Neutral Citation Number: [2020] EWCA Civ 409

Case No: A4/2020/0333

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THEHIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**
**MR JUSTICE FOXTON**
**[2020] EWHC 258 (Comm)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2020

**Before:**

**LORD JUSTICE FLAUX**
**LORD JUSTICE NEWEY**
and
**LORD JUSTICE MALES**

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**Between:**

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|---|---|
| **A and B** | **Appellants** |
| **- and -** | |
| **C, D and E** | **Respondents** |

**(Taking evidence for a foreign seated arbitration)**

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**Richard Lissack QC, Teresa Rosen Peacocke and Leonora Sagan** (instructed by **Cooke, Young & Keidan LLP)**) for the **Appellants**
**Ben Carroll** of **Linklaters LLP** for the **First and Second Respondents**
**Angeline Welsh and Felix Wardle** (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Third Respondent**

Hearing date: 12 March 2020

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# Approved Judgment

## Lord Justice Flaux:

Introduction

1. The appellants appeal, with the permission of the judge, the Order of Foxton J dated 14 February 2020 dismissing the appellants' Arbitration Claim seeking an order under section 44(2)(a) of the Arbitration Act 1996 to take the evidence of the third respondent in England so that it can be adduced in an arbitration being conducted in New York between the appellants and the first and second respondents.

2. The third respondent is not a party to the arbitration and the appeal concerns what the judge described as "a long-standing controversy, on which there are conflicting statements by a number of judges" as to whether orders under section 44 can be made against non-parties to the arbitration.

Factual background

3. The dispute being arbitrated in New York arises in the context of two settlement agreements between the appellants and the first and second respondents respectively in relation to the exploration and development of an oil field off the coast of Central Asia. Under those agreements the appellants were entitled to a percentage of the net sale proceeds if the first and second respondents sold their respective interests in the field, which they did in 2002. A central issue in the arbitration is the nature of certain payments made by the first and second respondents to the Central Asian government described as "signature bonuses" and whether those amounts are deductible as costs in calculating the sums due to the appellants.

4. The appellants contend that the sums paid were bribes and so not properly deductible. They rely upon the fact that G, who negotiated the payment on behalf of the Central Asian government, was indicted almost 20 years ago by a US court for violations of the US Foreign Corrupt Practices Act. The third respondent, who is resident in England, was the lead negotiator for the respondents who negotiated directly with G.

5. The third respondent was not prepared to go to New York to give evidence and, on 13 November 2019, the tribunal granted the appellants permission to make an application to the English Court to compel his testimony. The appellants seek an Order permitting them to take his evidence by deposition under CPR 34.8.

The relevant statutory framework

6. The provisions of the Arbitration Act 1996 which are relevant to the present appeal are as follows:

> "**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.

**2. Scope of application of provisions**.

(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—

(a) section 43 (securing the attendance of witnesses), and

(b) section 44 (court powers exercisable in support of arbitral proceedings);

but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.

**4. Mandatory and non-mandatory provisions.**

(1) The mandatory provisions of this Part are listed in Schedule 1 [these include section 43 but not section 44] and have effect notwithstanding any agreement to the contrary.

(2) The other provisions of this Part (the "non-mandatory provisions") allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.

**38. General powers exercisable by the tribunal.**

(5) The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.

**43. Securing the attendance of witnesses.**

(1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order

to give oral testimony or to produce documents or other material evidence.

(2) This may only be done with the permission of the tribunal or the agreement of the other parties.

(3) The court procedures may only be used if—

(a) the witness is in the United Kingdom, and

(b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.

(4) A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings.

**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.
>
> (7) The leave of the court is required for any appeal from a decision of the court under this section.
>
> **82. Minor definitions**
>
> (1) In this Part
>
> "legal proceedings" means civil proceedings in England and Wales in the High Court or the county court or in Northern Ireland in the High Court or a county court;"

The judgment

7. The judge noted at [11] of his judgment that at first blush the language of section 44, particularly section 44(1), suggests that the Court has the same power to make orders against non-parties to an arbitration as it would have in legal proceedings to make orders against non-parties to the litigation. Furthermore, the reference in section 44(2)(a) to "the taking of evidence of witnesses" might suggest that it was principally concerned with securing evidence from witnesses who are not in the control of the arbitrating parties. However he considered that, on a review of the authorities, the position was more complex.

8. He considered first the decision of Moore-Bick J in *Commerce and Industry Insurance v Certain Underwriters at Lloyd's* [2002] 1 WLR 1323, the only authority specifically concerned with section 44(2)(a). There the arbitration tribunal sitting in New York issued a letter of request for the taking of evidence in this jurisdiction of two Lloyd's brokers. Moore-Bick J set aside an order obtained ex parte for the taking of their evidence under section 1 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 on the basis that the arbitration tribunal was not a "tribunal" within the meaning of the Act. However, on the day of the hearing the applicant applied instead for an order under section 44(2)(a) of the Arbitration Act. Foxton J said that Moore-

Bick J was clearly of the view he had jurisdiction to make an order direct against the witnesses, but the point that the subsection was limited to making orders against arbitrating parties does not seem to have been argued. In the event, Moore-Bick J decided not to make an order under section 44(2)(a) as a matter of discretion, so the precise form of order which would have been made was not apparent.

9. The approach of Foxton J was particularly influenced by two decisions at first instance. The first was the decision of Males J, as he then was, in *Cruz City Mauritius Holdings v Unitech Limited* [2014] EWHC 3704 (Comm); [2015] 1 Lloyd's Rep 191 which concerned an attempt to serve out of the jurisdiction an application for a freezing injunction against non-parties to the arbitration. As Foxton J says at [15], the immediate question in that case was whether service out against a non-party to the arbitration was possible under CPR 62.5(1)(c) although in considering that question Males J had to consider whether CPR 62.5(1)(b) (which relates to an order under section 44) permitted service on a non-party. He reviewed the authorities which had considered the question whether section 44 permitted orders against non-parties, noting the views of judges either way. Males J concluded that the better view was that section 44 did not include the power to make an order against a non-party. His reasons were set out at [48] to [50] of his judgment which Foxton J quotes in full.

10. At [16] Foxton J noted that the conclusion of Males J was strictly *obiter* but that there had been full argument on the point, unlike in other cases. He then went on to consider the other case which particularly influenced his approach, the decision of Sara Cockerill QC (as she then was) in *DTEK Trading SA v Morozov* [2017] EWHC 1704 (Comm); [2017] Bus LR 628. That case concerned an application for permission to serve out under CPR 62.5(1)(b) in respect of an application against a non-party under section 44(2)(b). In that case, the judge considered the arguments challenging the conclusion of Males J in *Cruz City* but, having referred to the terms of section 44 itself and the authorities, she concluded at [56] that whilst there was plainly an argument as to the issue, she was clear in her own mind that the right answer was the one Males J had reached.

11. At [18] Foxton J considered what the position would be without the benefit of prior authority:

> "I can see considerable force in the arguments advanced in favour of the view that the jurisdiction under s.44 could, in an appropriate case, be exercised against a non-party. Those parts of s.44 which are suggestive of orders against arbitrating parties might reflect the fact that this was the dominant, but not exclusive, focus of the drafter. The fact that court injunctions can have legal force against non-parties even when the order is not made against them (as the Departmental Advisory Committee on Arbitration Law recognised in paragraphs 214 to 216) reflects the fact that a court order will engage interests, and give a right to be heard, to non-arbitrating parties, and will therefore necessarily involve a fundamental departure from the bilateral nature of consensual arbitration. For example, a court injunction against an arbitrating party can place a non-party who interferes with it in contempt of court, and a non-party affected by the order has the right to apply to vary or discharge

> the order. A power to make an order directly against a non-party would go further than this, but it might be said only incrementally."

12. He referred to a decision in Hong Kong where an order had been made against a non-party under the similarly worded section 45(2) of the Arbitration Ordinance, but said that the reasoning in *Cruz City* and *DTEK* was also persuasive and, like Moulder J in the recent case of *Trans-Oil International v Savoy Trading* [2020] EWHC 57 (Comm), he had concluded that he should follow those decisions. Accordingly, if the appellants were to succeed in establishing that the Court had jurisdiction to make an order against the third respondent under section 44(2)(a), they would have to distinguish the reasoning in those two cases.

13. Foxton J then dealt with the two grounds upon which the appellants sought to distinguish that reasoning, the first of which was that section 44(2)(a) extends to non-parties because it refers to the taking of the evidence of witnesses, even if that was not the case for the other subsections. The judge rejected that argument for three reasons. First, the language and structure of the section, the introductory words of section 44(1) and the provisions on which the Courts had placed emphasis in *Cruz City* and *DTEK* apply to all the powers in section 44(2). The judge did not regard the argument that some of the powers could be exercised against non-parties whereas others could not as an attractive one in the absence of language in the section justifying differential treatment.

14. Second, the judge considered that in so far as Sara Cockerill QC in *DTEK* at [47] noted that section 44(2)(a) was concerned with the English Court issuing letters of request to foreign courts for the taking of evidence of non-parties, those are not coercive orders directed at a non-party but a request made of a foreign court which may or may not exercise its own coercive powers over the non-party potential witness.

15. Third, applications for coercive orders against non-party witnesses might be said to raise additional complications. If the power is the same as in relation to legal proceedings, it might suggest powers equivalent to CPR 34.8 but that does not have coercive effect. If the witness does not attend, the examiner fills in a certificate of non-attendance at which point the party seeking the deposition can apply to the Court for an order under CPR 34.10 requiring the witness to attend. Failure to attend is then a contempt of Court. Foxton J considered that if section 44(2) orders could not generally be made against non-parties it would be surprising if coercive orders could nonetheless be made against non-party witnesses under section 44(2)(a) when section 43 already makes specific provision for securing the attendance of witnesses with the two limitations that the provision is limited to securing the attendance of witnesses before the tribunal rather than an examiner and that the arbitral proceedings must be being conducted in this jurisdiction.

16. The second ground upon which the appellants sought to distinguish *Cruz City* and *DTEK* was that, unlike in those cases, it was not necessary for the appellants to serve their application out of the jurisdiction because the third respondent is resident here. At [31] Foxton J noted that the submission that the difficulties in seeking section 44 relief against non-parties only arise where the application must be served outside the jurisdiction mirror the view expressed at 44.7.5 of Merkin and Flannery on the

Arbitration Act 6th edition. The judge disagreed with that view, concluding at [33] that: "the position is not that applications against non-parties under s.44 have failed because it is not possible to serve those applications out of the jurisdiction. It is that applications to serve s.44 claims against non-parties out of the jurisdiction have failed because s.44 has been held not to apply to non-parties."

17. The judge went on to consider the issue of discretion, in other words, if he had held that he had jurisdiction to make an order under section 44(2)(a) would it have been appropriate to do so. He cited what Moore-Bick J said in *Commerce & Industry Insurance* at 1330C-D about the evidence that should be adduced in support of such an application:

> "This should normally include an explanation of the nature of the proceedings, identification of the issues to which they gave rise and grounds for thinking that the person to be examined can give relevant evidence which justifies his attendance for that purpose. The greater the likely inconvenience to the witness, the greater the need to satisfy the court that he can give evidence which is necessary for the just determination of the dispute."

18. The judge said at [37] that the appellants had explained in broad outline why the third respondent's evidence was of sufficient relevance to justify his giving evidence and he was satisfied that the appellants had shown sufficient justification for his attendance, subject to two caveats he came on to address. His reasons for that conclusion were: (i) the issue of the "signature bonuses" was clearly an issue of importance in the arbitration; (ii) the third respondent had been the lead commercial negotiator for the first and second respondents of the relevant agreement, involved in negotiating the signature bonuses; (iii) although the negotiations were over twenty years ago, there was sufficient prospect of the third respondent having relevant evidence to give, even if only that nothing memorable happened; (iv) the tribunal had already heard evidence from another person involved in the negotiations, Z, assistant general counsel. However, given their different roles, there was a sufficient possibility that the third respondent had relevant evidence to give, notwithstanding that Z had given evidence; (v) while the respondents' points as to why the third respondent's evidence is unlikely to add to that of Z may prove to have weight, it would not be appropriate for the Court hearing a section 44(2)(a) application to delve too deeply into the evidence given to date or to assess the relative weight of evidence, which was a matter for the tribunal.

19. The first caveat was that the list of proposed topics about which the appellants proposed to ask the third respondent questions was too broad. The second caveat was the open offer the third respondent's solicitors had made that, on being provided with various documents in the arbitration, the third respondent would produce a witness statement and then give evidence to the tribunal by video-link or, if the tribunal did not agree that procedure, before an examiner. The judge indicated that if he had been prepared to make an order, it would have been broadly along those lines.

Grounds of appeal and Respondents' Notice

20. The grounds of appeal on which the judge gave permission to appeal were:

(1) That the judge erred in law in holding that the Court does not have jurisdiction under section 44 to make an order against a non-party to the arbitration agreement;

(2) That the judge further erred in law in holding that the reasoning in *Cruz City* and *DTEK* was equally applicable to an application under section 44(2)(a) or where it is not necessary to serve the application out of the jurisdiction;

(3) The judge ought to have held that on the true construction of section 44: (i) the Court's powers extend to making an order against a non-party, subject to the exercise of the Court's discretion; (ii) in particular the power under section 44(2)(a) extends to an order to take the evidence of a witness who is not a party to the arbitration agreement but who is located within the jurisdiction; and (iii) by virtue of section 2(3)(b) the Court can exercise its power under section 44(2)(a) to order the taking of the evidence of a witness within the jurisdiction in support of arbitral proceedings even if the seat of the arbitration is outside England and Wales.

21. The third respondent served a Respondent's Notice which sought to uphold the order made by Foxton J on different or additional grounds:

(1) That even if orders under section 44 can be made against non-parties, an order cannot be made for the taking of the evidence of a third party who is located in the jurisdiction, in support of a foreign seated arbitration being conducted abroad;

(2) The conclusion of the judge at [37] that it would have been appropriate to make such an order if he had held that he had power to do so, was wrong, since he applied the wrong test when assessing whether it was appropriate to make an order under section 44(2)(a).

22. The appellants contended that the third respondent should not be permitted to raise the second ground which was on analysis a cross-appeal for which the third respondent did not have the permission of the judge as required by section 44(7). This Court did not have power to grant permission: *SAB Miller Africa v East African Breweries* [2009] EWCA Civ 1564. In my judgment, that objection is misconceived. Appeals are against orders and the only order made by Foxton J was one dismissing the appellants' application, and thus an order in the third respondent's favour, against which he neither could nor would want to appeal. The second ground is properly a matter for a Respondent's Notice which can be considered by this Court.

Summary of parties' submissions

23. On behalf of the appellants, Mr Richard Lissack QC submitted that Foxton J had erred in not following through the analysis at [18] of the judgment, that on the statutory language alone, section 44(2)(a) gave the Court power to make orders against a non-party. He had erred in concluding that he should follow *Cruz City* and *DTEK* in circumstances where those cases did not concern section 44(2)(a) or even section 44 at all but the scope of CPR62.5(1).

24. He drew attention to the various provisions of the Arbitration Act set out above and to commentary on those sections in the Departmental Advisory Committee (DAC)

Report on the Arbitration Bill. He emphasised the general power given to the tribunal by section 38(5) which drew the distinction between "party" and "witness" which indicated that "witness" was not limited to someone who was a party. Sections 43 and 44 were in a part of the Act beginning at section 42 headed "Powers of court in relation to arbitral proceedings". Section 43 was concerned with securing the attendance of witnesses because the tribunal did not have power to compel attendance of witnesses. The powers under section 43 were limited geographically to witnesses in the United Kingdom and to making orders where the arbitral proceedings were being conducted in England and Wales, but were otherwise exercisable against all witnesses, not just party witnesses.

25. Although section 44(2)(a) was dealing with something else, namely the taking of evidence of a witness, he submitted that there was no reason why "witness" in section 44(2)(a) should have a different meaning from its meaning in section 38(5) and section 43 and every reason why it should have the same meaning. In answer to a point taken by the third respondent that it would be surprising, if section 44(2)(a) applied to non-parties, that the DAC does not say so, Mr Lissack QC submitted that the surprise is the other way. Section 44(2)(a) is the successor of section 12(6)(d) of the Arbitration Act 1950 which did apply to non-party witnesses: see per Clarke J in *Unicargo v Flotec Maritime (The Cienvik)* [1996] 2 Lloyd's Rep 395 at 404 rhc. If section 44(2)(a) was taking away that existing right, one would have expected the DAC to say so, which it did not.

26. Mr Lissack QC submitted that the starting point for section 44 is not the consensual nature of the arbitration agreement but what powers the Court is to have. The opening words of subsection (1) were just making it clear that the provision was non-mandatory, so that the parties to an arbitration agreement can contract out of giving the Court the section 44 powers. Where the parties do not contract out, the Court has the powers, subject to the other subsections. Contrary to the submissions on behalf of the third respondent, subsection (1) does not limit the powers given to those which the Court has in relation to foreign proceedings. The Hague Convention and the 1975 Act were irrelevant. Focusing on what he described as the narrow question as to the scope of section 44(2)(a), irrespective of the scope of the other subsections, he submitted that subsection (2)(a) gave the Court the same power in relation to taking of evidence from a witness for an arbitration as the English Court would have in civil litigation before the English Courts. Because of section 2(3)(b) these powers could be deployed in aid of a foreign arbitration as well. One of the powers given to the Court in civil litigation was the power to order a deposition to be taken before an examiner under CPR 34.8 and, accordingly, Mr Lissack QC submitted that, whatever the scope of the other subsections, section 44(2)(a) combined with section 2(3)(b) meant that the Court had jurisdiction to make such an order in aid of the New York arbitration, as Moore-Bick J had held in *Commerce & Industry Insurance*.

27. Thus he submitted that, on the correct answer to his narrow question, the appeal should succeed. Nonetheless, he maintained that there was a wider question as to whether *Cruz City* and *DTEK* were correctly decided. He referred in particular to Merkin & Flannery on the Arbitration Act 6th edition at 44.7.5 who are critical of those decisions. He submitted that those cases were essentially dealing with the scope of CPR 62.5(1) on service out of the jurisdiction and what was said about section 44 was *obiter*. *Commerce & Industry Insurance* was not cited in *Cruz City* and in *DTEK*

it was only cited in relation to section 2(3). Both judges were influenced by the consensual nature of arbitration, but section 44 was to do with the powers of the Court, not the powers of arbitrators.

28. On behalf of the third respondent, Ms Angeline Welsh submitted that the opening words of section 44(1): "Unless otherwise agreed by the parties" point to the powers of the Court being intra-parties not against third parties. The appellants' argument ignores this language and the paramount concept which lay behind the 1996 Act of party autonomy, enacted as one of the principles in section 1(b). This was also clear from section 44(4) which provides that other than in cases of urgency, the Court can only act with the permission of the tribunal or the agreement of the parties to the arbitration. Since a third party in the position of the third respondent was not a party to the arbitration and had no locus to address the tribunal as to whether such permission should be granted, the powers of the Court under the section were only those directed against the parties, not a non-party.

29. This was also clear from section 44(5) which provides that the Court can only act to the extent that the tribunal "has no power or is unable for the time being to act effectively". Ms Welsh submitted that this indicated that the powers which the Court was given mirrored those of the tribunal which could not make an order against a third party.

30. The other subsection which clearly indicated that the section was not intended to confer powers on the Court to make orders against a third party was section 44(7) which limited the right of appeal to cases where the judge at first instance gave permission to appeal. Whilst this provision (which is replicated in a number of places in the Act) is perfectly understandable as between the parties to the arbitration, given party autonomy and the need for finality in arbitration, it would be quite unfair to deprive a third party of his normal "two bites of the cherry", the opportunity to seek permission to appeal not just from the judge at first instance, but if he or she is refused permission, from the Court of Appeal itself.

31. Ms Welsh submitted that the provision which was intended to give the Court powers in relation to the compulsion of evidence to the tribunal by non-party witnesses was section 43, which is only applicable where the arbitration was being conducted within the jurisdiction. That was a power to order a witness summons and did not extend to ordering evidence to be taken by deposition. She submitted that section 44(2)(a) was not intended to deal with compulsion of evidence. There was no mention of compulsion of evidence in the DAC Report in relation to section 44 at [214]. Furthermore, the DAC Report made clear at [25] in relation to section 2(3) the extension to foreign arbitrations was giving effect to the DAC recommendation that section 25 of the Civil Jurisdiction and Judgments Act 1982 should be extended to arbitration proceedings. That section dealt with interim relief (such as the grant of an injunction) but subsection (7) expressly excluded any provision for obtaining evidence.

32. She submitted that the "taking of the evidence of witnesses" in section 44(2)(a) related only to letters of request, not to depositions. She recognised that the subsection would therefore be limited to outward letters of request to a foreign court in aid of an arbitration in this jurisdiction (as Sara Cockerill QC thought at [47] of *DTEK*) because, as Moore-Bick J held in *Commerce & Industry Insurance* at 1226-7 the

subsection cannot apply to an inward letter of request from the arbitral tribunal since it was not a "court or tribunal" within the meaning of section 1 of the 1975 Act. Ms Welsh sought to address this issue of the limited effect which this construction, that the subsection was not concerned with compulsion of evidence, would place upon the subsection by submitting that the power under the subsection could be used where a witness was willing to give evidence but for example one of the parties to the arbitration sought to prevent the witness giving evidence because of a non-disclosure agreement or where someone was trying to intimidate a witness.

33. Ms Welsh submitted that another reason why the subsection did not give the Court power to order examination by deposition is that the power under CPR 34.8 was a narrow power with a limited role under the Civil Procedure Rules. It would be surprising if this narrow power could be used to aid a foreign arbitration, in effect putting such an arbitration in a significantly better position as regards the taking of evidence here than a foreign court could be under the Hague Convention and the 1975 Act. If, contrary to her primary position, the subsection did give the Court power to order a deposition, that power should be limited in the same way as it would be in civil proceedings where it could only be ordered in English court proceedings, in other words it should be limited to domestic arbitrations.

34. In relation to the issue of discretion raised by the second ground of the Respondent's Notice, Ms Welsh submitted that the judge had applied the wrong test and should have applied a more stringent test, that the evidence was necessary for the determination of the arbitration, such as she submitted Males J had applied in relation to outward letters of request sought under section 44 in *Silver Dry Bulk v Homer Hulbert Maritime* [2017] EWHC 44 (Comm); [2017] 1 Lloyd's Rep 154 at [52]-[53]. She submitted that if that test had been applied, the Court should have refused to make an Order even if it had jurisdiction to do so.

Discussion

35. Like Males LJ, with whose judgment I agree, I prefer to decide this case on the narrow approach, that section 44(2)(a) does give the Court power to make an order for the taking of evidence by way of deposition from a non-party witness in aid of a foreign arbitration, whatever the scope of the other heads of the subsection and whether or not they also apply in relation to non-parties. I would prefer to leave the issue of whether *Cruz City* and *DTEK* were correctly decided as regards the heads of subsection 44(2) with which they were specifically concerned to another occasion when that issue arises directly on appeal.

36. However, whatever the position under the other heads of the subsection, I am satisfied that section 44(2)(a) does give the court power to order the taking of evidence from a non-party for a number of related reasons. First, the wording of section 44(1) when read with section 2(3) and the definition of "legal proceedings" in section 82(1) makes it clear that, provided the other limitations built into the section, such as section 44(5), are satisfied, the English Court has the same powers under subsection (2)(a) in relation to arbitrations, wherever their seat, as it has in relation to civil proceedings before the High Court or the county court. There is simply no justification in the language of the Act for limiting the application of the subsection to domestic arbitrations as Ms Welsh submitted. That submission simply disregards, impermissibly, section 2(3).

37. Second, the words "the taking of the evidence of witnesses" are apt as a matter of language to cover all witnesses, not just those who are a party to the arbitration. Indeed, as Males LJ points out in his judgment, in the context of modern commercial arbitration, it is rare for a witness also to be a party. Furthermore, as Mr Lissack QC correctly submitted, the statute clearly distinguishes between a "party" and a "witness" when it is necessary to do so: see section 38(5) and section 43(1). There is no basis for construing "witnesses" in section 44(2)(a) as synonymous with "parties". Equally, there is no justification in the wording of the statute for limiting "witnesses" to those who are in the control of one or other of the parties. If Parliament had intended that limitation, it would have said so.

38. Third, the powers which the English court has in relation to "the taking of the evidence of witnesses" in civil proceedings in the High Court or the county court include the power to order evidence to be given by deposition under CPR 34.8. There is nothing in the point that the English Court could not order a deposition in support of foreign court proceedings, but could only issue a letter of request under section 1 of the 1975 Act. Ms Welsh's submission to that effect asks the wrong question: the question under section 44(2)(a) is not what power the English Court would have in relation to the taking of evidence from witnesses for the purpose of foreign court proceedings but what power it would have in relation to civil proceedings in the High Court or the county court, where clearly the Court's powers are not in any sense limited by reference to the Hague Convention or the 1975 Act.

39. Whilst this does produce the somewhat anomalous situation that the English Court can order a deposition in support of a foreign arbitration when it could not make an equivalent order in support of foreign court proceedings unless there was an inwards letter of request, that is not a reason for placing limitations on the statutory language which it will not bear. There is simply no justification for reading into "the taking of the evidence of witnesses" a limitation that it excludes depositions when the power to order a deposition is one of the powers the English Court would have in civil proceedings before the High Court or the county court. In any event, there may be less of an anomaly than appears at first blush given that (a) on the basis that a case where this form of order is sought is unlikely to be one of urgency, so that unless the parties are agreed, the party seeking to depose a witness will need to obtain the permission of the tribunal under section 44(4) to make an application; and (b) the Court always has a discretion under section 44 as to whether to make an Order under section 44(2) and, in the cases of a foreign arbitration has a specific discretion under section 2(3) not to make an Order if it considers it inappropriate to do so.

40. Fourth, contrary to Ms Welsh's submissions, it does not seem to me that the other subsections of section 44 point against the Court having the power to make an Order against third parties under section 44(2)(a). The opening words of section 44(1) and the terms of section 44(4) provide what are, in effect, thresholds or gateways which have to be satisfied before the Court can exercise its powers, that the parties have not agreed to contract out of the Court having the powers and that, save in the case of urgency or agreement between the parties, any application to the court is made with the permission of the tribunal. However, if the thresholds or gateways are satisfied, as they were in this case, there is nothing in any of the subsections relied upon which restricts the power of the Court to make whatever Order in relation to the taking of evidence from witnesses it could have made in civil proceedings in the High Court or

the county court, which clearly includes the power under CPR 34.8 to make an Order for evidence to be taken by deposition.

41. There is some force in Ms Welsh's point that if the Court has the power under section 44(2)(a) to make an Order against a non-party, it is something of an anomaly that there is a limitation in section 44(7) on the rights of appeal of a non-party. However, in practice, that anomaly may be more apparent than real, in the sense that where a third party objecting to the making of an Order against him or her under section 44(2)(a) raises an issue of principle, as in the present case, the judge at first instance is likely to grant permission to appeal, as Foxton J did. In any event, even if there is this anomaly, it is not such as to justify giving section 44(2)(a) the restrictive interpretation suggested on behalf of the third respondent.

42. Fifth, Ms Welsh submitted that the power to order a deposition should be narrowly construed because the power is generally only used in limited circumstances, such as where the witness is unfit or otherwise unable to attend the trial and, even then, in the modern context, it is more common for such evidence to be given by video-link. I see no reason to construe the power narrowly merely because it may be used in practice relatively rarely. The question whether to exercise the power in a particular case is one which goes to discretion not to jurisdiction. Nothing in the wording of CPR 34.8 itself suggests that it bears or should bear the narrow construction for which Ms Welsh contends. Nor is there anything in the point that an Order under CPR 34.8 is not coercive unless a subsequent Order is made under CPR 34.10. Both forms of Order are within the powers that the Court has in relation to civil proceedings in the High Court or the county court.

43. Sixth, if the subsection does not permit the Court to order the taking of evidence by deposition, the subsection has little or no content in the context of a foreign arbitration. It cannot apply to inwards letters of request from the foreign arbitral tribunal for the reasons given by Moore-Bick J in *Commerce & Industry Insurance*. Whilst it could apply to an outward letter of request to a foreign court in support of arbitration proceedings in England and Wales, it is difficult to see in what practical situation such a letter of request would ever be made in support of an arbitration seated abroad. Ms Welsh suggested the subsection would cover orders preventing a party from interfering with witnesses or ordering a party to permit a witness to give evidence who had signed a non-disclosure agreement. However, neither of those situations is commonplace and, as Males LJ says in his judgment, there is no reason to think Parliament had them in mind in enacting subsection (2)(a).

44. Seventh, although there is force in Ms Welsh's submission that the effect of the narrow approach is that subsection (2)(a) applies to non-parties, whereas the other heads of the subsection may not, I do not consider that is a sufficient reason not to conclude that subsection (2)(a) does apply to non-parties, which it clearly does. Any apparent inconsistency between the various heads of subsection (2) may be explained by the different language of those heads and, as I have said, I would prefer to leave the issue of the scope of the other subsections and whether *Cruz City* and *DTEK* were correctly decided to an appeal where that issue arises directly.

45. Finally, I am fortified in the conclusion which I have reached by the fact that the same conclusion was reached by Moore-Bick J in *Commerce & Industry Insurance*, the only decision at first instance which deals directly with the question of whether the

Court can make an Order under section 44(2)(a) for the deposition of non-party witnesses to be taken under CPR 34.8 in support of a foreign seated arbitration. The judge held that he had jurisdiction to do so, albeit that he exercised his discretion against making an Order on the facts of that case. Although that case is not, of course, binding on this Court, I find its reasoning on the issue of jurisdiction compelling.

46. As Moore-Bick J noted at 1328E, the power which the Court had to order a witness to be deposed by an examiner was a long-standing power now contained in CPR 34.8. He went on to consider at 1328G-H how the matter had been dealt with by section 12(6)(d) of the Arbitration Act 1950 noting that it referred explicitly to examination of witnesses before an officer of the High Court or any other person. He continued at 1328H-1329C:

> "The language of section 44 of the 1996 Act is, if anything, broader and is apt, in my judgment, to include an order for the examination of a witness in order to provide evidence in the form of a deposition for use at the hearing.
>
> It appears from the witness statement of Mr David Kroeger, one of the lawyers acting for Viking in the arbitration, that arbitrators in New York have the power under section 7 of the United States Federal Arbitration Act to subpoena witnesses to give deposition evidence in the form of oral testimony. They may also have the power to direct that a person gives evidence to an examiner, although nothing is said about that.
>
> However, the fact that the witnesses in the present case are resident in this country means that they are beyond the effective jurisdiction of the tribunal. The requirements of subsection (5) of section 44 are therefore met. I am satisfied, therefore, that the court does have jurisdiction to make an order for the examination of witnesses in support of arbitration proceedings, even though the seat of the arbitration is in New York and the curial law of the arbitration is the law of New York. However, the court has a discretion to refuse to exercise its powers and it does not follow that it would be appropriate to make such an order."

47. In concluding that, if he had had jurisdiction, he would have made an Order under section 44(2)(a), the judge clearly considered the question of whether, because section 2(3)(b) was in play, it was appropriate to make an Order (see [35] of the judgment). In exercising his discretion, he applied the test set out by Moore-Bick J in *Commerce & Industry Insurance* at 1330C-D which I quoted at [17] above. There is nothing in Ms Welsh's suggestion that the judge erred in the exercise of his discretion by not applying a more stringent test. He not only applied the right test, but applied the test which Ms Welsh invited him to apply as set out by Moore-Bick J, as is apparent from her skeleton argument before Foxton J.

48. As I noted at [19] above, the Order which the judge would have made would have been for a witness statement and evidence by video-link. In the event, the parties have agreed the broad terms of an Order pursuant to which the evidence of the third

respondent will be taken by way of deposition before an examiner of the Court in this jurisdiction and videotaped so that it available to the arbitral tribunal.

Conclusion

49. Accordingly, I would allow the appeal on the narrow approach, concluding that, whatever the position is as regards Orders against non-parties under the other heads of subsection 44(2), the Court does have jurisdiction under section 44(2)(a) to make an Order for the deposition of the third respondent as a non-party and I would make an Order for the examination of the third respondent by way of deposition before an examiner of the Court. I should emphasise that in reaching that conclusion, I intend no criticism of the judge who, for understandable reasons, followed the reasoning of *Cruz City* and *DTEK*.

**Lord Justice Newey**

50. I agree with both judgments.

**Lord Justice Males**

51. I agree that this appeal must be allowed. Because the judge decided, against his own inclination, that he should follow a decision of mine at first instance, I will explain my reasons in my own words.

***Cruz City* and *DTEK***

52. The judge was faced with two recent decisions of the Commercial Court in which it had been held that orders under section 44 of the Arbitration Act 1996 could only be made against a party to the arbitration. The first of these was my decision in *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm), [2015] 1 Lloyd's Rep 191. The issue in the case was whether the court had jurisdiction to make a freezing order in aid of enforcement of a London arbitration award against subsidiaries of the award debtor against whom no substantive claim was asserted and who had no presence or assets within the jurisdiction; and, for that purpose, whether those subsidiaries could be served pursuant to CPR 62.5(1)(c) on the basis that the claim form sought a "remedy … affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award". I held that it did not have such jurisdiction. Although it was not necessary for my decision, I expressed the view *obiter* at [47] that "the better view is that section 44 does not include any power to grant an injunction against a non-party" to the arbitration. While that statement was in terms limited to the grant of an injunction under section 44(2)(e), it is fair to say that my reasoning at [48] to [50] was equally applicable to all the different paragraphs of section 44(2) without distinguishing between them.

53. The second case was *DTEK Trading SA v Morozov* [2017] EWHC 1704 (Comm), [2017] Bus LR 628. The issue in that case was whether the court had jurisdiction under section 44(2)(b) to make an order for the preservation and inspection of a document in the possession of a third party in Ukraine. After considering and rejecting various criticisms of my decision in *Cruz City*, Sara Cockerill QC, sitting as a Deputy Judge of the High Court, held that it did not. She indicated, however, that she would in any event have refused to make an order as a matter of discretion.

## The judge's approach

54. In the present case the judge indicated at [18] that he could see "considerable force in the arguments advanced in favour of the view that the jurisdiction under section 44 could, in an appropriate case, be exercised against a non-party" and indicated in his reasons for granting permission to appeal that, if there had been no prior authority, he would have been inclined to accept those arguments. Nevertheless he decided at [34] that, as there were persuasive arguments either way, he should follow the reasoning in *Cruz City* and *DTEK* and hold that the court did not have jurisdiction under section 44 to make an order against a non-party to the arbitration agreement, giving permission to appeal so that the point could be authoritatively determined by this court.

55. In my view the judge cannot be criticised for taking this course, which in the circumstances was obviously sensible.

## The narrow question

56. In this court the submissions of Mr Richard Lissack QC for the appellants have focused on paragraph (a) of section 44(2), which did not feature prominently (if at all) in the arguments in *Cruz City* and *DTEK*, concerned as they were with paragraphs (e) and (b) respectively. His primary submission (which he described as the "narrow question") was that, whatever the position may be as regards other paragraphs of subsection (2), section 44(2)(a) permits a court to make an order for the taking of evidence of a non-party witness located within its jurisdiction in support of a foreign-seated arbitration.

57. I see the force of the point made by Ms Angeline Welsh for the third respondent, which the judge accepted at [23], that in this respect there is no sufficient ground to distinguish between the various powers listed in the different paragraphs of subsection (2). Nevertheless I would allow this appeal on the basis that section 44(2)(a) does apply to taking the evidence of a witness who is not a party to the arbitration. I see no reason to doubt the actual decisions in *Cruz City* and *DTEK*, but I would reserve my opinion whether their reasoning on this point is correct as regards the other paragraphs of section 44(2). There are, in my view, strong arguments either way and it may be that the position varies as between the various paragraphs of subsection (2).

## Section 44(2)(a) – "taking of the evidence of witnesses"

58. The considerations which have weighed with me in reaching the conclusion that section 44(2)(a) enables evidence to be taken from a witness who is not a party to the arbitration are as follows.

59. First and obviously, subsection (2)(a) is concerned with taking the evidence of witnesses. But it will be relatively rare, at least in commercial arbitrations, for a witness also to be a party. That will only be the case where an individual is a party to the arbitration agreement. The subsection draws no distinction between witnesses who are under the "control" of a party, whether because they are employees or for any other reason, and those who are not, while even those who are under the control of a party may nevertheless be reluctant to give evidence. So the paragraph is clearly directed towards obtaining the evidence of individuals who are not parties to the arbitration. It would make no sense to conclude that Parliament intended this

paragraph to apply only when an individual happens to be a party to the arbitration. Indeed, in such circumstances, invoking the power of the court would be unnecessary or impossible. Plainly paragraph (a) is not there to enable one party to go to court to obtain either his own evidence or the evidence of the other party.

60. Second, subsection (1) must be read in the light of the fact that by virtue of section 2(3) it applies to foreign-seated as well as domestic-seated arbitrations. It is also necessary to have regard to the definition of "legal proceedings" in section 82 of the Act. Bearing these points in mind, subsection (1) can be understood as providing that (with the inserted words italicised):

> "Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings *anywhere* the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings *in the High Court or County Court*."

61. It is therefore necessary to ask what powers the court has as regards "the taking of the evidence of witnesses" for the purpose of civil proceedings in the High Court or the County Court in this country. Undoubtedly one such power is the power in CPR 34.8 to order that a witness's evidence be obtained by way of a deposition before a judge or an examiner of the court. It is fair to say (cf. *Cockerill, The Law & Practice of Compelled Evidence* (2011), para 1.08) that this power is generally used in limited circumstances, typically where the witness is unfit or otherwise unable to attend the trial, and that the norm is for witnesses to give their evidence before the judge at the trial, either by attending in court or by video link. Ms Welsh submitted that the power to order a deposition under CPR 34.8 should as a result be narrowly construed. I do not accept this submission. It is more accurate to say that the power is a broad power, used in practice in limited circumstances, and that the court has a discretion, subject to the provisions of CPR 34.8 and 34.9, to determine the circumstances in which it should be exercised.

62. Thus on the plain language of the section, if the court is to have the same powers of making orders about the taking of a witness's evidence for the purpose of an arbitration as it would have for the purpose of High Court proceedings, that must include the power to order a deposition. The fact that the court also has other powers, such as the power to issue a letter of request seeking the assistance of a foreign court to obtain the evidence of a witness present within the jurisdiction of that court, which does not require the court to make an order against the witness, does not detract from this conclusion.

63. I can see no reason why the court should not have the power to order the deposition of a witness in support of a domestic arbitration. It is possible to imagine circumstances in which it would be useful to do so – for example, if a reluctant witness was unwell or about to travel abroad but the arbitrators were not available to hear his evidence themselves. The question then arises whether the position should be different when the arbitration has a foreign seat.

64. Ms Welsh submitted that in the case of foreign-seated arbitral proceedings, the court has no power to compel a witness here to give evidence by way of deposition. She relied on the fact that a witness in this jurisdiction can only be compelled to give

evidence in support of foreign proceedings outside the European Union in accordance with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (implemented here by the Evidence (Proceedings in Other Jurisdictions) Act 1975). She pointed out that, as held in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547, this Act provides a complete code in that respect. As Lord Diplock put it at page 632G:

> "… the jurisdiction and powers of the High Court to make the orders that are the subject of this appeal are to be found in sections 1 and 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 and nowhere else."

65. Thus the English court would have no power to order a witness to give evidence by deposition in support of foreign court proceedings otherwise than pursuant to an incoming letter of request and, in that event, the evidence would be subject to the limitations (and the witness would have the protections) set out in the 1975 Act. Ms Welsh submitted that the position could be no different when the evidence is to be given, not in support of foreign court proceedings, but in support of a foreign-seated arbitration. That is a formidable submission, but in my judgment it poses the wrong question. Under section 44 of the Arbitration Act, the question is not whether the English court would have power to order a deposition outside the scope of the 1975 Act in support of foreign court proceedings, but rather whether it has power to order a deposition in support of legal proceedings in this country. That is the necessary consequence of the correct understanding of section 44(1) as I have explained it above.

66. The answer is that the court does have such a power, which is contained in CPR 34.8. Whether that power should be exercised and in what terms are matters for the court's discretion, which pursuant to section 2(3) of the Arbitration Act will include consideration of whether the fact that the arbitral seat is abroad makes it inappropriate to do so. There is also scope, if necessary, to build into any order protections for the witness equivalent to those contained in the 1975 Act. But these are matters of discretion, not jurisdiction.

67. In this regard it is relevant to note that the conduct of an examination when the court exercises its power under CPR 34.8 is governed by CPR 34.9. This includes provision that:

> "(1) Subject to any direction contained in the order for examination, the examination must be conducted in the same way as if the witness were giving evidence at a trial."

68. It follows that the only questions which may be asked are those calculated to elicit admissible evidence and that the witness will be entitled, if appropriate, to rely on such matters as legal professional privilege and the privilege against self-incrimination.

69. I recognise that to hold that section 44(2)(a) enables the court to order a deposition in support of a foreign-seated arbitration when it would have no power to make an equivalent order in support of foreign court proceedings in the absence of an incoming letter of request means that the court has in this regard a more extensive

power to support a foreign-seated arbitration than it has to support foreign court proceedings. This was aptly described by Mr Lissack as one of the "rough edges" which would exist on either party's interpretation of section 44. However, this anomaly (if that is what it is) does not in my view undermine the conclusion which I have reached. The Arbitration Act provides sufficient protection against misuse of the power to order a deposition in the need for the court to consider the appropriateness of making an order in the case of a foreign-seated arbitration (section 2(3)), in the requirement contained in section 44(4) for the permission of the tribunal or the agreement of the parties before an application can be made, and in the court's discretion whether to make an order in any particular case.

70. Third, if section 44(2)(a) does not enable the court to order the taking of a witness's evidence by deposition, it is difficult to see to when it does apply in the case of a foreign-seated arbitration. It is not concerned with securing the attendance of a witness to give evidence before the tribunal, which is dealt with separately in section 43 (which also applies to foreign-seated arbitrations albeit with the requirement, whatever precisely it may encompass, that "the arbitral proceedings are being conducted" here). It may enable the court to issue an outward letter of request to a foreign court in support of arbitration proceedings here (cf. *Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd* [2017] EWHC 44 (Comm), [2017] 1 Lloyd's Rep 154), but it would not enable the court to give effect to an incoming letter of request pursuant to the Evidence (Proceedings in Other Jurisdictions) Act 1975. That Act does not apply to a request made by a private arbitral tribunal, as held by Moore-Bick J in *Commercial & Industry Insurance Co of Canada v Certain Underwriters at Lloyd's* [2002] 1 WLR 1323 at pages 1236F to 1237D. Moreover, pursuant to section 1 of the 1975 Act the incoming letter of request procedure is only available when the evidence to be obtained is for the purpose of civil proceedings "before the requesting court", which rules out a request in order to obtain evidence for the purpose of arbitral proceedings.

71. In an attempt to give content to paragraph (a) consistently with her submissions, Ms Welsh submitted that there might be some applications which would be made against the other party to the arbitration and which could be regarded as falling within subsection 2(a). She gave as examples an order to prevent a party from interfering with witnesses or a case where a witness was willing to give evidence but was unable to do so because of a non-disclosure agreement with the other party to the arbitration. I am not convinced that these examples would be orders about "the taking of the evidence of witnesses" or that they are cases where the arbitral tribunal would have no power to act or would be unable to act effectively (see section 44(5)). However that may be, however, I see no reason to think that Parliament had in mind these somewhat niche cases in enacting section 44(2)(a).

72. I would accept that the fact that section 44(2)(a) had little or no real content in the case of a foreign-seated arbitration would not justify giving it a strained interpretation. But to interpret the paragraph as enabling the court to order the deposition of a witness in such a case involves no strain upon its language. Rather, as I have sought to show, this is its natural meaning.

73. Fourth, there is authority, albeit not binding upon us, that section 44(2)(a) of the Arbitration Act does enable the court to order the examination of a witness in this country in order to provide evidence in the form of a deposition for an arbitration

abroad. It was so held by Moore-Bick J in *Commercial & Industry Insurance* (which, not surprisingly, was not cited in *Cruz City*), albeit that he refused as a matter of discretion to make an order in that case:

> "The language of section 44 of the 1996 Act is, if anything, broader [than the language of section 12(6)(d) of the 1950 Act] and is apt, in my judgment, to include an order for the examination of a witness in order to provide evidence in the form of a deposition for use at the hearing. …
>
> However, the fact that the witnesses in the present case are resident in this country means that they are beyond the effective jurisdiction of the tribunal. The requirements of subsection (5) of section 44 are therefore met. I am satisfied, therefore, that the court does have jurisdiction to make an order for the examination of witnesses in support of arbitration proceedings, even though the seat of the arbitration is in New York and the curial law of the arbitration is the law of New York. However, the court has a discretion to refuse to exercise its powers and it does not follow that it would be appropriate to make such an order."

74. The witnesses in question were not parties to the arbitration and were not even employed by the parties, but were former employees of brokers who were alleged to have acted as agents of parties to the arbitration.

**Discretion**

75. The judge indicated that, if he had held that there was jurisdiction to make an order under section 44(2)(a), he would have exercised his discretion do so. It is plain that he had regard to the question of appropriateness under section 2(3) of the Act and that he applied the test indicated by Moore-Bick J in *Commerce & Industry Insurance* as to the evidence which should be adduced in support of such an application against a reluctant witness:

> "This should normally include an explanation of the nature of the proceedings, identification of the issues to which they give rise and grounds for thinking that the person to be examined can give relevant evidence which justifies his attendance for that purpose. The greater the likely inconvenience to the witness, the greater the need to satisfy the court that he can give evidence which is necessary for the just determination of the dispute."

76. Ms Welsh submitted that the judge applied the wrong test and that he should have been more demanding in requiring the appellants to demonstrate that the witness's evidence would have an important bearing on the outcome of the arbitration. In my judgment there is nothing in this point.

77. However, it should be noted that the order which the judge would actually have made would not have been that sought by the appellants. Rather it would have been "along

the broad outlines" of an open offer made by the Third Respondent in a letter dated 17th January 2020. This offer was to the effect that (1) the Third Respondent would be provided with various documents relating to the arbitration, (2) he would then produce a witness statement addressing the permitted topic of enquiry and any other subjects he wished to include, and (3) he would then give evidence by video link to the arbitral tribunal or, if the tribunal did not agree to this procedure, before an examiner of the court.

78. In the event the parties have been able to agree, with only limited points of dispute, what order should be made if we decide (as we have done) that the court has power to make an order under section 44(2)(a). The order which they have agreed will enable the Third Respondent's evidence to be given before an examiner and for his evidence to be videotaped so that it will be available to be viewed by the arbitral tribunal.

## Disposal

79. I would therefore allow the appeal and would make an order for the examination of the Third Respondent by way of deposition before an examiner of the court.

80. I record my thanks to counsel for the quality of their submissions and to the arbitral tribunal in New York for deferring the closing of the evidentiary phase of the arbitration to enable this appeal to be heard and judgment to be given.