CA on appeal from the Commercial Court (The Hon Mr Justice Beatson [2004] EWHC 3175 (Comm)) before The Vice Chancellor; Clarke LJ; Neuberger LJ. 24th May 2005

Lord Justice Clarke :

Introduction

1. This is an application for permission to appeal against an order of Beatson J made on 29 December 2004 granting an interim mandatory injunction and continuing a freezing order made against the applicant ("RHL") without notice on 23 December 2004. The judge refused permission to appeal. When I considered the application on paper I refused it but directed that any renewed application should be on notice to the respondent ("Cetelem") before a three member court. This is the hearing of the renewed application.

Grounds of Proposed Appeal

2. The grounds of the proposed appeal are: (1) that the court had no jurisdiction to grant an interim mandatory injunction under section 44 of the Arbitration Act 1996 ("the 1996 Act"); (2) that the court was wrong (if it did) to exercise any power it might otherwise have to grant such an injunction; and (3) that the purported exercise of the court's jurisdiction was wrong in law.

The 1996 Act

3. The 1996 Act provides, so far as relevant, as follows:

"1. 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.

….

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) These 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."

4. There are many other sections which are in the same or substantially the same terms as section 44(7). They include a plethora of different sections dealing with many different matters, including sections 12(6), 18(5), 24(6), 25(5), 42(5), 50(5), 56(7), 67(4), 68(4), 77(4) and 79(6).

The Supreme Court Act 1981

5. The Supreme Court Act 1981 ("the SCA 1981") provides, so far as relevant:

"37(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

Background

6. RHL is a company incorporated in the British Virgin Islands. Cetelem is a company incorporated in France and is a wholly owned subsidiary of BNP Paribas. It is said to be the largest consumer lending bank in the European Union. By a written agreement dated 22 July 2004 ("the SPA"), RHL agreed to sell and Cetelem agreed to acquire a 50% interest in a Cypriot company, RCL. The SPA was expressly governed by English Law and provided for the resolution of disputes by ICC arbitration in London.

7. The sale and purchase of shares in RCL were intended to effect at completion the indirect transfer to Cetelem of 50% of the shares in a Russian bank indirectly owned by RHL, namely Russian Standard Bank Limited ("RSB"). The ultimate beneficial owner of RHL, through a trust, is the Russian businessman Mr Roustam Tariko. There are a number of holding companies in the corporate structure between RHL and RSB, notably for present purposes Roust Trading Limited ("RTL"), which is a company incorporated in Bermuda and a wholly owned subsidiary of RHL.

8. Approval of the Russian Central Bank was a principal condition precedent to the SPA. Article 3.3 of the SPA provided: *"The parties will make their best efforts and provide mutual assistance so that the principal and other conditions precedent are satisfied as rapidly as practicable."*

   By article 3.5, the SPA was to be null and void in the event that the approval of the Russian Central Bank was not forthcoming by 31 January 2005. By 21 December 2004 the approval of the Russian Central Bank had not yet been obtained. Cetelem had earlier asserted in correspondence with RHL that the latest possible date for submitting documents to the Central Bank to secure approval of the transaction by 31 January 2005 was 10 December 2004. There is no express timetable or deadline in the SPA for submission of documents to the Russian Central Bank, although article 6.8 of the SPA provided: *"The parties hereto shall sign up and deliver all the documents, provide all information, and take all reasonable and lawful measures that may be necessary or appropriate to the achievement of the purposes of this agreement."*

9. By clause 6.2 of the SPA the parties agreed that the SPA should be governed and construed in accordance with English law and by clause 6.3 they agreed that any dispute arising in connection with the SPA should be referred to ICC arbitration in London before three arbitrators. RHL says that Cetelem did not take any steps to commence arbitral proceedings before the passing of the deadline of 10 December 2004.

Applications made on 23 December 2004

10. There were three applications, which were supported by an affidavit of Catherine Olivier, as follows:

   "1. a without notice application pursuant to section 44 of the 1996 Act for a freezing order, restraining RHL from disposing or otherwise dealing with its assets, including in particular its shareholding in RTL;

   2. a with notice application pursuant to section 44 for an order requiring RHL by 1600 GMT on 29 December 2004 to procure that:

   (1) all documents to be produced by RHL or on its behalf necessary to accompany the application for the authorisation by the Central Bank of the Russian Federation (the "CBR"):

   (a) the transfer by RTL of all of its shares in RSC to RCL; and

   (b) the acquisition by Cetelem and the sale by RHL of 499,500 shares in RCL representing 49.5% of the outstanding share capital and voting rights in RCL,

   are delivered to the offices of Gide Loyrette Nouel Vostok of [an address in Moscow]; and

   (2) the application is signed by it or on its behalf by its duly authorised representatives and also delivered to the offices of Gide Loyrette Nouel Vostok; and

   3. an application for permission to serve the application at sub-paragraph 2 above out of the jurisdiction or, alternatively to effect alternative service on RHL's London-based lawyer."

   Beatson J granted the application for the freezing order on 23 December at a without notice hearing at which RHL was not represented.

The order of 29 December

11. The matter came back before the judge on 29 December, when both parties were represented by leading counsel. Cetelem was represented by Mr Michael Black QC, who has represented it before us. RHL was represented by Mr Kenneth MacLean QC, whereas before us they have been represented by Mr Graham Dunning QC. Cetelem invited the judge to continue the freezing injunction and to grant an interim mandatory injunction in the terms set out above.

12. Mr Black submitted to the judge that the court had jurisdiction to grant such an injunction under section 44 of the 1996 Act. He relied upon the decision of Cooke J in ***Hiscox Underwriting Limited v Dixon*** [2004] EWHC 479 (Comm), [2004] 2 Lloyd's Rep 438. He submitted in the alternative that the court had jurisdiction to grant the injunction under section 37 of the SCA 1981, although it is to my mind plain that the order was made under section 44 of the 1996 Act.

13. In the ***Hiscox Underwriting*** case Cooke J held that section 44(3) of the 1996 Act did not restrict the power of the court to grant interlocutory relief under section 44. He made an order under section 44 that an underwriting agent comply with its contractual obligation to allow inspection of its records. Arbitration proceedings had been commenced but Cooke J held that without such an order the insurers could suffer substantial losses before the arbitral tribunal could itself make the necessary orders. It was argued on behalf of the defendant before him that the power of the court was restricted to the class of case identified in section 44(3), namely to make "such orders

as it thinks necessary for the purpose of preserving evidence or assets". Cooke J rejected that submission. He held that section 44(3) was permissive and not restrictive.

14. He compared the expression "*the court may*" in subsection (3) with the expression *"the court shall act only"* in subsections (4) and (5) of section 44. He held in effect that the draftsman must have a good reason for the use of such different language and that, if the draftsman had intended that all three sub-sections should impose similar restrictions, he would have used the same language. He rejected an argument based on the contents of the February 1996 Report on the Arbitration Bill of the Departmental Advisory Committee on Arbitration Law, which led to the 1996 Act. I will refer to the report as "*the DAC Report*".

15. In the instant case the arguments advanced before the judge were not quite the same as those which have been advanced before us. Mr Dunning submits that the *Hiscox Underwriting* case was wrongly decided, whereas, as I read the transcript, Mr MacLean did not advance that submission. The judge recorded his submissions in this connection as being twofold: first that the powers in section 44 are in support of arbitral proceedings, whereas no such proceedings were on foot and, secondly, that the proposed order would not be in support of arbitral proceedings but an usurpation of the powers of the arbitrator.

16. The judge rejected both submissions. He rejected the first on the ground that section 44(3) itself contemplates an order being made before arbitral proceedings are on foot because it expressly provides that an application for such an order can be made by a "*proposed party*" to such proceedings. That seems plainly correct and it is no doubt for that reason that Mr Dunning does not take that point in this court. As to the second point, although the judge did not address it specifically in his judgment, it is I think plain that he accepted Mr Black's submission (which he recorded) that the only way in which Cetelem's position could be protected until an arbitral tribunal was convened was by making the order sought. He must thus have rejected the submission that the order would usurp the functions of the arbitral tribunal.

17. The judge also rejected a number of further submissions made on behalf of RHL and, in the exercise of his discretion, made the order sought. He refused permission to appeal for these two reasons. The first proposed ground of appeal again raised the same objection to the jurisdiction of the court as had been raised before him and the second ground related to the exercise of his discretion, which involved taking into account several factors. Neither ground raised an appropriate question for an appeal. I note in passing that on 24 February this year Langley J made a further freezing order against RHL.

The proposed appeal

18. As indicated earlier, the point which RHL wishes to advance raises a different objection to the jurisdiction of the court from that raised before the judge. Mr Dunning submits that, in a case of urgency, the court only has jurisdiction to make an order under section 44 if it thinks that such an order is *"necessary for the purpose of preserving evidence or assets"*. He further submits that the order made by the judge was not made for the purpose of preserving evidence or assets and that the court accordingly had no jurisdiction to make it. Mr Black, by contrast, seeks to uphold the decision of the judge on jurisdiction, submitting that the ***Hiscox Underwriting*** case was correctly decided. He submits in the alternative that, if he is wrong about that, the order made by the judge was within the court's jurisdiction, even if confined by section 44(3), because the order was necessary for the preservation of assets. In the further alternative Mr Black submits that the court had jurisdiction to make the order under section 37 of the SCA 1981. In response Mr Dunning submits that the court had no jurisdiction to make the order under section 44(3) and, as to section 37 of the SCA 1981, that the court either had no jurisdiction to make such an order or, if it did, that it was wrong in principle to do so.

19. As I see it, the first question for this court to consider (although Mr Dunning argued it second) is whether, having regard to the express terms of section 44(7) of the 1996 Act, it has jurisdiction to entertain an appeal at all. In these circumstances I propose to consider these topics in this order: the jurisdiction of the Court of Appeal, the jurisdiction of the High Court in cases of urgency, "*preserving assets*" and section 37 of the SCA 1981.

Jurisdiction of the Court of Appeal

20. It will be recalled that section 44(7) is in the same terms as many other provisions of the 1996 Act and provides:

"(7) The leave of the court is required for any appeal from a decision of the court under this section."

This court has considered the meaning of "*the court*" in equivalent sub-sections on three previous occasions and has held that it means the court of first instance and not the Court of Appeal. They are ***Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*** [2001] QB 388, ***Athletic Union of Constaninople v National Basketball Association (No 2)*** [2002] 1 WLR and ***Virdee v Virdi*** [2003] EWCA Civ 41, in which the court considered sections 67(4), 68(9) and 18(5) respectively.

21. When I considered the application in this case on paper, I refused permission (or leave) to appeal because it did not then seem to me that there was any escape from those decisions and that they would prevent the court from having jurisdiction in this case. In the written materials a number of points of distinction were suggested, all of which have now been abandoned by Mr Dunning except one.

22. Mr Dunning accepts that the reference to "*the court*" in section 44(7) is a reference to the court of first instance, just as it was in the equivalent sub-sections discussed in the above cases. However, he submits that where a judge purports to make an order under section 44 which he has no jurisdiction to make, such an order is not "*a decision of the court under the section*" within the meaning of section 44(7). He submits that Parliament cannot have

intended to confer upon a judge the sole power of deciding whether to allow the losing party to challenge his decision in this court in circumstances where the judge had no jurisdiction to make the order he made.

23. I recognise that this was one of the points included in the written materials and, having now heard oral argument on the point, I do not think that when I refused leave on paper I gave it the consideration that it deserves. I am persuaded that a decision made under section 44 without jurisdiction cannot fairly be held to have been made under the section within the meaning of section 44(7) merely because the judge is purporting to make an order under the section.

24. As I see it, the purpose of section 44(7) and the many sections like it is to limit the role of the court where the court is exercising its supervisory powers under the 1996 Act. In those circumstances it seems to me to make sense to preclude further recourse to the court by way of appeal. It makes much less sense so to hold where the judge makes an order which he has no jurisdiction to make. I would draw a distinction between orders which are within the court's jurisdiction and those which are not. Thus section 44(7) and its equivalents in other parts of the Act limit appeals on fact or law to cases in which the judge at first instance grants permission to appeal. As I see it, however strong the proposed appellant's argument that the judge was wrong in law or on the facts, this court will have no jurisdiction. It will not be enough to show that the judge was plainly wrong in fact or law or that he made a decision which no reasonable judge could make. Parliament has limited the supervisory jurisdiction of the courts to one tier.

25. So long as the judge could make the order in the sense that it was within the jurisdiction specified in the relevant section, the buck stops with him. The order is made under the section. It is only where the judge makes an order which is outwith his jurisdiction, so that he could not (as opposed to should not) make it, that section 44(7) and other similar provisions do not prevent an appeal to this court.

26. Neither side was able to refer to any authority which is directly in point. I should however refer to the decision of this court in ***Aden Refinery Co Ltd v Ugland Management Co Ltd*** 1987] 1 QB 650, which was referred to by Mr Black. It was held that the court had no jurisdiction in these circumstances. A dispute under a charterparty was referred to arbitration. The charterers were refused leave to appeal to the court by a judge under section 1(3)(b) of the Arbitration Act 1979. They were also refused leave to appeal to this court under section 1(6A) of the same Act, which provided, so far as relevant:

> *"(6A) Unless the High Court gives leave, no appeal shall lie to the Court of Appeal from a decision of the High Court – (a) to grant or refuse leave under subsection (3)(b) …"*

It was submitted that the ouster of the jurisdiction of the court was subject to what Sir John Donaldson MR called (at page 657C) a concealed exception which comes into play if the judge failed to exercise his discretion judicially. Reliance had been placed upon a principle known as "the *Scherer* principle" (after ***Scherer v Counting Instruments Ltd*** *(Note)* [1986] 1 WLR 615). By that principle, section 18(1)(f) of the SCA 1981, which provides that no appeal shall lie to the Court of Appeal without the leave of the lower court *"relating only to costs which by law are left to the discretion"* of the lower court, has no application if this court is able to say that the judge in the lower court did not really exercise his discretion at all or based his discretion upon an inadmissible reason.

27. This court rejected that submission. It held that it was a question of construction of the relevant statutory provision, that section 18(1)(f) of the SCA 1981 was on its face limited and the limitation had been construed restrictively and that, by contrast, section 1(6A) of the Arbitration Act 1979 was not so limited. Indeed, as Mustill LJ put it at page 662G, the words could scarcely be plainer.

28. The question in the instant case is thus one of construction of section 44(7) of the 1996 Act. For the reasons I have given, I would hold that a decision of a judge which he had no jurisdiction to make was not a decision "under the section" within the meaning of section 44(7). I turn therefore to the jurisdiction of the court under section 44 of the 1996 Act in cases of urgency.

Jurisdiction of the High Court in cases of urgency

29. I focus here only on the jurisdiction of the court under section 44 of the 1996 Act. I will return below, so far as is necessary, to the jurisdiction of the court under section 37 of the SCA 1981. The critical provision of the 1996 Act is section 44(3), which it will be recalled provides:

> *"(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."*

The question is whether in a case of urgency, as Cooke J held and Mr Black submits, the subsection is simply permissive and does not in any way restrict the circumstances in which the court can exercise the powers conferred upon it by subsections 44(1) and (2) or, as Mr Dunning submits, the subsection restricts the powers of the court to making such orders as it thinks fit for the purpose of preserving evidence or assets.

30. There are compelling considerations on both sides of the question. In favour of the wider construction is the striking contrast between the statutory language of subsection (3) and that of subsections (4) and (5), which it will be recalled provide:

> *"(4) If the case is not one or 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."

31. Thus the 1996 Act provides that if the case is one of urgency the court may make the orders identified in subsection (3), whereas if the case is not one of urgency the court shall act only in specified circumstances. It was that difference in wording which struck Cooke J as significant and led him to the conclusion that subsection (3) does not restrict the powers which the court has under subsections (1) and (2) but is merely permissive. There seems to me to be considerable force in that construction.

32. Mr Dunning submits, however, that that construction is wrong. He points to the wording of subsection (3), to the terms of section 1 and, in particular, to the guidance to be derived from the DAC Report. I will consider each of these points in turn.

33. As to the first, I agree with Mr Dunning that the natural meaning of the word "may" in section 44(3), construed on its own, is that in a case of urgency the court has power to make "such orders as it thinks necessary for the purpose of preserving evidence or assets" but not otherwise. However, the difficulty with that construction is the difference between the wording of subsection (3) on the one hand and of subsections (4) and (5) on the other. For that reason, there is a problem with accepting it in preference to that which persuaded Cooke J.

34. As to section 1, Mr Dunning relies upon the mandatory provision contained in it that Part I of the Act, which includes section 44, shall be construed according to the principles set out in paragraphs (a), (b) and (c). He stresses that by paragraphs (a) and (b) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal and that the parties should be free to agree how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest. Importantly he also stresses paragraph (c), which provides that the court should not intervene except as provided by the Act. For my part, I do not see how section 1 affords any real support for Mr Dunning's submission. The question for decision is what is provided by section 44(3) of the Act. I do not therefore see that a provision that says that the court should only interfere as provided by the Act helps to decide what is provided by the Act.

35. On the other hand, I accept Mr Dunning's submission that the whole purpose of the Act is to make provision for consensual resolution of disputes and to provide only a very limited role for the court and, with that in mind, I turn to his third point. He relies upon the part of the DAC Report which comments upon clause 44 of the Bill, which became section 44 of the Act.

36. In paragraphs 214, 215 and 216 the DAC said this:

"214. This provision corresponds in part to Article 9 of the Model Law. As part of the redefinition of the relationship between arbitration and the Court, which was mentioned above, the powers we have given the Court are intended to be used when the tribunal cannot act or act effectively, as sub-section (5) makes clear. It is under this Clause that the Court has power to order Mareva or Anton Piller relief (ie urgent protective measures to preserve assets or evidence) so as to help the arbitral process to operate effectively. Equally, there may be instances where a party seeks an order that will have an effect on a third party, which only the Court could grant. For the same reason the Court is given the other powers listed.

215. In order to prevent any suggestion that the Court might be used to interfere with or usurp the arbitral process, or indeed any attempt to do so, we have stipulated that except in cases of urgency with regard to the preservation of assets or evidence, the Court can only act with the agreement of the parties or the permission of the tribunal. We have excepted cases or urgency, since these often arise before the tribunal has been properly constituted or when in the nature of things it cannot act quickly or effectively enough.

216. Furthermore, under sub-section (6) the Court, after making an order, can in effect hand over to the tribunal the task of deciding whether or not that order should cease to have effect. This is a novel provision, but follows from the philosophy behind these provisions: if a given power could possibly be exercised by a tribunal, then it should be, and parties should not be allowed to make unilateral applications to the Court. If, however, a given power could be exercised by the tribunal, but not as effectively, in circumstances where, for example, speed is necessary, then the Court should be able to step in."

37. In paragraph 214 the DAC identified the purpose of section 44, namely to give the court powers to be used when the tribunal cannot act effectively. The key paragraph for present purposes is paragraph 215, which Mr Dunning relies upon in two respects. The first is that it makes clear that the purpose of subsection (3) was to prevent any suggestion that the powers of the court might be used to interfere with or usurp the arbitral process or any attempt to do so. The second is that it shows that in cases of urgency the powers of the court are limited to the exercise of powers "*with regard to the preservation of assets or evidence*". Mr Dunning submits that it is plain from paragraph 215 that the DAC did not intend that the court should have power in cases of urgency to make orders other than orders for the preservation of assets or evidence.

38. I agree with Mr Dunning that it is clear from paragraph 215 that in cases of urgency, where the court can act without the agreement of the parties or the permission of the arbitral tribunal, the DAC intended that the powers of the court should indeed be limited to orders necessary for the preservation of assets or evidence. The question is whether subsection (3) should be construed so as to have that effect. I have reached the conclusion that it should.

39. In *Hiscox* Cooke J simply said in paragraph 36 of his judgment that section 44 could not be construed in such a limited way. As I have already indicated, he did so by reference to the statutory language in subsections (4) and

(5). He also pointed to the wide power in section 44(2)(e), which (read with section 44(1)) gives the court power to grant an interim injunction. Mr Black submits that the decision in *Hiscox* should be followed.

40. To my mind, section 44(3) is capable of either construction and in those circumstances it is both legitimate and appropriate to construe it consistently with the view of the DAC expressed in the DAC Report. There have now been a number of cases in which the court has treated the DAC Report as a valuable aid to the construction of the 1996 Act. They include *The Halki* [1998] 1 Lloyd's Rep 465, ***Azov Shipping Co v Baltic Shipping Co*** [1999] 1 Lloyd's Rep 68, ***ABB Lummus Global Ltd v Keppel Fels Ltd*** [1999] 2 Lloyd's Rep 24, ***Laker Airways Inc v FLS Aerospace Ltd*** [1999] 2 Lloyd's Rep 44, ***Federal Insurance Co v Transamerica Occidental Life Insurance Co*** [1999] 2 Lloyd's Rep 286, ***Harbour General Works Ltd v Environment Agency*** [2000] 1 Lloyd's Rep 65, ***Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd*** [2000] 2 Lloyd's Rep 1, ***Hussman (Europe) Ltd v Al Ameen Development & Trade Co*** [2000] 2 Lloyd's Rep 83, ***Warborough Investments v S Robinson*** [2003] EWCA Civ 751 and ***Collins (Contractors) Ltd v Baltic Quay Management*** *(1994) Ltd* [2004] EWCA Civ 1757.

41. The textbooks afford some support for Mr Dunning's submission. In particular in the 2001 Companion Volume to the second edition of *Mustill & Boyd on Arbitration* the authors say this about section 44(3) at page 324: *"In case of urgency the court may act ex parte, ie without notice to the other parties or the tribunal, but only where the order sought is 'necessary for the purpose of preserving evidence or assets': subsection 44(3). This expression is apt to cover Mareva injunctions and Anton Piller orders, as well as the appointment of a receiver."*

As can be seen, that precisely reflects Mr Dunning's argument on this point. See also to the same effect the 22nd edition of *Russell on Arbitration* at paragraph 7-132 and *Merkin on Arbitration Law*, 1991, at paragraph 12.53.

42. In the instant case the judge accepted that the court had jurisdiction on the same basis as Cooke J had done in ***Hiscox***, although (as already indicated) it was not submitted to him that ***Hiscox*** was wrongly decided. Our attention has also been drawn to a decision of David Clarke J in ***The National Insurance & Guarantee Corporation Ltd v M Young Legal Services Ltd*** [2004] EWHC 2972 (QB), where an injunction was granted directing the delivery up of certain policy documents. As I read the judgment, David Clarke J made the order under sections 37 of the SCA 1981 and 44(3) of the 1996 Act. Even if he did not make the order under section 44(3), he certainly took the view that the court had jurisdiction to do so.

43. So in ***Hiscox***, in this case and in *The National Insurance & Guarantee Corporation* case the court made (or would have made) an order under section 44(3) notwithstanding that it involved making at least some determination of the rights of the parties under a contract in which the parties had agreed that the determination of their rights should be submitted to arbitration. In each case the court did so because it was a case of urgency. However, in none of the cases was it submitted that section 44(3) restricted the power of the court to the making of orders which it thought necessary for the preservation of evidence or assets.

44. In the May 2005 edition of *Arbitration Law Monthly* Professor Merkin says that the conclusion of the courts in these cases is that judicial power to provide assistance to pending arbitrations is wider than the precise wording of the section appears to contemplate, in that orders may be made which in effect require the defendant to adhere to the very contract the rights under which would fall to be resolved in arbitration. I agree with Professor Merkin that the judgments do contemplate the making of orders in broader circumstances than the words of section 44(3) of the Act appear to contemplate.

45. I have reached the conclusion that Mr Dunning's submission on construction is correct and that the approach approved by Cooke J in ***Hiscox*** should not be followed. As stated earlier, it seems to me that there are two possible constructions of section 44(3). Although there is undoubted force in the argument based on the different language in the subsections, if the purpose of subsection (3) was not to restrict the circumstances in which orders can be made in cases of urgency, it is unclear why there is any reference to the preservation of evidence and assets. If the powers of the court were intended to include a power to make orders about all the matters listed in subsection (2), it would have been sufficient simply to provide that in cases of urgency the court may, on the application of a party or proposed party, make such orders as it thinks necessary under section 44(1).

46. In all the circumstances, it is in my judgment appropriate to construe the subsection consistently with the intention identified in paragraph 215 of the DAC Report. That report makes it clear that it was intended to interfere as little as possible with the arbitral process and to limit the power of the court in urgent cases to the making of orders which it thinks are necessary for the preservation of evidence or assets.

47. It follows that I would hold that in the instant case there was only power under section 44(3) to make an order if the judge thought that it was necessary for the preservation of evidence or assets. Since the question whether the order made in this case was necessary for those purposes (as opposed to a wider purpose) was not considered by the court, I would hold that it must be taken to have been made on a wider basis and that the court had no jurisdiction to make it on that basis. On that footing, I would hold that this court has jurisdiction to entertain an appeal from the order notwithstanding that the judge refused leave to appeal and would grant leave to appeal. However, for the reasons given below, I would dismiss the appeal.

"Preserving assets"

48. Although I have expressed my agreement with Professor Merkin that the decisions to which he refers go further than the wording of section 44(3) justifies, that is because the power in the subsection is limited to the making of orders which the court thinks are necessary for the purpose of preserving evidence or assets. It is important to emphasise that it is not because the order may incidentally involve the preliminary (or even final) determination of

an issue which the parties have agreed to submit to arbitration. The section does not provide that the court must not make an order under section 44(3) which might have that effect. Whether it is appropriate for a court to make an order in such circumstances may be an important matter to take into consideration in deciding how to exercise the discretion conferred by the section but it is not a matter which goes to the jurisdiction of the court.

49. It is also important to note that section 44(3) is not restricted to orders for the preservation of evidence or assets. Under the subsection *"the court may … make such orders as it thinks necessary for the purpose of preserving evidence or assets"*. As I see it, the effect of subsection (3) is that the court may make any order which it could make under subsection (1) provided that it thinks that it is necessary for that purpose. It may thus make an order about any of the matters set out in subsection (2), provided that it is *"necessary for the purpose of preserving evidence or assets"*.

50. Mr Black says (and I accept) that, if RHL had submitted to the judge that the jurisdiction of the court was restricted in the way described above, he would have submitted that the court had jurisdiction under section 44(3) to make the same order as was in fact made because it was necessary to make such an order for the purpose of preserving Cetelem's assets. Mr Dunning submits that the judge would have had no such jurisdiction because an order requiring RHL to procure that certain documents (together with an application signed by RHL or on its behalf) be delivered to the offices of Gide Loyrette Nouel Vostok in Moscow could not have been made under section 44(3).

51. The question whether the judge would have had jurisdiction to make such an order under section 44(3) on that basis was not raised until the hearing of the appeal. On 26 January Mr MacLean signed a skeleton argument which stated that RHL would if necessary contend that ***Hiscox*** was wrong or should not be followed. On 6 April Mr Black produced a skeleton arguing that ***Hiscox*** was correct but not arguing in the alternative that the court nevertheless had jurisdiction to make the order under section 44(3), even if it had the limited meaning which we have held to be correct. On 12 April, which was a week before the hearing, Mr Dunning and Mr Flynn, who were now representing RHL, produced a skeleton argument which elaborated the submission that *Hiscox* was wrongly decided and that the judge had no jurisdiction to make the order on the basis he did.

52. Before us it was submitted by Mr Black that the court had power to make the order which it in fact made because it was necessary for the preservation of one of RHL's assets, namely its right to purchase shares in RCL. He further submitted that the decision of the judge can be justified on that basis and, indeed, that the judge would have made the order on that basis had he not simply followed ***Hiscox.*** In oral argument before us both Mr Black and Mr Dunning addressed the question whether the order made in this case could be an order which was necessary for the preservation of assets within the meaning of section 44(3). In addition, after the conclusion of the hearing, Mr Dunning produced a short written submission on the point to which Mr Black replied.

53. The central issue between the parties is thus a question of construction of section 44(3) of the 1996 Act. I have considered whether, having regard to the circumstances in which the point has arisen and to the differing roles of this court and the court of first instance for which the Act provides and which I have discussed above in connection with section 44(7), we should decline to consider this question but remit it either to Beatson J or, if he were not available, to another judge. However, no-one suggested that course and, in any event, I have reached the conclusion that we should not take that step, not least for this reason. As I understand it, the parties now each say that the SPA has come to an end, although they do so on entirely different legal bases. We were told that Cetelem has purported to accept an alleged repudiatory breach on the part of RHL, whereas RHL says that a condition precedent was not met by 31 January. In these circumstances it seems to me that nothing could be gained by remitting the matter to the judge. He would no longer have jurisdiction to grant an injunction on any view.

54. Moreover, although the judge had no jurisdiction to make the order on the basis that he did, ie in effect under section 44(1), if we were to conclude that he had such jurisdiction under section 44(3), it seems to me that we could make (or effectively confirm) the order he made by virtue of CPR 52.10(1). I therefore turn to the question of construction of section 44(3).

55. Mr Dunning submits that Parliament could not have intended that the court should have power to grant an interim mandatory injunction in circumstances such as the present. He points to the DAC Report, and in particular to paragraphs 214 and 215 quoted above, and submits that it was intended to limit the power of the court in cases of urgency, to a power, as it was put in paragraph 214, *"to order Mareva or Anton Piller relief (ie urgent protective measures to preserve assets or evidence) so as to help the arbitral process to operate effectively"*.

Mr Dunning submits that an order of the kind made here is not such an order.

56. For my part, I agree with Mr Dunning that the interim mandatory injunction in this case does not immediately strike those familiar with the *Mareva* injunction and freezing order as an order of the same kind. However, the question is one of construction of the language of section 44(3), construed in its context. Can it fairly be said that an order of this kind could be necessary for the preservation of assets. I have reached the conclusion that it can.

57. Mr Dunning correctly accepts that *'assets'* are not limited to tangible assets but include, for example, choses in action. That is evident, both because section 44(2) refers to 'property' and 'goods', so that 'assets' must be wider than both and because the classic freezing injunction freezes bank accounts, which, when in credit, evidence choses in action. It seems to me that, once it is accepted that *'assets'* includes *'choses in action'* there is no reason to limit them to particular types of chose in action. There may be some other reason for limiting the operation of section

44(3) but I do not see any reason why a contractual right should not be an 'asset' within the meaning of the subsection. Further, given the fact that the purpose of section 44(3) is to permit orders for the preservation of assets, and given the limitations on the operation of the subsection, namely that it can only be invoked (a) when *"the case is one of urgency*" and (b) when the judge thinks that it is "*necessary"* to make the order, it seems to me that in this context there is no good reason for construing the meaning of "assets" narrowly.

58. Mr Dunning suggested a number of limitations in the course of the argument. He first suggested that the asset to be preserved must be an asset of the defendant and could not be a claimant's asset. However, as the Vice-Chancellor observed in argument, if his car was stolen or allegedly stolen by the defendant, there is no reason why an order should not be made for the purpose of preserving the car pending the resolution of the issues between the parties. That appears to me to be a powerful point. I can see no reason why 'assets' should be limited to the defendant's assets.

59. Similarly, Mr Dunning submitted that an order had to be for the purpose of preserving assets in the sense of ensuring, for example, in the case of a freezing order, that assets are available against which an award or judgment can be enforced. I of course accept that that is the paradigm case but I do not see why it should be held to be the only example of a case within the language of section 44(3).

60. In the course of his oral argument Mr Dunning's principal submission, if I understood him correctly, was that an order of this kind is not an order for the preservation of assets but for the enforcement of the defendant's contractual obligations and is outside the contemplation of the 1996 Act. He correctly noted that there is no support for an order of this kind in the DAC Report. He further submitted that it would be treated with astonishment by the international arbitration community and would be detrimental to London arbitration because international parties do not want disputes which they have referred to arbitration to be determined or interfered with by the courts.

61. I entirely accept the submission that a central and important purpose of the 1996 Act was to emphasise the importance of party autonomy and to restrict the role of the courts in the arbitral process. In particular the Act was intended to ensure that the powers of the court should be limited to assisting the arbitral process and should not usurp or interfere with it. However, those considerations do not seem to me to lead to the conclusion that Parliament did not intend the court to have the power to make an order of this kind. On the contrary, it seems to me that Parliament intended to give the court powers to assist the arbitral process which are wide enough to include such an order. Although it is right to say that the DAC does not expressly support an order of this kind, there is nothing in the DAC Report to suggest that the court should not have the power to assist the arbitral process in this way.

62. It is important to note that we are considering only the powers of the court and not how those powers should be exercised. Thus section 44(3) only gives jurisdiction to the court to make orders which are *necessary* for the purpose of preserving evidence or assets (my emphasis). It is evident that the purpose of the order must be to facilitate the arbitration or the enforcement of an award and not to usurp the functions of the arbitral process. However, as I observed earlier, there is nothing in the subsection to limit the power of the court to orders which do not involve a preliminary determination of a contractual right of the parties. I see nothing in the subsection or the Act which provides that the court has no power to make an order which it thinks necessary for the purpose of preserving evidence or assets because it will also involve forming a view on the merits of the dispute which the parties have agreed to submit to arbitration or because it involves directing a party to take a step which the contract provides that it must take. Whether it is right in principle to make such an order in any given case is an entirely different question but I cannot see that there is anything in the subsection or the Act which deprives the court of the power to make an order which it thinks is necessary for the purpose of preserving evidence or assets. It is that power which is expressly conferred by the subsection.

63. Mr Dunning submitted that the international arbitration community would be particularly horrified by the idea of a mandatory injunction. I am not persuaded that that is so. As Mr Black observed, an ordinary freezing injunction almost always includes orders of a mandatory nature by ordering the defendant to provide detailed information about his assets, which may be very onerous indeed. Section 44(1) and (2)(e), read together, expressly include the same powers to grant interim injunctions for the purposes of and in relation to arbitral proceedings as the court has for the purposes of and in relation to legal proceedings. Those powers include a power to grant interim mandatory injunctions, although the authorities make it clear that the court should exercise such a power very sparingly. That would be particularly so in the context of proposed arbitral proceedings but that consideration does not go to the jurisdiction of the court but to the exercise of its jurisdiction.

64. It is important to note that the power is to grant an *interim* mandatory injunction (my emphasis). The power does not extend to granting final injunctions. Although it is not necessary to resolve this question in this case, the power does not extend to making a final determination of the rights of the parties. The purpose of the power, in the context of section 44(3) is to preserve evidence or assets and no more. Moreover the defendant will be protected by an appropriate cross-undertaking in damages such was included in the order in the instant case. The court can require the cross-undertaking to be secured and, as I see it, can require other undertakings to ensure that the position of the defendant is not prejudiced in the arbitral proceedings. I note in passing that the court has power under section 44(6) to order that any order made by it shall cease to have effect on the order of the arbitral tribunal. I do not see why it should not be possible to ensure, by framing the order and undertakings appropriately, that any step taken pursuant to an order should not be irrevocable.

65. However, I recognise that all depends on the circumstances. There was some discussion in the course of the argument as to whether the court could, for example, order the sale of a perishable cargo under section 44(3) in a case of urgency on the footing that they were "*goods the subject of the proceedings within section 44(2)(d)*". Mr Dunning did not, I think, accept that it could, but in my opinion, if the court thought that it was necessary so to order in order to preserve the value of the fish, which would otherwise be diminished or lost by putrefaction, the court could properly conclude that the order was necessary for the purpose of preserving assets. The asset would be the value of the fish rather than the fish itself.

66. There was also discussion of this example, which was suggested by Neuberger LJ. Suppose an agreement for the transfer of shares which contained an arbitration clause. The purchaser and the vendor has each done everything required of him under the contract and there are two days to go before the final step must be taken, which is for the vendor to send the share certificate to the registrar. Suppose further that it is too late to appoint arbitrators and there was no reason to do so earlier. Would the court have power to make an order to direct the vendor to take that step, even though to do so would be obtain the whole of the relief which would be sought in an arbitration? Mr Black's answer is yes, whereas Mr Dunning's answer is no.

67. It appears to me that the court would have power under section 44(3) in that extreme situation if it thought that it was necessary to make the order in order to preserve the purchaser's right to purchase the shares under the contract. That right would to my mind be an asset and, provided that what was granted was one of the orders identified in section 44(2), the court would have jurisdiction to make it. The only relevant power in subsection (2) would be the power to grant an interim injunction in subsection (2)(e), which provides a power to grant an interim injunction. That emphasises (as indicated earlier) the interim nature of the relief which can be granted in order to assist the arbitral process. The court would therefore have to ensure, by obtaining appropriate undertakings from the claimant, that the substantive rights of the parties would ultimately be resolved by arbitration.

68. In his written submission provided to us after the hearing, without in any way resiling from any of his previous submissions, Mr Dunning took a somewhat different point. While accepting that a chose in action is an asset, he sought to distinguish between the substantive rights created by the contract, which he accepted were choses in action (and thus assets), and the remedies which were or might be available to enforce those rights such as specific performance. He submitted that Cetelem's claim for specific performance of the SPA was not a chose in action but merely a form of relief or remedy to enforce a substantive right. He accordingly submitted that the order of the judge was not an order for the preservation of assets and that it was not an order which it was open to him or indeed this court or any other court to make.

69. In response Mr Black submitted that the relevant assets are not the rights to have RHL's promises in the SPA specifically enforced but the promises themselves, principally the right to buy the shares in RCL. He submitted, as he had submitted orally both to us and to the judge, that that right was in danger of being destroyed by administrative and artificial means, that is by the failure of RHL to operate the terms of the SPA, and that it was that right that he had invited the court to preserve by granting the interim mandatory injunction. He thus submitted that in granting the injunction it was plain that the judge thought it necessary to preserve the right to purchase the shares so that, although he did not put it in these express terms, the judge was making an order which he thought necessary for the purpose of preserving an asset within the meaning of section 44(3) of the 1996 Act.

70. For my part, I prefer the submissions of Mr Black on this point to those of Mr Dunning. I would not accept the submission that the injunction was granted merely for the protection or preservation of Cetelem's claim for specific performance and not for the protection or preservation of its contractual right to buy the shares. It appears to me that the right to purchase the shares under the SPA was indeed a substantive right, although it may properly be regarded as a conditional right since it depended upon the performance of certain conditions precedent. In my opinion, whether regarded as a conditional right or not, it was to my mind an asset within the meaning of section 44(3). It follows from the language of the subsection that, if the judge thought that it was necessary to grant the injunction in order to preserve the right, he had the power (but not of course the obligation) under the subsection to make an appropriate order. Moreover, it appears to me that it was that right (and not simply Cetelem's equitable remedies) which the order was designed to protect or preserve.

71. In these circumstances I would hold that the court had jurisdiction to grant the injunction under section 44(3), even though it did not have the wider discretion which it had been held to have in *Hiscox*. I would repeat here the point I made earlier that I do not think that this decision in any way usurps the functions or powers of the arbitral tribunal. The whole purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before there is an arbitration on foot. Otherwise it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process. Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertakings from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators.

72. The question arises what order this court should now make. Mr Black submits that, even on the narrow basis which I would hold to be the correct approach, it follows from the above that the order made by the judge fell within his jurisdiction under section 44(3) of the 1996 Act and that, since the judge did not give leave to appeal, from it this court has no jurisdiction to review it. On the assumption that we reached the conclusions on construction which I have set out, I understood Mr Dunning to accept that that was the case.

73. I would only add this. It appears to me to be clear that, although the judge did not expressly approach his powers on the narrow basis identified above, he would have reached the same conclusion and made the same order if he had done so. He essentially accepted Mr Black's submissions as particularly summarised in paragraphs 14, 17 and 18 of the judgment. Mr Black submitted to the judge that the only way that Cetelem's position could be protected until an arbitral tribunal was convened was if the court compelled RHL to take all steps necessary to allow for the possibility of the satisfaction of the principal condition precedent referred to above, namely the authorisation of the Central Bank. The order would not be dispositive of the parties' rights but merely facilitated the administrative processes necessary to give the contract effect. Making the order did not prevent RHL from raising such arguments as it wished before the arbitrators to justify refusal to complete the transaction. As I read the judgment, the judge essentially accepted those submissions and must to my mind have been satisfied that the order was necessary for the purposes of preserving Cetelem's contractual rights and thus its assets.

Section 37 of the SCA 1981

74. Given the conclusions reached above it is not necessary to consider whether the court had jurisdiction to make the same order under section 37 or, if it did, whether it was right to do so. Mr Dunning made it clear that in that event it would or might be necessary to give greater consideration to the facts and it was agreed between the parties that a further hearing would have to be held. I therefore say nothing about section 37 except this. The relationship between the powers of the court under section 37 of the SCA and section 44 of the 1996 Act will at some stage require detailed consideration because there is a tension (to put it no higher) between the apparently wide powers conferred on the court by section 37 and the much narrower powers conferred on the court by section 44. The resolution of that tension must await another day.

Conclusion

75. I do not think that the correct disposal of this application is simply to refuse it as proposed by Mr Black. Although it can now be seen after considerable argument (to which I would like to pay tribute) that the judge did have jurisdiction to make the order under section 44(3), he did not have jurisdiction on the wide basis upon which he did so. It seems to me that, for the reasons given earlier, section 44(7) did not prevent this court from considering whether the court had jurisdiction to make an order on that wide basis and that the right course is to grant permission to appeal on the limited question whether the judge had jurisdiction to make the order on the basis upon which he purported to make it. The question then arises what order should be made on the appeal. On the appeal, I would hold that the judge did not have jurisdiction to make the order on the wide basis on which he purported do so it but that he did have jurisdiction on the narrower basis discussed above and would indeed have made the same order on that narrower basis if he had been asked to do so. In these circumstances I would dismiss the appeal.

76. In summary my conclusions are:

i) that a decision of a judge which the court had no jurisdiction to make is not a decision "under the section" within the meaning of section 44(7) of the 1996 Act;

ii) that, on the true construction of section 44(3) of the 1996 Act, if the case is one of urgency the court only has jurisdiction to make such orders as it thinks necessary for the purpose of preserving evidence or assets;

iii) that the judge purported to make an order under section 44(3) on a wider basis and thus had no jurisdiction to make it on that wider basis;

iv) that the judge did, however, have jurisdiction to make the order under section 44(3) if he thought that it was necessary to do so for the purpose of preserving assets;

v) that the judge would have concluded that it was necessary for preserving assets, namely Cetelem's rights under the SPA and would have made the same order on the narrower basis if he had been asked to do so; and

vi) that in all the circumstances leave to appeal should be granted but the appeal dismissed.

Lord Justice Neuberger

77. I agree.

The Vice Chancellor

78. I also agree.

ORDER: Leave to appeal against the order of Beatson J, made on 29th December 2004, is granted, but appeal is dismissed; appellant to pay half the respondent's costs of the appeal; permission to appeal to the House of Lords refused. (*Order does not form part of approved Judgment)*

Michael Black QC and S Andrew, Solicitor Advocate (instructed by Andrews) for the Claimant/Respondent
Graham Dunning QC and Vernon Flynn (instructed by Jones Day) for the Defendant/Appellant