

**Judgment : Colman J:** Commercial Court. 21<sup>st</sup> December 2004

1. This arbitration application raises some important points on the scope of the court's jurisdiction under sections 43 and 44 of the Arbitration Act 1996. I am therefore setting out my reasons rather more fully than might otherwise have been done given that neither defendant opposes the application.
2. The Claimant was the owner of the tanker TASMAN SPIRIT. The first defendants ("PNSC") were voyage charterers on an amended Asbatankvoy form for a voyage from Kharg Island to Pakistan. The fixture was made on 15 July 2003. The form contained the following provisions:
3. *"SAFE BERTHING – SHIFTING. The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat ..."*
4. In accordance with the orders of PNSC the vessel loaded a cargo of Iranian light crude oil at Kharg Island and then proceeded to Karachi where it arrived off the port and anchored on 26 July 2003. The port of Karachi is directed and managed by the Karachi Port Trust ("the KPT"). The port installations are approached through a buoyed channel about three nautical miles long. At the time of the arrival of the vessel's arrival the chart showed the channel to be dredged to 12.2 metres with a bottom of sand and mud. The vessel with a draft of 11.89 metres fore and aft proceeded up the channel under pilotage at 12.19. While still within what was shown on the chart as the dredged channel, the vessel grounded at 12.57. A salvage operation was put in hand but about 45 per cent of the cargo was lost, there was very significant pollution and the vessel became a total loss. These losses to the shipowners, including pollution indemnity claims, amounted to what is said to be US\$6.567493 billion.
5. The shipowner claimant alleges that the grounding of the vessel was caused by the fact that the port was unsafe and, that accordingly, the PNSC is liable for breach of the safe berth warranty. Amongst the allegations of lack of safety are the following:
  - "1. The approach channel was unsafe in that it presented unacceptable hazards to ships of the Vessel's size in terms of the amount of port helm required at the 75° port turn, the size of the bend radius, and the safety margin under the keel.
  2. There was an ebb tide in the approach channel after high water which pushed ships towards the shoal ground on the starboard side of the Vessel.
  3. The approach channel was not deep enough and had been insufficiently dredged.
  4. The Karachi Port Trust had supplied misleading information about the depth of the approach channel and the composition of the channel bottom, and had no adequate systems for measuring the depth of the channel or for calculating the effect of seasonal conditions and/or the tides on the channel, see paragraphs 15(6)-(11) and (14)-(17) of the Points of Claim.
  5. The Karachi Port Trust had no means of monitoring the strength or direction of the tidal stream in the approach channel.
  6. The tugs at the port were insufficient both numerically and in terms of their efficacy in assisting vessels negotiate the channel."
6. Arbitration proceedings were commenced. Those advising the shipowners ascertained that in 1998-2000 the KPT had commissioned HR Wallingford, a British marine survey organisation, to conduct a feasibility study for deepening the upper harbour and approach channel at Karachi to take container vessels up to 12 metres wide. It was further ascertained that the work had included:
  - o "field measurements
  - o traffic forecast
  - o evaluation of approach channel and port development options
  - o wave, flow and sediment transport modelling
  - o navigation studies, assessment of dredging
  - o impact on the backwaters and coastal environment
  - o environmental impact review
  - o refurbishment of the KPT physical model so that it can be used for future studies of developments within the Harbour
  - o technology transfer and an evaluation of the potential for institutional strengthening"and that Wallingford had reported on the impact of such a development on the point and its environment and had developed a strategic plan for the deepening works.
7. Since it appeared that the contents of this material were likely to be at least in part directly relevant to the safety of the channel and might therefore assist the shipowner claimants in preparing their evidence for the arbitration their solicitors wrote to Wallingford on 24 October 2003 inviting them to disclose the report. Wallingford replied that the KPT had requested that it be kept confidential but that application for further information should be made to them. Eversheds then wrote on 14 November 2003 to KPT asking for disclosure of the report but have received no reply.
8. The claimant shipowners thereupon issued their applications against Wallingford under sections 43 and 44 of the Arbitration Act 1996. These provide, to the extent material, as follows:

**"Securing the attendance of witnesses**

- 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.
- (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.

**Court powers exercisable in support of arbitral proceedings**

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.

- (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 to 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;"

9. These applications are opposed by neither Wallingford nor PNSC. The arbitral tribunal has expressly given its permission for the making of applications under both section 43 and 44.

10. Under the heading "Remedy claimed and grounds on which claim is made" in the arbitration application form the primary relief claimed is expressed to be that the court should exercise its power under section 44 of the 1996 Act and make an order as follows "for non-party disclosure in accordance with CPR 31.17". This last provision states:

"(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where:

- (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
- (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.

(4) An order under this rule must:-

- (a) specify the documents or the classes of documents which the respondent must disclose; and
- (b) require the respondent, when making disclosure, to specify any of those documents:-
  - (i) which are no longer in his control; or
  - (ii) in respect of which he claims a right or duty to withhold inspection."

11. The relief asked for is then that Wallingford should "disclosure and make available for inspection and copying" the "documents/information" listed on the form. This includes the capital dredging feasibility study. There then follows "Results and any documents relating to work/investigations undertaken when carrying out above-mentioned study including a list of those aspects of the work identified at para 6 above together with:

- o "Reports, and associated documents, on the impact of development on the port and its environment;
- o Detailed strategic plan for the deepening works, and
- o Any documents falling into the above classes which post-date the Feasibility Study of 1998-2000.

2. H R Wallingford to specify:

- (a) those documents requested to be disclosed which are no longer in its control including an explanation of what has happened to them; or
- (b) those documents in respect of which it claims a right or duty to withhold inspection and copying including the grounds for withholding them."

12. It is clear from the words of section 44 that its purpose is to make available to participants in arbitration proceedings those ancillary powers of the court available in relation to legal proceedings listed at (a) to (e). These five types of order do not include an order for disclosure by a non-party of documents relevant to an issue in the arbitration. It follows that reliance in the application on CPR 31.17 is misconceived. However, they do include (b) preservation of evidence and (c) the making of orders relating to property which is the subject of the proceedings or, as to which any question arises in the proceedings, for the inspection, photocopying, preservation

custody or detention of such property. Orders for preservation of evidence reflects the availability of search orders under section 7 of the Civil Procedure Act 1997, whereas the order for inspection, photographing, preservation, custody or detention of property reflects CPR 25.1 and 25.5(1) and section 34(3) of the Supreme Court Act 1981.

13. The state of the channel as found by Wallingford in the course of their work on their report and the recommendations made within it are clearly highly likely to contain evidence directly relevant to the issue of lack of safety of the port of Karachi and it can thus be said that, although no substantive relief is sought in relation to the report or the underlying documents produced for the purpose of producing it, nonetheless a question does arise as to that report and ancillary documents in the sense that it probably made available to KPT information relating to the channel which went to whether it was unsafe. This information was allegedly passed on by KPT to the British Hydrographic Office for the purpose of updating the applicable charts which were being relied on at the time for the navigation of the vessel. Accordingly, it can, in my judgment, be said that a question arises in the arbitration as to the specific documents provided by Wallingford to KPT consisting of their report and all ancillary documents. The preservation of the contents of those documents for the purpose of resolving the issues in the arbitration is therefore a consideration of such weight as to justify the exercise of the court's jurisdiction under section 44. If an order is not made at least for copying of the documents in question, those documents may cease to exist or be rendered unobtainable.
14. It is, however, to be kept in mind that section 44 cannot be used as a means of obtaining ordinary disclosure of documents from a non-party. It is thus clear that an order cannot be made under this section which replicates an order of that kind under section 34 of the Supreme Court Act 1981. Accordingly, it is only where it can be shown that a question arises in relation to a particular document or documents of a non-party which need to be inspected or photocopied or preserved that an order under this section can be made. However, such documents must be capable of specific description. They cannot simply be defined by reference to their relevance to particular issues, as would be the case with an order for ordinary disclosure. For that reason, in the present case the documents to be inspected and copied must be confined to those sent by Wallingford to the KPT or documents which were created as part of the process of preparing such documents. As to the latter, "document" in my order will have the meaning of that word given in CPR 31.4, namely "anything in which information of any description is recorded" and, as has been held, that includes computer material.
15. The form of order under section 44 should therefore reflect the principles which I have set out in this judgment. If Wallingford encounter particular problems in making these documents available for inspection or photocopying, whether on account of the volume of material or its definition, they are encouraged to ask for the assistance of the court.
16. The claimant shipowners put forward an alternative application under section 43 of the 1996 Act. They ask for a witness summons requiring the attendance at the hearing of the arbitration of a director of Wallingford to produce those documents described in the claim form as covered by the section 44 application already described. I have been referred to the recent decision of Morison J. in *BNP Paribas v. Deloitte and Touche LLP* [Lloyds] 1 Lloyd's Rep 233 in which it was held that the procedure provided for under section 43 was equivalent in substance to that of the subpoena duces tecum under the Rules of the Supreme Court and that accordingly the scope of the documentation to be produced by the witness must be specifically defined by reference to proof of a particular matter. Such applications could not be made for the purpose of obtaining ordinary disclosure from a non-party of the nature of what used to be called a discovery exercise. Thus, it is insufficiently specific to order a witness to produce a broad class of documents, but sufficient to order production of a defined group of documents individually identifiable by reference to a compendious description: see the decision of this matter by Lord Fraser in *In re Asbestos Insurance* [1985] 1 WLR 331 at pages 337-338.
17. In conclusion therefore, in relation to both sections 43 and 44, on the present application, subject to adjustments already discussed with counsel, the documents in paragraph 1 can be included in the order. The second category should be amended to read "*Any documents as defined in CPR 31.4 comprising work/investigations ...*". The third category should be amended to read "*To the extent not covered by the above, reports, and associated documents ...*". The fifth category should be amended to any supplemental report by the second defendant to Karachi Port Trust prior to 27 July 2003. The whole of paragraph 2 should be deleted. It is appropriate only for ordinary disclosure and therefore impermissible.
18. There will also be an order for a witness summons to the employee of Wallingford who was responsible for and/or undertook the inspection of Karachi Port for the purposes of the report to KPT to attend to give oral evidence.
19. The claimant shipowners must also submit to an order requiring them to pay Wallingford's reasonable costs of compliance with this order and the witness summonses.

Mr Christopher Smith (instructed by Eversheds) for the Claimant  
First and Second Defendants were not represented