ESSEX COURT CHAMBERS

BARRISTERS

A & B V C, D & E [2020] EWCA CIV 409

How far has the Court of Appeal opened the door to compelling evidence and obtaining interim orders against non-parties?

Thursday 4 June 2020, 1 - 1:45pm

ANGELINE WELSH

AWelsh@essexcourt.com

FELIX WARDLE

FWardle@essexcourt.net

OUTLINE

ESSEX COURT CHAMBERS
BARRISTERS

1. **S44 non-party case law**
2. **A vs C**
   - Foxton J
   - Court of Appeal
3. **Narrow implications**
   - S.44(2)(a) Vs. S.43
   - Practical Tips
4. **Broader implications**

1. S44 non-party case law

THE STATUTORY FRAMEWORK – S.44/43

ESSEX COURT CHAMBERS
BARRISTERS

- Two routes available to compel a witness to give evidence in relation to an arbitration
- **Route 1**: Compel a witness to give evidence direct to the Tribunal under s.43. This is only available where "*the arbitral proceedings are being conducted in England and Wales*"
- **Route 2**: Obtain an order that the witness to give evidence by way of a deposition pursuant to s.44(2)(a), which provides that "*the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about [the taking of the evidence of witnesses] as it has for the purposes of and in relation to legal proceedings*."
- Both routes are available even if the seat is outside England & Wales, but the Court may refuse to make an order where this would make it "*inappropriate* to do" so (s.2(3)).

BACKGROUND

- An issue in a New York arbitration was whether certain payments made by the first and second respondents to a Central Asian government (described as '**signature bonus payments**') constituted a bribe.
- E had played a role in the negotiations which led to the payment of the Signature Bonuses, but was not prepared to go to New York to give evidence to the Tribunal.
- The Appellants sought a Court Order permitting them to take his evidence by way of deposition under CPR 34.8.
- The application was made under s.44(2)(a) of the Arbitration Act 1996.

PREVIOUS CASE LAW

- ***Cruz City 1 Mauritius Holdings v Unitech Ltd*** [2015] 1 All ER (Comm) 305 (Males J, as he then was) - concerned an attempt to serve out of the jurisdiction an application for a freezing injunction against a non-party. Males J (obiter) concluded that there was no power under s.44 to make an order against a non-party.
- ***DTek Trading S.A. v Mr Sergey Morozov, Incolab Services Ukraine LLC*** [2017] Bus LR 628 (Cockerill QC, as she then was) - another service out case. Cockerill J concluded she had no power to make an an order under s.44(2)(b) requiring a non-party to preserve and allow inspection of a document for use in the arbitration.
- ***Benhurst Finance Ltd v Colliac*** [2018] EWHC 2188 (QB) – DTek followed in context of application for Norwich Pharmacal order.
- ***Trans-Oil International SA v Savoy Trading LP*** [2020] EWHC 57 (Comm) – yet another service out case. Moulder J concluded that the Court had no power to make a *Chabra* freezing order against a non party.

PREVIOUS CASE LAW CONT

ESSEX COURT CHAMBERS
BARRISTERS

One authority in the other direction:

- The Court in ***Commerce and Industry Insurance Co of Canada v Lloyds Underwriters*** [2002] 1 WLR 1323 proceeded on the basis it could make a deposition order against a non party under s.44(2)(a). However:
  - The Court opted not to make the order.
  - Non party point not argued.

Cruz City was the most influential case. Males J gave three reasons for his conclusion that s.44 did not cover non parties (see: [47-50]).

- **First**, and most important, he looked at s.44 as a whole and concluded that there are "*several indications*" that demonstrate the powers should only apply to parties. For instance:
  - The requirement that the applicant must obtain the tribunal's permission.
  - The restriction on appeal rights (there can be no appeal against a s.44 order, unless the first instance court gives permission) is only justified because the parties have consented to arbitrate.
- **Second,** s.44 applies even if the seat of arbitration is outside England and Wales and it "*seems unlikely that Parliament intended to give the English court jurisdiction to make orders against non-parties in support of arbitrations happening anywhere in the world*."
- **Third**, there is nothing in the DAC report (which explains the background and purpose of s.44) "*to suggest that it was intended to confer jurisdiction on the court to make orders against non-parties*".

2. A v C

FIRST INSTANCE DECISION ON JURISDICTION

ESSEX COURT CHAMBERS
BARRISTERS

- Application came before Foxton J. He saw "*considerable force*" in the argument that s.44 "*could in an appropriate case be exercised against a non-party*" (at [18]), but he concluded that he was bound to follow ***DTEK*** and ***Cruz City*** (at [19]-[20]).

- He rejected the argument that ***DTEK*** and ***Cruz City*** could be distinguished on the basis (i) that they did not concern applications for the taking of evidence of non-party witnesses; or (ii) that this case did not involve permission to serve out because E was in England (see: [20—[33]). His view was that Justice Males' reasoning in *Cruz City* applied equally to each of the s.44 powers.

- Foxton gave the Appellants permission to appeal his decision:

  …the contrary arguments are formidable (and, if there had been no prior authority, I would have been inclined to accept them). The issue is an important one to the arbitration community (for example it directly impacts the Court's power to grant Chabra injunctions in the arbitration context)...

FIRST INSTANCE DECISION ON DISCRETION

ESSEX COURT CHAMBERS
BARRISTERS

- Foxton J concluded that if he had jurisdiction, he would have ordered E to give evidence.
- He applied the test from ***Commerce and Industry*** (at [36]):

  > *When an application is made to the court for an order for the examination of a witness the party making the application should therefore normally* ***put before the court evidence sufficient to satisfy the court that it is appropriate to make the order****. This should normally include an explanation of the nature of the proceedings, identification of the issues to which they give rise and the grounds for thinking that the person to be examined can give relevant evidence which justifies requiring 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****.*

- Foxton J concluded at [37] that since there "*there is no suggestion of any particular inconvenience to [E] in attending to be deposed in this jurisdiction, I am satisfied that the claimants have shown a sufficient justification for his attendance*".

THE COURT OF APPEAL DECISION

ESSEX COURT CHAMBERS
BARRISTERS

- The Appellants put the appeal in two ways:
  - **The Broad Basis**: Does s.44 as a whole confer the power on the court to make orders against non-parties? This would have required the Court of Appeal expressly to overrule *Cruz City* and *DTEK*.
  - **The Narrow Basis**: Does s.44(2)(a) permit an order to be made against a non-party to give evidence by way of a deposition, whatever is said about the scope of the other s.44 powers?
- The Court of Appeal decided the case on the narrow approach, holding that s.44(2)(a) does give the power to the Court to order the taking of evidence from a non-party.

THE COURT OF APPEAL'S REASONING

ESSEX COURT CHAMBERS
BARRISTERS

- LJ Flaux gave the lead judgment. He gave 8 reasons for why s.44(2)(a) applied to non-parties (at [36-46])
- The most important reason was that this was the natural reading of s.44(2)(a):
  - The Court had the "*same*" powers in relation to arbitrations as they have in civil proceedings.
  - The words "*the taking of the evidence of witnesses*" suggests all witnesses.
  - If s.44(2)(a) did not apply to third party witnesses it would have little or no content when it came to foreign arbitrations.
- Flaux LJ rejected Males' reasoning in Cruz (which E had relied on) to the effect that the terms of s.44 suggested it should be limited to the parties to the arbitration agreement. He considered the various requirements in the s.44 subsections to be "*thresholds or gateways which have to be satisfied before the Court can exercise its power*s".
- The only point he considered had "*some force*" was that s.44(7) restricted third party appeal rights. However he considered this was more theoretical than real as the first instance judge would grant permission where there was an "*issue of principle*" at stake (as here).

3. Narrow Implications

NARROW IMPLICATIONS (1):
S. 44(2) vs S. 43 – key differences in the format of evidence

ESSEX COURT CHAMBERS
BARRISTERS

	S44(2)(a) – deposition order CPR 34.8/9	S43 – witness summons CPR 34.2/4
Who has conduct of the proceedings?	Examiner	Tribunal
How is evidence taken?	Same as English legal proceedings unless order otherwise. Questions in chief unless witness declared hostile.	In discretion of Tribunal, save that cannot be compelled to produce evidence that a person would not be compelled to legal proceedings.
Who rules on objections?	Examiner gives an opinion, but ultimately Court decides	Tribunal

NARROW IMPLICATIONS (2):
S. 44(2) vs S. 43 – availability of relief

ESSEX COURT CHAMBERS
BARRISTERS

	S44(2)(a) – deposition order	S43 – witness summons
Are they available for a foreign seated arbitration?	Yes. Residual discretion under s 2(3) to decline where it would not be appropriate.	Yes, but witness and conduct of proceedings in England & Wales and N. Ireland Residual discretion under s 2(3) to decline where it would not be appropriate.
Test for issue of court order	Relevant evidence justifying attendance. Greater inconvenience, greater need to satisfy court that evidence is necessary for just resolution of the dispute: ***Commerce & Industry*** [2002] 1 W.R. 1323 at 1330C-D	Summons can be set aside if evidence is not relevant/fishing expedition.
Is permission of the tribunal required?	Yes but: ***Commerce & Industry*** [2002] 1 W.R. 1323 at 1333 F-G ***Silver Dry Bulk*** [2017] EWHC 3704 (Comm) at 53	Yes. Same comments as in relation to S44(2)(a)

TIPS – THE APPLICANT

ESSEX COURT CHAMBERS
BARRISTERS

- Decide whether to go under s.43 or s.44(2)(a), or both. If it is a foreign arbitration, this will depend on whether the tribunal is willing to 'conduct a hearing' in this jurisdiction.
- When you ask the Tribunal for permission, consider asking for a reasoned decision setting out, even briefly, whether or not the tribunal considers the evidence to be important. This is likely to be treated by the English court as cogent evidence of relevance.
- Satisfy the ***Commerce and Industry*** test by putting in a witness statement explaining why the evidence sought is likely to be necessary to the outcome of the arbitration.

DEPOSITION ORDER TIPS

ESSEX COURT CHAMBERS
BARRISTERS

- If seeking a **deposition order:**
  - An English deposition is not equivalent to a US style deposition order. Justice Cockerill's book: *The Law and Practice of Compelled Evidence in Civil Proceedings* provides a guide as to what to ask for, and how the deposition will operate.
  - Attach a draft order that complies with CPR 34.8 (e.g. offering to pay the witness's expenses etc.).
  - Consider having a schedule setting out the topics that the witness will be asked about. Limit these to what is necessary.
  - Consider what information/documents you're willing to provide to the witness.
  - Be clear who is going to ask the questions. If you want foreign counsel, who lack rights of audience, to do so, you will need the court's permission.
  - Whose witness will they be? The usual position is that the witness 'belongs to' the party seeking the deposition order. This matters because that party is then limited to asking questions in chief (i.e. open questions).

TIPS – THE RESPONDENT

ESSEX COURT CHAMBERS
BARRISTERS

- It is important to establish that (i) it would be particularly inconvenient for the putative witness to give evidence; and (ii) the evidence is unlikely to be material.
- Where the arbitration is seated abroad, you can rely on s.2(3)(b) to argue it would be inappropriate to make the order. Males LJ raised the possibility that you could use s.2(3) to "*build into an order protections for the witness equivalent to those [available in letters of request cases]*" (at [66]). On this basis, you could seek to resist the application because the evidence is not sufficiently relevant and/or because it is little more than a fishing expedition.
- You can seek to limit the scope of the questions, and to obtain as much information in advance for your witness, such as documents, pleadings from the arbitration *etc*.
- Depending on the case, you may consider approaching the tribunal *via* the parties to give the witness's explanation for why they are unwilling to give evidence. It's most effective to do this before the tribunal gives permission for the application to be made, if aware.

4. Broader Implications

BROAD IMPLICATIONS (1):

ESSEX COURT CHAMBERS
BARRISTERS

Expressed to be decided on the narrow basis, leaving open possibility that the position may be different under other sub-sections of S44(2): ***A v C*** at [35], [54] & [55] BUT:

1. Court recognised the force of the position that S.44 should be construed as a whole;
2. While Males LJ silent in ***A v C*** on overall construction points, Flaux LJ in effect deals with Males' analysis in ***Cruz City***; and
3. Not obvious any other sub-section of S44(2) should be construed to exclude a non-parties

BROAD IMPLICATIONS (2):
S.44 - Overall Construction

ESSEX COURT CHAMBERS
BARRISTERS

	Cruz City [2015] 1 All ER (Comm) 305 (Males J as he then was)	**A v C [2020] EWCA CIV 409 (Flaux LJ)**
S44(1) "Unless otherwise agreed by the parties…"	The language of S44(1) and the fact that the application of S44 is expressed to be subject to party agreement and that Parliament intended to the powers to be those which the parties could invite the court to exercise against each other: **Cruz City** at [48(a)]	"thresholds or gateways which have to be satisfied before the court can exercise its powers" **A v C** [40]
S44(4) except in cases of urgency, the court can only act on an application made with the permission of the arbitral tribunal or the agreement in writing "of the other parties"	Surprising if: (i) Parliament intended to empower arbitrators to give permission for an application to be made against a non-party; or (ii) arbitrators would be empowered to give such permission without hearing from the third parties. **Cruz City** at [48(b)]	"thresholds or gateways which have to be satisfied before the court can exercise its powers" **A v C** [40]

BROAD IMPLICATIONS (3): S.44 - Overall Construction

ESSEX COURT CHAMBERS
BARRISTERS

	Cruz City [2015] 1 All ER (Comm) 305 (Males J as he then was)	**A v C [2020] EWCA CIV 409 (Flaux LJ)**
S44(5) the court shall act only if the arbitrators have no power or are unable for the time being to act effectively	Consistent with power not being available against non-party. **Cruz City** at [48(c)]	Not addressed.
S44(6) power to hand back to the tribunal	No application to an order against a non-party **Cruz City** at [48(d)]	Not addressed.
S44(7) no appeal from any order under S44 unless first instance court permission	It would be surprising if in the exceptional case of an order against a non-party, backed up by the sanction of contempt proceedings, the non-party's right of appeal was limited in this way. **Cruz City** at [48(d)]	This is an anomaly, but: (i) suggests it can be cured by the fact that the court is more likely to grant leave to appeal; and (ii) in any event is not sufficient by itself to justify a restrictive interpretation on part of S.44. **A v C** at [41].
S2(3) S44 is available for foreign seated arbitrations unless inappropriate	Unlikely that Parliament intended to give the English court jurisdiction to make orders against non-parties in support of arbitrations happening anywhere in the world. **Cruz City** at [49]	S2(3) does not go to jurisdiction but to discretion. **A v C** at [36] and [39].

# BROAD IMPLICATIONS (4):
S.44(2)

ESSEX COURT CHAMBERS
BARRISTERS

(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 the

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.

ESSEX COURT CHAMBERS

BARRISTERS

A & B V C, D & E [2020] EWCA CIV 409

How far has the Court of Appeal opened the door to compelling evidence and obtaining interim orders against non-parties?

Thank you. Any Questions?

ANGELINE WELSH
AWelsh@essexcourt.com

FELIX WARDLE
FWardle@essexcourt.net