TAKING OF EVIDENCE BY WAY OF DEPOSITION FROM A NON-PARTY WITNESS IN AID OF FOREIGN ARBITRATION PROCEEDINGS - *A AND B V C, D AND E* [2020] EWCA CIV 409

The late Frank Sinatra sang "*Start spreading the news, I'm leaving today, I want to be a part of it, New York, New York.*" His advice was not followed by the third respondent in the above case who, based in England, refused to give evidence in arbitration proceedings, seated in the New York, to which he was a third party.

On 19 March 2020, the Court of Appeal handed down judgment, holding that section 44(2)(a) of the Arbitration Act 1996 (the "**Arbitration Act**" or the "**Act**"), which provides for the Court's powers in respect of the taking of evidence of witnesses, *does* give the Court power to order the deposition of a non-party witness in England, in support of an arbitration seated in and being conducted in a foreign jurisdiction.

Facts

A and B (the "**Appellants**"), and C and D (the "**First and Second Respondents**"), were involved in arbitration proceedings seated in New York. The arbitration proceedings concerned fees paid in relation to the sale of an oil field off the coast of Central Asia pursuant to which settlement agreements were entered into between the Appellants and the Respondents.

One of the issues for the arbitral tribunal to decide upon was whether some of these fee payments were deductible from the sum due to the Appellants under the settlement agreements. The Appellants argued that these payments were actually bribes from the Respondents to the Central Asian government, whereas the Respondents were describing these payments as "*signature bonuses*".

An important witness had been identified as E (the "**Third Respondent**"[1]), the lead negotiator for the Respondents at the time the agreements were entered into and who had negotiated with G[2] (for the Central Asian government). E, who is a non-party to the arbitration proceedings and resident in England, was however unwilling to go to New York to give evidence before the arbitral tribunal.

Further to the arbitral tribunal giving them permission to do so, the Appellants sought an order before the English courts under section 44(2)(a) of the Arbitration Act to compel E's testimony by permitting them to take his evidence by deposition under CPR 34.8.

At first instance, Foxton J felt bound by the decisions held in *Cruz City 1 Mauritius Holdings v Unitech Limited* [2014] EWHC 3704 (Comm) ("***Cruz City***") and *DTEK Trading SA v Morozov* [2017] EWHC 94 (Comm) ("***DTEK***"), and decided to reject the application.[3]

Cruz City and *DTEK*

The difficulty Foxton J had at first instance was due to the rulings in *Cruz City* and *DTEK*, a brief and non-exhaustive summary of which is provided below:

1. In *Cruz City*, Males J[4] explained *obiter*, that section 44 of the Arbitration Act did not include the power to "*grant an injunction*" against a non-party. *Cruz City* concerned an attempt to serve, out of jurisdiction, an application for a freezing injunction (under section 44(2)(e)) against non-parties to the arbitration (see CPR 62.5(1)(c) which relates to a remedy sought or question to be decided by the court affecting an arbitration).

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[1] Together with C and D, the "**Respondents**".

[2] Who had been indicted for violation of the US Foreign Corrupt Practices Act 20 years ago.

[3] Foxton J indicated 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.*" It is perhaps unsurprising that he nevertheless gave permission to appeal since he also went on to explain that had there not been prior authorities, he would have been inclined to accept the arguments of the Appellants.

[4] Now Lord Justice Males. In this article, we will refer to Males J when discussing his decision in *Cruz City* and Males LJ when discussing his involvement in *A v C* where he sat as part of the panel of judges hearing the case.

2. In *DTEK*, Sara Cockerill QC[5] held in relation to section 44(2)(b) that the court did not have jurisdiction to make an order for the preservation and inspection of a document held by a third party outside the jurisdiction.

Two important points ought to be explained about *Cruz City* and *DTEK* before pursuing with our review of the present case:

First, both cases, although dealing with specific sub-sections of 44(2) of the Arbitration Act, approached the question of whether it applied to third parties taking section 44(2) as a whole. Of note in this regard, is that on a strict view, this wide approach was endorsed "*obiter*" in both cases and the judges worded their decisions[6] in order to limit them to the specific provision in issue.[7]

Second, *Cruz City* and *DTEK* have been criticised by academics who are of the view that those decisions are essentially dealing with the scope of CPR 62.5(1) on service out of the jurisdiction and that section 44 should apply to third parties, even where the arbitration is seated abroad.[8]

The decision of the Court of Appeal

The Court of Appeal held that, on the narrow approach, section 44(2)(a) of the Arbitration Act 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.*" This was decided whatever the scope of the other sub-sections of section 44 and whether they apply in relation to a non-party or not. As a result, the Court of Appeal did not engage with the question as to whether *Cruz City* and *DTEK* were correctly decided (in relation to section 44(2)(e) and (b) respectively).[9]

Flaux LJ, giving the judgment, principally relied on the following points:

1. It is clear that, reading sections 44(1), 44(2)(a) and the definition of "*legal proceedings*" at section 82(1) of the Arbitration Act[10] together, the English Court has the same powers under section 44(2)(a) in relation to arbitrations, even where seated abroad, as it has before the High Court or the county court.

2. "*Witnesses*" at section 44(2)(a) covers all witnesses and not only those who are a party or under the control of a party to the arbitration. In other places, the Arbitration Act itself distinguishes between a "*witness*" and a "*party*" where it is appropriate to do so (see for instance the wording at sections 38(5)[11] and 43(1)[12]).

   It would not make sense to limit this subsection to parties since, in the context of modern commercial arbitration, it is in any event rare for a witness to also be a party. Further, in drafting the Arbitration Act, had Parliament intended to limit this subsection to witnesses in the control of a party, it would have made it clear.

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[5] Now Justice Cockerill.

[6] For instance, see paragraph 47 in *Cruz City* where Males J adopts the wider view towards section 44 as a whole. Interestingly, discussing *Cruz City* in *A v C*, Males LJ explained that: "*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***" (emphasis added).

[7] See section 44(2)(e) and CPR 62.5(1)(c) for *Cruz City* and section 44(2)(b) and CPR 62.5(1)(b) for *DTEK*.

[8] Merkin & Flannery on the Arbitration Act (6th ed.) at 44.7.5.

[9] Left to an occasion where the issue is raised directly on appeal for each sub-section of section 44(2).

[10] Section 44(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.*"
Section 44(2(a): "*(2) Those matters are— (a) the taking of the evidence of witnesses.*"
Section 82(1): "*"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.*"

[11] Section 38(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.*"

[12] Section 43(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.*"

3. The English court's power in support of foreign court proceedings clearly includes the power to order evidence to be given by deposition under CPR 34.8. The Court of Appeal stressed that the relevant question was what power the English court would have in relation to civil proceedings in the High Court and county court, and not in relation to the taking of evidence from witnesses for the purpose of foreign court proceedings.

   Further, the fact that such an order from the English court, when in support of foreign court proceedings requires a letter of request, does not create an anomaly with the present situation (i.e. in support of arbitration proceedings seated abroad, where it does not). This is essentially because (i) where the parties in the arbitration do not agree, the arbitral tribunal will have to give permission before the party who wishes to rely on section 44(2)(a) can apply; and (ii) the English court retains a discretion not to make the order if it considers it inappropriate to do so.

4. The other words contained in section 44 of the Arbitration Act do not justify a restrictive interpretation of section 44(2)(a). In particular, the words of section 44(1) giving the parties the right to opt-out of the provisions of the section and terms of section 44(4) on urgency and permission from the arbitral tribunal,[13] are merely "*thresholds or gateways*" to be satisfied before the Court can exercise its powers, and not indicators that the Court does not have the power to do so.

   Flaux LJ nevertheless recognised that, in theory at least, an anomaly could be created by allowing section 44(2)(a) to apply to third parties. One must remember that under section 44(7) of the Act, the leave of the lower court is required to appeal a decision rendered under section 44 (there is no possibility to seek permission from the Court of Appeal itself). Counsel for C contented that although this provision can be understood "*between the parties to the arbitration, given party autonomy and the need for finality in arbitration,*" it would be unfair to "*deprive a third party of his normal "two bites of the cherry""*[14] (i.e. the right to seek permission to appeal before the lower court first and then, in case of refusal, before the Court of Appeal).

   Flaux LJ noted that, in practice however, judges at first instance are likely to grant such permission to a third party. He highlighted that this is especially the case since by seeking to oppose the measure the third party would be raising an issue of principle. Thus, the theoretical anomaly should not justify the restrictive interpretation of section 44(2)(a) of the Act.

5. The question whether to exercise the power is one which goes to discretion, not to jurisdiction. It is therefore irrelevant whether the power is, in practice, used in limited circumstances such as where the witness is unfit or unable to attend the hearing. There is nothing in the wording of CPR 34.8 (Evidence by deposition) which suggests it should bear a narrow construction.

6. If the subsection did not permit the Court to order the taking of evidence by deposition, section 44(2)(a) would have virtually no use in support of foreign arbitration proceedings. Indeed, the subsection does not apply to letters of request from the arbitral tribunal seated abroad,[15] and it is difficult to imagine a letter of request ever being issued in support of an arbitration seated abroad.[16]

7. There is no need for uniformity within the different heads of section 44(2). Any difference as to whether each subsection applies to third parties in the context of arbitration proceedings seated abroad "*may be explained by the different language of those heads*". Flaux LJ thereby reaffirmed his reluctance to go onto *Cruz City* and *DTEK* territory.

It was therefore held that section 44(2)(a) of the Arbitration Act could apply to third parties based in England and Wales for the support of foreign arbitration proceedings, and that the Third Respondent's evidence could be taken by way of a deposition.

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[13] Section 44(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.*"

[14] Paragraph 30 of the judgment.

[15] See Moore-Bick J in *Commerce and Industry Insurance v Certain Underwriters at Lloyd's* [2002] 1 WLR 1323.

[16] It could however apply to an outward letter of request in support of arbitration proceedings seated in England and Wales.

Interplay with *Cruz City* and *DTEK*

Where does this decision leave us as regards the decisions in *Cruz City* and *DTEK*?

In *A v C*, the Court of Appeal[17] took extra care not to grapple either with the wide approach or the specific subsections of section 44(2) of the Act relevant for these cases. In giving judgment, Flaux LJ nevertheless noted the following:

> "*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).*"

As such, the question of whether *Cruz City* and *DTEK* were in fact correctly decided remains open. As mentioned above, adopting the wider approach, Males J in *Cruz City* held *obiter* that section 44 of the Arbitration Act did not include the power to "*grant an injunction*" against a non-party. Is there not an inconsistency therefore in holding in *A v C* both that section 44(2)(a) applies to third parties and that *Cruz City* and *DTEK* remain "*actual decisions*"? This "*wider approach*" seems to be, at least indirectly, overturned by the decision of the Court of Appeal in *A v C*. Reconciling the line of authority is perhaps not impossible if one remembers that in *Cruz City*[18], the then Males J confined his decision to the relevant subsection of section 44(2) of the Act.

The saga surrounding the applicability of other parts of section 44 to third parties continues. At the very least, arbitration practitioners may be led to believe that the Court of Appeal may be prepared to revisit the question as to the correct interpretation of section 44 and that a broader construction of other subsections in the future may yet permit injunctions and other interim relief to be ordered against non-parties in support of arbitration seated or held abroad.

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[17] Lord Justices Flaux, Newey and Males.

[18] And to some extent in *DTEK* as well.