Neutral Citation Number: [2019] EWHC 1335 (Ch)

Case Number: BL-2018-000980

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

BETWEEN:

SCHILLINGS INTERNATIONAL LLP

Claimant/Applicant

and

CHRISTOPHER HOWARD SCOTT

Defendant/Respondent

Rolls Building, Fetter Lane,

LONDON EC4A 1NL

Date: Monday 10th June 2019

(incorporating typing corrections pursuant to CPR 40 r12 inserted on 5th July 2019)

Before:

MR JEREMY COUSINS QC SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION

APPROVED JUDGMENT

Mr Jeremy Callman (instructed by **Messrs Fox Williams LLP**, of 10, Finsbury Square, LONDON EC2A 1AF) for the Claimant/Applicant

Mr James Mather (instructed by **Messrs Cooke, Young & Keidan**, of 21, Lombard Street, LONDON EC3V 9AH) for the Defendant/Respondent

Hearing date: Thursday 28th March 2019

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JEREMY COUSINS QC:

1. On 8th May 2018, Norris J granted an injunction, on the application of Schillings International LLP ("Schillings") against Mr Christopher Scott ("Mr Scott"), a solicitor, who on any view, had been a member of Schillings, pursuant to a Deed of Adherence dated 1st May 2015. At the time of the hearing before Norris J, there was, and indeed still remains, an issue as to whether Mr Scott's membership of Schillings had terminated by agreement on 4th April 2018. Since the hearing before Norris J, and pursuant to an undertaking given by Schillings on that occasion, the disputes between the parties have been referred to arbitration, although no arbitrator has yet been appointed. The present application, which was issued on 19th November 2018, but which it did not prove possible to list for a hearing until it came before me on 28th March 2019, has been made by Schillings, because it is said that there has not been proper compliance by Mr Scott with the terms of that injunction, and Schillings maintains that I should make an order to secure such compliance. Mr Scott denies the alleged failure to comply on his part, and he disputes the jurisdiction of the court to deal with the matters which the application raises; alternatively, he submits that as a matter of discretion, I should decline to make any orders as sought, irrespective of the merits of the matters raised by Schillings, because any disputes should now be dealt with in the arbitration.

<u>BACKGROUND</u>

2. The proceedings in which the application before Norris J was issued were commenced on 30th April 2018 by way of a "Claim Form (arbitration)". They were headed "In an arbitration claim between" the parties. They referred to

"an intended arbitration", and sought an order pursuant to s44(2)(e) of the Arbitration Act 1996 ("the 1996 Act") "for an interim injunction restraining [Mr Scott] whether by himself or his servants or agents or howsoever otherwise, pending final determination of disputes pursuant to clause 42 of the LLP Agreement dated 30 April 2015 from acting in any way contrary to" his being a Member of Schillings governed by the terms of its LLP Agreement, and the terms of a letter of suspension, to which I refer below. The relief sought included "other ancillary injunctive relief".

3. The evidence in support of the application included a witness statement, dated 30th April 2018, from Mr Roderick Christie-Miller, a solicitor and partner in Schillings, who said at para 60 of his evidence that Mr Scott had declined to give certain undertakings as to compliance with his obligations, and that "As such, the risk of Mr Scott causing damage to the LLP has become too great and urgent action now needs to be taken." He expanded, in para 61, by explaining that the relief sought at that stage was the minimum necessary to protect Schillings and that "The LLP merely seeks to enforce, pending the operation of the dispute resolution clause (mediation and arbitration) in accordance with clause 42.4 of the LLP Agreement, the terms of Mr Scott's suspension and the delivery up of communications in relation to the LLP's business and affairs." Schillings' fears were described at para 62, namely, that if Mr Scott's compliance with his obligations were not enforced, there would be difficulty in quantifying loss suffered as a result, and that there was a "serious risk of losing [a number of important] clients", such that "damages are not an adequate remedy and it is necessary for urgent action to be taken to prevent continued breaches and to protect [Schillings'] business". Reference was made, later in that statement, to the potential loss of clients and the need to compel Mr Scott to comply with the terms of his suspension "until the expiry of his notice period".

4. Norris J's judgment, given under Neutral Citation Number [2018] EWHC 1210 (Ch), described the background to this case, and to the application then

before him. I gratefully adopt what he said in those respects, as well as the terms that he used:

> "1 Schillings was formerly a firm of media lawyers, but its business has moved into more general, non-legally focused business in that field. Schillings International LLP was established to deal with that larger business. Its governing document is a limited liability partnership agreement dated 30 April 2015. It is in fairly conventional form.
>
> [Norris J then set out material provisions of the LLP Agreement.]
>
> 14 … Mr Scott … developed his expertise away from strictly legal issues into general issues of reputation management. In this, he was held in high regard by one particular client (referred to at the hearing as "client X"). Client X was, through Mr Scott, the source of a very substantial fee income for Schillings LLP. This was dependent to a very significant extent on Mr Scott's personal relationship, but it also required for its proper performance the involvement of significant numbers of Schillings' staff.
> 15 There came a time when Mr Scott decided that he no longer wished to service this client within the confines of the LLP, being more attracted to providing high level strategy … leaving Schillings to deal with the operational issues which arose out of this strategic high level advice.
> 16 On 30 November 2017, Mr Scott gave notice of his retirement. This would have made his leaving date 30 May 2018. … Mr Scott and the LLP began to explore how they might develop a collaborative relationship which freed Mr Scott to undertake his high level strategic assessments but which left Schillings (rather than any other legal firm) providing the operational needs for the implementation of that advice. It should be said that client X engages a number of other lawyers, often to act alongside Schillings. The evidence is clear that the parties made strenuous efforts to see if they could work collaboratively. During this time, it was recognised by the LLP that Mr Scott would continue his relationship with client X upon his departure and that indeed Schillings' continued involvement with client X was to some extent dependent on Mr Scott continuing that relationship.
> 17 On 11 January 2018, Mr Scott established a limited company, Scott & Co Lawyers Ltd, with the obvious intent that this would be the vehicle through which he provided his future services to client X and others. The negotiations continued through February and March … Mr Scott's leaving date became one of the matters which fell for consideration, along with others.
> 18 … [V]arious leaving dates were canvassed in the draft agreements and in the communications which passed between the parties. But ultimately, the position was reached when negotiation about this new

collaborative arrangement was not fruitful. The parties involved a mediator to try and resolve those disputes. Mr Scott communicated certain information to the mediator. But in the end, it was decided by the LLP that the proposed arrangements were unlikely to be achievable, and they reverted to the terms of the LLP agreement itself as it stood.

19 They gave to Mr Scott a notice of suspension on 29 March 2018. Referring to clause 28.12 of the agreement, they said that the suspension should be on the terms set out in that clause, excluding Mr Scott from the firm's offices, preventing him from attending to the business and affairs of the firm and preventing him from contacting or communicating with clients, prospective clients, referrers or introducers of work, suppliers, agents, other professionals, including lawyers or other advisers to current clients, the media, or employees or independent contractors of the firm.

20 They then removed his access to the LLP's information technology system. But they reminded him that whilst on suspension, he remained a member of the firm. He therefore owed all of those obligations of confidence and the other more detailed obligations to which I have referred. But in turn, Mr Scott was entitled to be remunerated as a continuing member of the firm up until his retirement date on 30 May.

21 When Mr Scott received notice of his suspension, solicitors on his behalf wrote to say that they did not accept the validity of the notice of suspension. They did not accept that Mr Scott continued to be a member of the LLP. They said that there had been an agreed leaving date of 4 April …

…

23 [Mr Scott] disputed the validity of his purported suspension and of the restrictions purportedly thereby placed upon him. [His] solicitors said that Mr Scott could not give undertakings which were flatly contrary to that case. They also said that the undertaking being sought was without justification or purpose. But they noted that since learning of his purported suspension, Mr Scott had not in fact been in contact with any clients or referrers, with two exceptions (which they set out), and in both which cases they asserted that Mr Scott had referred the matters to the LLP.

24 [Following correspondence concerning undertakings] … the LLP decided to commence proceedings and to seek an interim injunction; the draft order seeking a general injunction that until 30 May 2018, Mr Scott must not act in any way contrary to his being a member of Schillings, suspended pursuant to clause 28.1 of that agreement and on the terms of the suspension letter dated 29 March 2018.

…

27 One of Schillings' principal concerns has been that they have discovered that during the period which negotiations were taking place and following his suspension, and during the period which the

> mediation was taking place, Mr Scott has had an operative personal email account, ('SL18'), on which communications concerning client X at the least, if not other clients, have been undertaken. Not only has Mr Scott such an email account, but two other individuals also have linked accounts.
> 28 It was Mr Scott's initial disclosed position that this was an email account established in order to maintain continuity in his dealings with client X; and that he had given the email details to another individual who had in an unauthorised way used it for matters concerning client X, but that the use was minimal. Mr Scott told as much to the mediator. But further work as disclosed that (at a time when Mr Scott was telling members of the LLP that client X was unusually quiet), there was very substantial email traffic on his personal email account. These matters do not seem to be disputed by Mr Scott.
> 29 They found the submission made on behalf of the LLP that;
> (a) Mr Scott's conduct in establishing the SL18 email account and in using it for extensive contact with client X, (that will not appear on Schillings' information systems, although client X is as matters stand their client),
> (b) his economy with the truth when disclosing the reason for the existence of the personal email account and
> (c) the manner in which it came to be used in an unsolicited manner by a third party, found the inference that there is more going on in the background than Mr Scott is prepared to disclose to those with whom he may well still be in membership as a partner in the LLP. The LLP submits that Mr Scott's refusal to acknowledge that he is a member bound by the terms of the LLP agreement (and will continue to be so until 30 May) indicate
> (a) a desire to be free to act and
> (b) the probability that that freedom has been exercised in a way that has not been disclosed,
> and that this justifies an application for injunctive relief in the broad terms in which it is sought."

5. At this point, Norris J went on to explain that for Mr Scott it had been submitted that an injunction in the wide ranging terms which were sought was inappropriate, that he had given assurances as to not undertaking commercial activity until after 30th May 2018, and that having regard to that assurance, coupled with an undertaking as to not dealing with clients and referrers, the grant of injunctive relief was inappropriate.

6. Having considered the evidence before him, and the parties' respective submissions, Norris J found that there was a serious issue to be tried as to whether Mr Scott remained a member of the partnership, as to which he

considered, as matters stood before him (an important qualification as he acknowledged), that Schillings seemed to have the better of the argument. The judge then considered the issue of breaches of obligation on the part of Mr Scott, and concluded that he was satisfied that there was a serious issue to be tried to justify the exercise of the jurisdiction to grant injunctive relief. As to that he expressed himself satisfied. He mentioned specifically Mr Scott's alleged breach by "the establishment of a parallel line of communications with the LLP's clients through which he can communicate with them without the LLP knowing. But that, I think, is such a serious breach (and indeed Mr Scott says in his evidence that he deeply regrets it) that it raises a justifiable suspicion that the whole truth as to this matter has not emerged, and that there are indeed serious issues to be tried in relation to what contact Mr Scott has had and what steps he has been able to take in order to provide a springboard for his new venture when he leaves the partnership." Addressing, next, the question of whether breaches by Mr Scott, if proved, could be compensated for in damages, Norris J, at para 34, expressed himself "satisfied that in relation to such matters as impermissible contact with clients, referrers, introducers, employees and co-professionals, there is a real risk that adequate compensation in damages cannot be provided. Establishing what has occurred and what its consequences are (and assessing those consequences in money terms) is difficult." However, Norris J also recognised that there was "a real risk that uncompensatable loss will occur if [Mr Scott] is wrongly held to be a member after 4 April, when he should have been free on that basis to contact clients or suppliers, subject only to the obligations imposed upon outgoing members by the LLP agreement."

7. Norris J concluded that the balance of convenience, which he addressed at paras 37-46, weighed in favour of the grant of injunctive relief "to govern the position until 30 May". But he explained, at para 47, that such grant was to be limited by reference to "those provisions of the agreement which are seriously in play in the next 21 days whose terms can leave Mr Scott in no doubt of what he is to do". These he identified, indicating the relevant clauses, including of particular importance for the present application clause 21.1.4, "insofar as it obliges Mr Scott to give a true account of all of his dealings

relating to the business and affairs of [Schillings]. In the instant case, that requires him to give a true account of his dealings with the clients of the firm."

8. In concluding his judgment, Norris J said, at para 55, so far as is relevant, that the provisions of the order he made, were "injunctions which are clear in their terms and can leave Mr Scott in no doubt as to … in the case of the clause 21 provisions, what he must do. They are in my judgment necessary because of his insistence that he is not a member of the LLP, is not bound by the terms of the LLP agreement, and is not subject to the terms and conditions imposed by the suspension letter. Beyond that, I am not prepared to go."

9. The order which Norris J made ("the Norris J Order"), so far as is material, provided by paragraph 1 that:

> "Until the end of 30 May 2018 the Respondent must comply with the following clauses of the LLP Agreement:
>
> a. Clause 21.1.4 in so far as it obliges the Respondent to give a true account of all his dealings relating to the Business and affairs of the Firm since 30 November 2017 with clients, prospective clients, referrers and introducers of work, including:
>
> i. giving full details of the time, date and content of all communications in so far as those communications are not already on the Firm's document system or recorded on the Firm's mobile telephones;
>
> ii. giving full details of all media via which he has communicated save for media controlled by the Firm (including email, fileshare app, messaging platforms whether encrypted or unencrypted, cloud based storage facilities or social media);
>
> and he shall provide (i)-(ii) above by no later than 4pm on 18 May 2018."

10. By schedule 2 the order recorded that Schillings had given an undertaking to the court in terms that "As soon as practicable [Schillings] will pursue the procedure set out in clause 42 of the LLP Agreement for the determination of disputes." This was, of course, a reference to the mediation and arbitration provision of the LLP Agreement.

THE PRESENT APPLICATION

11. The present application is made on the basis that, in breach of paragraphs 1(a), 1(a)(i) and/or 1(a)(ii) of the Norris J Order, Mr Scott has failed to provide such (i) telephone records, (ii) copies of text messages, (iii) copies of e-mails (as identified in correspondence from Schillings' solicitors and a schedule attached by way of a confidential annex to a witness statement in support of the application), and (iv) copies of all other communications with clients, prospective clients, referrers and introducers of work. The application states that it is made "to seek compliance with the Court's earlier order and to obtain inspection and/or preservation (or custody or detention) of and/or disclosure of certain documents and/or electronic records and/or [Mr Scott's] iPad, mobile phone and laptop". Schillings is stated to be seeking "a further order that [Mr Scott] do provide the documentation and/or electronic records and/or information and/or devices" mentioned "by a specified time and date".

12. The evidence presently before the court consists of the witness statements of Mr Christie-Miller (30th April 2018) and Mr Scott (6th May 2018) that were before Norris J in May 2018, together with a witness statement (16th November 2018) in support of the present application from Mr Gavin Foggo, a partner in Fox Williams, Schillings' solicitors, and a witness statement (14th February 2019) from Mr Scott in response. There was then a further round of witness statements from both Mr Foggo (11th March 2019) and Mr Scott (21st March 2019), making a total of six statements.

13. In his first witness statement, Mr Foggo acknowledges that on 25th May 2018, following an agreed extension to the time permitted for compliance with the Norris J Order, Mr Scott produced a lever arch file containing documents which comprised the account ("the Account") pursuant to that order. That is exhibited to Mr Foggo's evidence. The Account included a 46-page document prepared by Mr Scott in which he described efforts that he had made to recover documents, and explained that the server upon which the SL18 e-mail accounts were housed was shut down before his suspension from Schillings. Mr Scott maintained that copies of documents that were moved from the server to a secure drive, but that deleted e-mails were lost in the process of

such copying over. Mr Scott's case is that he regularly deleted client materials (e-mails and texts) from his devices before travelling to certain jurisdictions because authorities in such places might stop or question him and require access to the content of those devices. The deletions were effected with a view to preserving and protecting client confidentiality. Mr Foggo points out that this was not something that had been explained at or before the hearing before Norris J last May.

14. Mr Foggo's evidence made other criticisms of the Account; it included dates of calls, meetings and e-mails, together with summaries thereof, and some text from electronic attendance notes; however, copies of the underlying attendance notes themselves were not produced. Whilst brief details of texts were provided, the texts themselves were not copied. The Account itself acknowledged that there were unrecovered deleted documents as to which Mr Scott had described how he had enlisted assistance from Kindleworth LLP and Kroll Ontrack ("Kroll") to assist with recovery. Mr Scott promised that he would supplement the Account when the recovery processes had been completed.

15. There is an extensive description in Mr Foggo's evidence of the correspondence into which the parties entered, and in the course of which Schillings sought explanations as to the deletion of e-mails, the extent to which material had been backed up, and attempts at recovery. Schillings raised the possibility of recovery by an expert retained by Schillings. Specific reference was made to communications with lawyers at Kobre & Kim, lawyers in Washington DC, who acted for client X; there was an absence of reference to such matters. Mr Foggo referred to there having been, in the early stages following provision of the Account, "an open dialogue" between the parties as to the further information and documents required, when it seemed that Mr Scott was co-operating. In June 2018, Mr Scott provided a zip file of some e-mails in their native format, and a PDF file that had not been mentioned in the Account. At about the same time he said that he had been informed by Kroll that it had not been able to effect recovery from his laptop He said that Kroll

would provide him with a report to that effect which he would then copy to Schillings. As to recovery, he said that he was seeking a second opinion, and would consider allowing inspection by an expert nominated by Schillings.

16. Subsequent to this early and apparently co-operative phase in the post-Account communications, the thrust of Mr Foggo's evidence is that Mr Scott's attitude hardened, and that he maintained in correspondence in July 2018 that he had complied with his obligations under Norris J Order, such that any further assistance he gave was by way of a courtesy and subject to his discretion. Even by early September, the promised Kroll report had not been provided, despite reminders. In light of Mr Scott's ongoing failure to co-operate, as it was perceived, Fox Williams warned, by letter of 11th October 2018, that a further application to the court was in contemplation. This caused Cooke, Young & Keidan ("CYK"), Mr Scott's newly instructed solicitors, to respond, by letter of 25th October 2018, saying that Mr Scott had complied with the order, and exceeded what was required of him, raising also a dispute as to whether the court would have jurisdiction to deal with the proposed application, given that there was an arbitration provision contained within the LLP agreement. In that same letter, whilst stating that the Norris J Order did not require the same to be provided, CYK enclosed three reports from Kroll, together with a report from DHL, the latter confirming the accidental destruction of Mr Scott's iPad in transit.

17. For his part, Mr Scott disputes that there has been any breach by him of the Norris J Order. In his second witness statement, he suggests that the application now made against him is motivated by "an abusive attempt to sabotage [his] new business in circumstances where [he has] complied fully with [his] obligations, under the order". This is all part, he maintains, of an attempt to "bog him down" in "time consuming litigation" irrespective of its merits. He is insistent that the application now made serves no purpose "as there is nothing else to provide within the scope" of the order. He maintains that he has complied with the terms of the Norris J Order, that some of the material which has been sought is outside the scope of that order, and he denies that he has been "anything other than candid". He asserts expressly that

"there is nothing else to provide within the scope of the [Norris J Order]", something which has been stated repeatedly in correspondence before the present application was made.

18. Besides denying that he is in breach of the Norris J Order, Mr Scott in his second witness statement, maintains that there is "clearly no urgency" and that "an arbitrator could have been appointed many months ago in accordance with the dispute resolution procedure", and that an arbitrator could have dealt with genuine document requests made by Schillings.

THE ARBITRATION ISSUES

19. In my judgment, against this background, and in light of the issues that have been raised, it is appropriate for me first to consider the parties' respective submissions as to my entertaining this application, both jurisdictional and discretionary, that arise from the dispute resolution clause and the engagement of the provisions of the 1996 Act ("the Arbitration Issues"). Depending upon the conclusions which I reach in connection with the Arbitration Issues, those might be dispositive of the entirety of the present application.

20. Clause 42 of the LLP Agreement is headed "Governing Law and Jurisdiction". Clause 42.1 provides that any dispute arising out of or in connection with the Agreement was to be subject to the laws of England and Wales. Clause 42.2-4 makes provision in respect of mediation (to be initiated by giving an ADR Notice), and related matters; Clause 42.5 ("the Arbitration Clause") is in the following terms:

> "In the event that the dispute is not resolved at the mediation appointment or the mediation has not taken place within 40 Business Days of the ADR Notice (and the parties have not agreed to extend the time period) then either party shall be at liberty to refer the dispute to be determined by a sole arbitrator appointed by the parties or failing agreement by the President for the time being of the Law Society."

21. Schillings' reference to arbitration ("the Reference") was dated 1st February

2019. The matters which it sought to put before the arbitrator were identified, in para 12 of the Reference, as (a) whether Mr Scott remained a member of Schillings until 30th May 2018, (b) whether Schillings is estopped from asserting that Mr Scott's leaving date was 30th May 2018, (c) whether Schillings was entitled to the Norris J Order (or whether it was wrongly granted), and (d) to what order Schillings is entitled as to costs in respect of the facts and matters in dispute (up to and after 8th May 2018), and in what amount (and on what basis, and with what interest payable thereupon). As at the date of the hearing before me, no arbitrator had been appointed, and I have not been notified since the hearing concluded of any such appointment. Therefore, so far as I am aware, the position remains that no arbitrator is yet in place.

22. Before I describe the parties' respective submissions, it is convenient first to set out the material provisions of s44 of the 1996 Act under which these proceedings were commenced:

> "44 *Court powers exercisable in support of arbitral proceedings*
>
> (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
>
> (2) Those matters are—
>
> (a) the taking of the evidence of witnesses;
>
> (b) the preservation of evidence;
>
> (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—
>
> (i) for the inspection, photographing, preservation, custody or detention of the property, or
>
> (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;
>
> and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;
>
> (d) the sale of any goods the subject of the proceedings;
>
> (e) the granting of an interim injunction or the appointment of a receiver.
>
> (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

> (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
> (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
> (6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.
> …"

23. Since Mr Mather's submissions on the Arbitration Issues mounted an attack on the propriety of granting relief upon this present application as a matter of principle, I shall begin by describing the nature of that challenge, even though, at the hearing of this application, Mr Callman addressed me both in opening and in reply on this aspect of the case.

24. For Mr Scott, Mr Mather submitted that as a matter of principle the application now before the court is misconceived for a number of reasons, which can be summarised as follows. First, he relied upon the width of the Arbitration Clause, which he submitted caught the present dispute as to Mr Scott's obligation to provide particular materials which are sought from him. Secondly, whilst Mr Scott had accepted the court's jurisdiction to hear the claim upon the original application, this was on the basis that it was for an injunction that was urgently sought. However, other than on that basis, pursuant to s44(3) and (4) of the 1996 Act, it is not open to the Court to grant any relief on the claim. He relied upon the decision of the Court of Appeal in *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555 as to the limitations upon the court's jurisdiction when granting relief under s44(3), namely to circumstances where the case is one of urgency, and the court considers an order to be necessary for the purpose of preserving evidence or assets. In this context, he reminded me of the principles upon which s1 of the 1996 Act provides that the provisions of Part 1 of the Act are founded, and in accordance with which the Part is to be construed; I shall refer to these later in this judgment. Further, there is no suggestion of any continuing urgency in this

case, the history of the conduct of which on the part of Schillings would be inconsistent with any such suggestion. He cited the delay in bringing the present application, and the absence of any attempt to expedite its being heard. He relied on the fact that there is no suggestion of ongoing need for springboard relief, nor could there be.

25. Thirdly, the grant of relief by Norris J was on a springboard-type basis "over a short period" because the matter was urgent. The relief to which the application under s44 was made was in support of the arbitration of the dispute as to (i) Mr Scott's date of retirement, and (ii) whether he was subject to the duties of a member in the period up to the end of May 2018. Mr Mather submitted that although Schillings undertook to pursue that dispute as expeditiously as reasonably possible, in fact they failed to do so. He submitted that upon the reference to arbitration the only remaining issue is that of some costs, the bulk of which have already been dealt with by the Norris J Order.

26. Whilst, fourthly, Mr Mather accepted that it could be possible, in some circumstances connected with arbitration claims, for the court to make orders to give effect to a previous order that it has made (for example, upon an application for contempt of court, or where a springboard effect is still continuing), he contended that such an order would be exceptional, and that in this case, the order sought would merely be repetitious of the earlier order that had been made. In the present case, there is no basis for departing from the statutorily enshrined principle that the court should not interfere with the arbitration process, absent circumstances of urgency.

27. In light of these points, and in particular the first two of them, Mr Mather submitted that I should refuse, as a matter of jurisdiction, the application now before me. In the alternative, he submitted, that even if the court has jurisdiction to grant the relief which is now sought, as a matter of discretion, taking into account the matters which I have mentioned, I should refuse to grant the relief sought.

28. Mr Callman, in his attractively presented submissions for Schillings, in the course of his submissions in opening the case, and in reply, argued that Mr Scott should, from the first, have taken steps assiduously to comply with the Norris J order. He contended that the evidence before the court raised real concerns that Mr Scott had failed to do so, and he relied upon some passages in Mr Scott's own evidence as tantamount to an acknowledgment that he had not properly reviewed the material which had been required by way of an account of his dealings.

29. Whilst Mr Callman accepted that as a matter of principle it would have been, or would still be, possible to obtain an order from an arbitrator for the disclosure of material sought from Mr Scott, this was not the correct position from which to start the analysis; part of the court's function was to ensure that its orders were complied with.

30. The fact, Mr Callman submitted, is that the Norris J Order was made, and the full benefit of that order should be available to Schillings; Mr Scott was under an obligation to use all reasonable efforts to bring about the result for which the order provided, and he would be in contempt if he failed to do so. Mr Callman relied upon passages at pages 659-660 in *Commercial Injunctions* (6th edition) by Mr Steven Gee QC in support of these propositions.

31. Mr Callman submitted that there was no question of Schillings now seeking a fresh springboard injunction; what was sought was simply a continuation of existing relief so that full and proper compliance would be achieved, and Schillings would be put into the position in which it should have been had Mr Scott complied with his obligations under the Norris J Order. It was wholly inappropriate, Mr Callman argued, that Schillings should effectively be compelled to "start again" before an arbitrator to obtain relief by way of proper disclosure and an account, which should have been achieved by way of proper compliance with the Norris J Order. He pointed out, in this context, that the subject-matter of the reference to arbitration does not encompass the issues, or at least all of them, with which the present application is concerned,

though, realistically, he accepted that an undertaking had been given to Norris J to refer "the determination of disputes" to arbitration, and that it would be possible to seek to widen the scope of the arbitration to require disclosure of the materials currently sought in the current application before me.

32. As for s44(3) and (4) of the 1996 Act, Mr Callman submitted that the restrictions which they imposed were not applicable when an existing order of the High Court "is already in being".

Discussion

33. In *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889, to which Mr Mather referred in the course of his submissions, Lord Mance began his judgment, with which Lords Neuberger, Clarke, Sumption, and Toulson agreed, as follows:

> "1 An agreement to arbitrate disputes has positive and negative aspects. A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever forum is prescribed. The (often silent) concomitant is that neither party will seek such relief in any other forum. If the other forum is the English court, the remedy for the party aggrieved is to apply for a stay under section 9 of the Arbitration Act 1996."

34. The *AES* case was concerned with the jurisdiction of the English courts to enforce that negative obligation by injunction by restraining foreign proceedings brought in violation of an arbitration agreement. However, Lord Mance's observations in the passage cited, above, and in the further passages from his judgment to which I refer below, I consider to be directly relevant to the response which a court should adopt to the application now before me. As Lord Mance explained, at para 31:

> "… the 1996 Act embodies, (from *Mustill & Boyd, Commercial Arbitration* 2001 Companion Volume to the Second Edition, preface endorsed by Lord Steyn) "a new balancing of the relationships between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature": *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221, para 17.

> The Act was also a response to "international criticism that the Courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means for resolving their disputes": *Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law* ("DAC") (February 1996) (with Saville LJ as its chair), paras 20–22. This criticism was addressed by the third of the general principles with which the 1996 Act, unusually, begins:
>
> > **"**1 *General principles*
> > "The provisions of this Part are founded on the following principles, and shall be construed accordingly— (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by this Part the court should not intervene except as provided by this Part."…"

35. The court's powers under s44 of the 1996 Act are to be approached and understood against this background. They are, as Lord Mance explained at para 43 of his judgment in *AES* "exercisable only "for the purposes of and in relation to arbitral proceedings" and depend on such proceedings being on foot or "proposed": see section 44(3)."

36. Consistently with the principles underpinning Part I of the 1996 Act, the court's exercise of its powers conferred by s44(2) is constrained, as Lord Mance described at para 46:

> "The matters listed in section 44 are all matters which could require the court's intervention during actual or proposed arbitral proceedings. The power to grant an interim injunction is expressed in general terms, but is limited, save in cases of urgency, to circumstances in which either the tribunal permits an application to the court or all the other parties agree to this in writing. There is no power to grant a final injunction, even after an award. There is authority (not requiring review on this appeal) that section 44(3) can include orders urgently required pending a proposed arbitration to preserve or enforce parties' substantive rights—eg an order to allow inspection of an agent's underwriting records or to submit a proposed transfer to a central bank: see *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] 1 All ER (Comm) 753; *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555. Such orders can be said to be "for the purposes of and in relation to arbitral proceedings". …"

37. The conditions for the exercise of the jurisdiction under s44(3) are twofold; first there must be urgency, and secondly, as Mr Mather submitted, the exercise of the power must be necessary for the preservation of evidence or assets. At least at Court of Appeal level this is now established by the decision of that court in *Cetelem.* In respect of the second condition, the Court of Appeal overruled the decision of Cooke J in *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] 1 All ER (Comm) 753, where the learned judge had held that s44(3) was not subject to that limitation. In *Cetelem* Clarke LJ, as he then was, said:

> "45 I have reached the conclusion that Mr Dunning's submission on construction is correct and that the approach approved by Cooke J in the *Hiscox* case should not be followed. As stated earlier, it seems to me that there are two possible constructions of section 44(3). Although there is undoubted force in the argument based on the different language in the subsections, if the purpose of subsection (3) was not to restrict the circumstances in which orders can be made in cases of urgency, it is unclear why there is any reference to the preservation of evidence and assets. If the powers of the court were intended to include a power to make orders about all the matters listed in subsection (2), it would have been sufficient simply to provide that in cases of urgency the court may, on the application of a party or proposed party, make such orders as it thinks necessary under section 44(1) .
> 46 In all the circumstances, it is in my judgment appropriate to construe the subsection consistently with the intention identified in para 215 of the DAC Report. That report makes it clear that it was intended to interfere as little as possible with the arbitral process and to limit the power of the court in urgent cases to the making of orders which it thinks are necessary for the preservation of evidence or assets.
> 47 It follows that I would hold that in the instant case there was only power under section 44(3) to make an order if the judge thought that it was necessary for the preservation of evidence or assets. Since the question whether the order made in this case was necessary for those purposes (as opposed to a wider purpose) was not considered by the court, I would hold that it must be taken to have been made on a wider basis and that the court had no jurisdiction to make it on that basis. On that footing, I would hold that this court has jurisdiction to entertain an appeal from the order notwithstanding that the judge refused leave to appeal and would grant leave to appeal. However, for the reasons given below, I would dismiss the appeal."

Both Neuberger LJ and Sir Andrew Morritt V-C, as they then were, agreed with the judgment of Clarke LJ.

38. At the time when these proceedings commenced in April 2018, there was quite clearly an urgency in the case, because for the reasons given by Norris J, which I have set out above, Mr Scott had newly established a venture, at a time when there was a serious issue to be tried as to whether he remained a member of Schillings, and it was necessary to safeguard against a springboard advantage. Further, there was, at that time, no possibility of seeking immediate relief in arbitral proceedings as time would not have permitted the appointment of an arbitrator; still further, whilst the grant of injunctive relief was appropriate and necessary, only the court would have been able to grant an injunction. Even so, the application before Norris J was made on the basis, confirmed in the wording of the order made, that Schillings would "proceed with the determination of the dispute between it and [Mr Scott] as expeditiously as reasonably possible pursuant to clause 42 of the LLP Agreement."

39. Any such urgency has long since dissipated. Mr Callman, consistently with his realistic approach, did not try to suggest that there was a continuing urgency. In any event, the leisurely manner in which the case has been allowed to progress since the hearing before Norris J, would have been totally inconsistent with any suggestion of urgency.

40. In my judgment, having regard both to the wording of the statutory provisions and the authorities, the absence of urgency alone would have been fatal to the present application since the element of urgency is a requirement for the exercise of the relevant jurisdiction. However, the application must also fail in my judgment for additional reasons. The first of these is also jurisdictional in light of *Cetelem*. I am not satisfied that there is any proper basis for finding that the order sought is necessary for the preservation of evidence or assets. The case advanced by Mr Callman (as encapsulated in his written submissions) for the making of an order was that its "purpose is what it always has been: to obtain the true account and full details to which the Firm is entitled pursuant to the Order of Norris J and the LLP Agreement, both of

which [Mr Scott] was bound by." In my judgment there exists no basis for any suggestion that either information or assets will be imperilled if an order is refused. Further, Mr Scott gave an undertaking to the court as to the preservation of documents which was recorded in the Norris J Order. It forms no part of the grounds for the application that there has been a breach of that undertaking, or that any such breach is threatened. Still further, the material which Schillings wishes to recover from this application could equally well be sought in the arbitration, so the necessity now for a court order is not made out.

41. The second additional reason is concerned with the exercise of discretion. There can, in my judgment, be no doubt that the seeking of documents and of an account of dealings are remedies which it has always been open to Schillings to claim in the arbitration which it undertook to pursue, along with any other disputes that may have existed, or still exist, between the parties. I cannot accept that Schillings can rely upon the narrow fashion in which it has cast its claim in its reference to arbitration as a justification for pursuing any aspect of the dispute between the parties in litigation, contrary to the express provisions of the Arbitration Clause.

42. Even if I were persuaded that the court has jurisdiction to deal with the ongoing dispute as to disclosure and production of documents and information, whether by way of an account or otherwise, in my judgment it would be wholly wrong for it to exercise that jurisdiction. It is for an arbitrator, the parties' chosen tribunal, to decide what documents or information should be provided, and he will have to take into account the necessity for any such relief as is sought, and decide issues of proportionality in relation thereto. It would be wholly inappropriate for the court to step into that domain. Whilst in May 2018 it was appropriate for Norris J to exercise powers under s44, the landscape has now changed, and the factors which guided his exercise of discretion are no longer present for reasons that I have already identified; an arbitrator can be appointed readily, any springboard

advantage is spent, on any view the Account has been provided, even though there is a dispute as to how satisfactory it has proved to be.

43. I entirely accept Mr Callman's submission that compliance with court orders is a matter of concern for the court; this is recognised in CPR1.1(2)(f), where the "enforcing compliance with the rules, practice directions and orders" is one of the matters expressly included in the definition of what amounts to dealing with a case justly and at proportionate cost for the purposes of the overriding objective. If a party wishes to maintain that there has been a breach of a court order and that such breach should be visited with consequences, that party can take appropriate steps to invite the court to consider whether there has been a contempt by another party. The present application does not seek to enforce the Norris J Order on the basis that Mr Scott is in contempt; if it had done so, different protections for Mr Scott, and different procedures would have applied. The overriding objective, and the recognised need to enforce compliance with court orders, does not go so far as to require a court to investigate matters which can and should be dealt with in an arbitral process.

44. In case either party might wish to take this matter further, I raised with counsel the question of whether it would be appropriate for me to express any view as to any findings that I might have been minded to make with regard to alleged breaches by Mr Scott of the Norris J Order. I am grateful to both counsel for their further written, and contrasting, submissions on this point.

45. I can state my reasons briefly as to why I consider it would be inappropriate for me to express any conclusions as to whether or not Mr Scott was, might have been, or was not, in breach of any of the provisions of the Norris J Order. First, for reasons that I have described above, I consider that the parties agreed that disputes between them should be dealt with in arbitration. Arbitral proceedings are dealt with in private, and a significant attraction for many who agree to such form of dispute resolution is that they do not wish to air their disputes in the public domain, quite possibly because of the risk of adverse, or unfairly presented, publicity. Having concluded that outstanding disputes in

this matter should be dealt with in arbitration, it seems to me that it would defeat what might have been an important object and advantage, possibly for both parties, for me to express findings one way or the other as to the conduct of either party to this dispute. Quite apart from considerations of publicity, the parties chose to have their disputes resolved by an arbitrator, and not by a judge. Having reached the conclusion that I do not have jurisdiction under s44 to deal with this matter, I think it would be wrong for me to express findings concerning matters incidental to the application. Further, the Court of Appeal, should it consider this case, would have available to it precisely the same material that has been available to me, and therefore it would be in just as good a position to reach any conclusions on any relevant matter as I would have been had I been tempted to do so.

46. Still further, I invited counsels' attention to the decision of the Court of Appeal in the case of *Rock (Nominees) Ltd v RCO Holdings Plc* [2004] EWCA Civ 118, in which a trial judge made findings of breach of fiduciary duty against respondent directors, but held that on the facts of the case no harm had been done or loss sustained. All three members of the Court of Appeal held that it was inappropriate to make such a finding of breach of duty where no relief or remedy was required from the court. In my judgment, these considerations are applicable to this case. I have determined that the relief or remedy sought by Schillings should not be granted, and for me to make findings that might be prejudicial to any party, in light of the determinations which I have expressed above, would be equally inappropriate.

47. For the avoidance of doubt, and in fairness to both parties, it should not be inferred from what I have said above that I would have been minded to find that any breaches of court orders had been committed by either party.

DISPOSAL

48. For the reasons described above, both jurisdictional and discretionary, I dismiss the present application.

49. I am grateful to both counsel for their very helpful and clear written and oral submissions. I extend my thanks also to the solicitors responsible for co-operating as to the production of the bundles for this hearing. They were thoughtfully put together, and very easy to use.

50. By arrangements made through counsels' clerks and the court's listing office, any consequential matters will be listed for hearing before me on 5th July next. As I indicated in my draft judgment sent out some weeks ago, time for any appeal will be extended from that date accordingly.