15 and 16 of his witness statement are thus wholly misplaced;

(f) the issues of privilege can still be determined by the Tribunal as the Tribunal itself has said in its second letter of 16 November 2001 but (as is also clear from that letter) the [Consortium] had not sought to bring that issue before the Tribunal."

25. Mr Fenwick Elliott also suggested that the reputation of the Government of the Sudan in respect of human rights left a good deal to be desired. He exhibited material relating to that suggestion which, he contended, would be relevant to any exercise of the court's discretion whether or not to grant the order sought.

26. The Consortium accepts that in view of the contents of the witness statement of Mr Fenwick Elliott the original claims for injunctions and delivery up cannot be pursued further. The application for interlocutory relief is now pursued only in respect of the claim for an order that FE and Techint do identify all confidential information in their possession and the source thereof.

27. The Tribunal commenced the hearing of the Tranche I issues on 10th December 2001. In the course of the next two weeks the Arbitrators made a number of material determinations. First, they concluded that the documents produced by OGP containing advice or recommendations to the Consortium were, prima facie, disclosable. Second, they decided that privilege had not been established in respect of any of them. But, third, they determined that the values placed on change orders by OGP were not relevant.

28. On 14th January 2002 Techint applied for an order setting aside the order granting permission to serve out or for a stay of proceedings. It is supported by a witness statement of Mr Francisco Elizondo in which he contends that the identity of the potential witness to whom Mr Fenwick Elliott had referred is privileged. He confirms that Techint does not waive its privilege.

29. It is convenient to deal with the three applications to which I have referred in paragraph 7 above in the order in which I described them for my conclusion in respect of an earlier application is likely to affect the position in respect of a later one. I start then with the application of the Consortium.

The application of the Consortium for a disclosure order

30. It is contended by counsel for the Consortium that the evidence before the court demonstrates a strong prima facie case to the effect that FE obtained from the potential witness information which he must have known was confidential and was being imparted to him in breach of a duty of confidence owed, as an employee or ex-employee, to the Consortium or OGP. He relies on the letter of 16th October 2001 from FE to the Tribunal in the respects to which I have already referred in paragraph 14 above.

31. Counsel for the Consortium submits that it is improper for a solicitor to take a proof from an employee or ex-employee of an opposing party to the proceedings concerning the confidential information of his present or former employer. He relies on Hollander & Adam on Documentary Evidence 7th ed paras 17-03 and 04 where it is stated that

"...it is often said there is no property in a witness. There are however constraints. The main constraints are as follows:

[(a).....]

(b) The witness will be obliged not to reveal to you confidential information. Where the witness has or had had some form of professional relationship with the other side, such as being a former employee, it is not permissible to encroach on areas where the witness would commit a breach of confidence on divulging information to you.

[(c)....]

Approaches to witnesses connected with the opposing party require special care. If the witness breaches a confidence, it may be that you incur liability for inducing breach of contract or unlawful interference."

Counsel also pointed to the duty of a solicitor, as indicated in para 16.06(5) of the Guide to the Professional Conduct of Solicitors issued by the Law Society in 1999, who is in receipt of information to which his client is obviously not entitled to return it to the person who is.

32. Counsel for the Consortium submitted that the identity of the potential witness did not attract privilege because the circumstances in which the proof was taken should be equated with the exception for crimes and fraud exemplified in ***Dubai Aluminium Co Ltd v Al Alawi*** [1999] 1 WLR 1964 and the cases there cited. If contrary to that submission privilege arose then, counsel argued, it had been waived by all or one or more of the letter of 16th October, the telephone conversation of 1st November, the letter from FE to the Tribunal dated 27th November and the first witness statement of FE.

33. On the basis of all the foregoing the Consortium claimed to have a good cause of action against both FE and Techint for the relief sought. Reliance was placed on the recent decision of the Court of Appeal in ***Ashworth Security Hospital v MGN*** [2001] 1 WLR 515, 529G-516F.

34. These submissions are challenged by both FE and Techint. They submitted, by reference to the original claim for interlocutory relief, that the matters to which the letter dated 16th October 2001 referred were neither confidential nor privileged. They disputed the contention that there was or could be any impropriety in Mr Fenwick Elliott taking a proof from any potential witness concerning those matters. They maintained that, even if there was, the communications between Mr Fenwick Elliott and the potential witness whose proof he took and information as to the identity of that person were privileged from disclosure. They contended that nothing done by FE or Techint could or did waive the privilege to which Techint was entitled.

35. No claim is now made for the disclosure of any document or proof of evidence given by the potential witness. This is obviously right. It is now apparently accepted by both sides that neither the Consortium, FE or Techint has or has seen any document from OGP answering the description given in the letter of 16th October 2001. Were it otherwise then the Consortium would be in breach of its disclosure obligations in the arbitration. Equally the proof of evidence obtained by FE is, prima facie, privileged and any objection to the admissibility of the evidence the witness might give may be taken if and when his witness statement is produced in the arbitration.

36. Counsel for FE contends that the claim is in any event insufficiently specific. In the circumstances prevailing when the proceedings were commenced the claim was sufficiently made. But as events have unfolded so the paucity of essential detail has become increasingly apparent. If there is no document answering the description given in the letter of 16th October 2001 then what is the confidential information and how was it conveyed? The confidential information must be the advice of OGP and its conveyance the oral communication by one individual on behalf of OGP to another on behalf of the Consortium of which the potential witness gave secondary evidence to FE.

37. I am not satisfied that any advice or recommendation by OGP to the Consortium of the type alleged in the particulars of claim is either confidential or privileged as between the Consortium and FE and Techint. The actions of the Consortium in agreeing to disclose the documents and inviting Techint to obtain such oral evidence from OGP as they wish is inconsistent with the claim to confidence and privilege now maintained. The Tribunal has already determined that documents of the description given in the particulars of claim are disclosable and are not privileged. Neither FE nor Techint has threatened to use any information they may obtain outside the proper confines of the arbitration.

38. With regard to the conveyance of such information orally from OGP to the Consortium there is no allegation at all with regard to the parties to the conversation, the circumstances in which it took place and its contents. Accordingly it is impossible to form any view as to whether, prima facie, either the communication from OGP to the Consortium or the secondary evidence of it provided by the communication from the potential witness to Mr Fenwick Elliott could have involved any breach of any duty of confidence owed to the Consortium.

39. Further, given the correspondence between FE and Masons in September 2001 to which I have referred it requires more than the fact that advice of the type recorded in the letter of 16th October 2001 was given by OGP to the Consortium to put FE on notice that the potential witness, or some other person of whom he spoke, was disclosing something he should not. So far as the arbitration was concerned Masons had made no suggestion that such advice or recommendation was confidential or privileged; to the contrary, they had invited Techint to obtain such evidence from such personnel of OGP as it chose.

40. It is in these circumstances that I must consider whether the Consortium has shown that its claim has a real prospect of success at the trial. The claim is based on the principles clearly affirmed by the Court of Appeal in **Ashworth Security Hospital v MGN** [2001] 1 WLR 515. In that case an employee had abstracted confidential information relating to a patient from the hospital's database and passed it on to an intermediary. The intermediary passed it on to the defendant who published it. The hospital sued the publisher for an order requiring them to disclose the identity of the intermediary so that, from the latter, the hospital might discover the identity of the employee. The judge made the order sought. The publisher appealed on the ground, amongst others, that the court had no jurisdiction to make such an order.

41. The Court of Appeal dismissed the appeal. The Master of the Rolls, with whom May and Laws LJJ agreed, held that the principle of ***Norwich Pharmacal Co v Customs & Excise*** [1974] AC 133 applied to all who were mixed up in the underlying wrongdoing not merely innocently or who are themselves liable for the same wrong. In paragraphs 64 to 66 the Master of the Rolls said

*64. .....At the outset of his judgment in the **Norwich Pharmacal** case Lord Reid said, at p 173:*

"Discovery as a remedy in equity has a very long history. The chief occasion for its being ordered was to assist a party in an existing litigation. But this was extended at an early date to assist a person who contemplated litigation against the person from whom discovery was sought, if for various reasons it was just and necessary that he should have discovery at that stage. Such discovery might disclose the identity of others who might be joined as defendants with the person from whom discovery was sought. Indeed in some cases it would seem that the main object in seeking discovery was to find the identity of possible other defendants. It is not clear to me whether in all these cases the plaintiff had to undertake in some way to proceed against the person from whom he sought discovery if he found on discovery being ordered that it would suit him better to drop his complaint against that person and concentrate on his cause of action against those whose identity was disclosed by the discovery. But I would think that he was entitled to do this if he chose."

65. Even if, contrary to my view, the jurisdiction to order discovery against an innocent party only arises when that party has been "mixed up" in tortious wrongdoing, I see no basis for extending that restriction to the case where the defendant is susceptible to suit on the ground of the same wrongdoing as that perpetrated by those whose identity is sought.

66. In summary, I find that the jurisdiction of the court was properly invoked in this case because: (1) the Norwich Pharmacal principal is not restricted to cases involving tort or (2) if it is so restricted, the restriction does not apply where the defendant is not merely innocently mixed up in the wrongdoing but is a party to it."

42. In the light of the conclusions I have already expressed I do not see how there is a real prospect that such principles can be applied in the circumstances of this case. For the reasons already given it is by no means clear that the advice of OGP to the Consortium was ever or is now confidential. Even if it was there is no evidence that the potential witness's knowledge of it was improperly obtained or disclosed. And even if those necessary preconditions are satisfied there is no evidence that in proofing that potential witness Mr Fenwick Elliott was either implicated in the original wrongdoing or himself liable for breach of any duty of confidence owed by him to the Consortium.

43. Counsel for the Consortium, whilst disclaiming any wish to see the proof of evidence obtained by Mr Fenwick Elliott, protested that the problems facing his client arise from the refusal of FE or Techint to share with the Consortium the information they have received from the potential witness. He suggests that the claim of FE and Techint to be entitled to withhold both the information and the identity of the potential witness on the ground of privilege should lead me to draw all possible inferences against them.

44. Litigation privilege exists because it is in the public interest that litigants should seek and obtain confidential advice in respect of actual or contemplated litigation. There is no such privilege where the communications are not made in the usual course of the solicitor's retainer because, for example, they are made in furtherance of a crime or fraud. The extent of the privilege and the exceptions to it were comprehensively examined by the Court of Appeal in ***Barclays Bank plc v Eustace*** [1995] 1 WLR 1238 and by Rix J in ***Dubai Aluminium Co Ltd v Al Alawi*** [1999] 1 WLR 1964. I note, in particular, that inducing a breach of duty is not, without more, within the exception. **Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd** [1972] Ch. 553.

45. In the normal course of proceedings a solicitor will interview and obtain proofs of evidence from all manner of potential witnesses for use in actual or prospective litigation. Both the information given and the identity of the person supplying it are confidential and privileged unless and until the privilege is waived by that person giving evidence in the proceedings or some other equivalent action. This was and is recognised in the common form claim to privilege contained in the former affidavit of documents as well as in the present disclosure statement in neither of which was or is the name of the witness who has given the proof revealed.

46. If the information provided by and the identity of a potential witness is privileged information then the claim to privilege made by Techint must preclude the grant of the order now sought by the Consortium. There is no evidence to justify any conclusion that the nature of the communications between Mr Fenwick Elliott and the potential witness were such as to exclude any claim for privilege. Even if it is assumed that the potential witness is an employee of OGP or the Consortium the information he is assumed to have given cannot have been imparted to Mr Fenwick Elliott in breach of duty because it is not, as between the parties to the arbitration, either confidential or privileged. Even if the information given by the potential witness indicated some earlier breach of a duty of confidence by him or another that cannot preclude privilege for the communication between him and Mr Fenwick Elliott. Frequently information given by a potential witness to a solicitor indicates the past commission of a crime or fraud but that is no ground for denying privilege in the communication; quite the opposite. If, as I conclude, the communication between the potential witness and Mr Fenwick Elliott is privileged then it must follow that the identity of the person giving the proof is similarly privileged.

47. The Consortium also contends that the privilege was waived. There was no express waiver and I find it impossible to imply one from any of the matters on which the Consortium relies. I was referred to the distinction between what has been described as a mere reference to a document and an implied waiver of privilege in respect of its contents. ***Government Trading Corpn v Tate & Lyle*** (19th October 1984 Court of Appeal unreported); ***Marubeni v Alafouzos*** (6th November 1986 Court of Appeal unreported). Those cases deal with the contents of a privileged document not the identity of a potential witness.

48. In my judgment there was no waiver of privilege in respect either of the contents of the communications between Mr Fenwick Elliott and the potential witness or in respect of his identity. The letter of 16th October 2001 refers to the recommendation as an example of documents which, FE believes, would be of general background assistance

to the Tribunal. It is written in the context of a request for an order for specific disclosure. In my view it is insufficient to waive privilege in the document had there been one. It is wholly inadequate to waive privilege in respect of the communication of that information by the potential witness to Mr Fenwick Elliott for it does not even refer to it. Similarly there is not even a reference to the potential witness let alone anything which could be regarded as the waiver of privilege regarding his identity.

49. The Consortium also relied on the telephone conversation between Mr Fenwick Elliott and Mr Black which occurred on 1st November 2001. I have referred to the nature of that conversation in paragraph 18 above. I am unable to see how such a conversation can waive privilege in anything. Discussion off the record of whether there is a document or a mole cannot undermine privilege in the contents of the document or identity of the mole, if, in either case, there is one.

50. The Consortium also relied on the letter from FE to the Chairman of the Tribunal and the passage in it to which I have referred in paragraph 21 above. The point was not developed. Suffice it to say that I am unable to read that letter as waiving any privilege.

51. Finally the Consortium relied on the witness statement of Mr Fenwick Elliott in these proceedings. But that cannot constitute a waiver as it specifically claims privilege on behalf of Techint. Counsel for the Consortium pointed out that it is not permissible to have a partial waiver. In that context he submitted that the witness statement was a partial waiver which should now be completed by disclosure of the name of the potential witness. Again, in my view, there has been no partial waiver so there is nothing to complete.

52. It follows that, in my judgment, the claim for privilege is properly made. In that event I refuse to draw any adverse inference from the fact that Techint has claimed it. The privilege exists for good reason; the exceptions have been developed to protect others in cases where such protection is needed. If adverse inferences are drawn in cases where the privilege, not the exception, applies then it will undermine the privilege itself. Thus to draw such an inference would be contrary to the very public interest the privilege is intended to serve.

53. In the result I conclude that (1) the claim of the Consortium is not sufficiently made and (2) Techint is entitled to claim that the information sought by the Consortium is privileged. For all these reasons I refuse to grant to the Consortium the relief they seek.

FE's application to strike out or dismiss the action

54. It follows for the reasons I have already given that I consider that the Consortium has no real prospect of succeeding on its claim in this action. Nor do I see any compelling reason why the case should be disposed of at a trial. Accordingly I dismiss it pursuant to CPR Rule 24.2. Whether or not it should also be struck out under CPR Rule 3.4 is of only academic interest.

Techint's application to set aside permission to serve out

55. Given my conclusion on the claim by FE to dismiss the action under CPR Rule 24.2, as Counsel for the Consortium accepted, it must follow that I should discharge the order permitting the Consortium to serve these proceedings out of the jurisdiction on Techint because the Consortium has not shown that it has a good arguable case. ***Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*** [1994] 1 AC 438. In those circumstances it is unnecessary for me to consider whether the claim fell within any or all of paragraphs (2), (3) and (8) of CPR Rule 6.20. It is also unnecessary for me to deal with the alternative claim that these proceedings should be stayed under s.9 Arbitration Act 1996.

Summary of Conclusions

56. For all these reasons:

a) I dismiss the Consortium's application for interlocutory relief,

b) I dismiss the Consortium's action against FE,

c) I set aside the order granting the Consortium permission to serve the proceedings out of the jurisdiction on Techint and dismiss the action against Techint also.

Mr. Gordon Pollock QC and Mr. Martin Griffiths (instructed by Messrs Masons) for the Claimants
Mr. Christopher Pymont QC (instructed by Messrs Fenwick Elliott) for the 1st Defendant
Mr. Thomas Ivory QC (instructed by Messrs Nicholson Graham & Jones) for the 2nd Defendant