



Neutral Citation Number: [2023] EWHC 2486 (Comm)

Case No: CL-2023-000617

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Date: 09/10/2023

Before :

MR JUSTICE FOXTON

Between :

(1) JOL
(2) JWL
- and -
JPM

Claimants

Defendant

David Allen KC and Jason Robinson (instructed by Stephenson Harwood LLP) for the Claimants

Michael Collett KC and Malcolm Jarvis (instructed by Hill Dickinson LLP) for the Defendant

Hearing date: 3 October 2023
Draft Judgment Circulated: 4 October 2023

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 09 October 2023 at 10:00am.

The Honourable Mr Justice Foxton:

1. This is an application for urgent injunctive relief, brought by the Claimants (“**Owners**”) on giving short and informal notice against the Respondents (“**Charterers**”) arising from bareboat charterparties dated 13 December 2017 (“**the Head BBCPs**”). The injunctions sought would require the Charterers to re-deliver two vessels which are the subject of the Head BBCPs to the Owners, and associated relief (the “ALPHA” and the “BETA” (“**the Vessels**”)), or at least to take “all and any steps” to do so.
2. The application is brought under both s.44 of the Arbitration Act 1996 and s.37(1) of the Senior Courts Act 1981, the Head BBCPs containing arbitration agreements providing for disputes to be referred to arbitration under the rules of the London Maritime Arbitrators’ Association (“**LMAA**”). However, Owners have now referred the underlying dispute to arbitration, and both Owners and Charterers have appointed their arbitrators. In these circumstances, I am satisfied that it is s.44 of the 1996 Act which is to be applied (**AES Ust-Kamenogorsk Hydropower Plant LLC v Ust-Kamenogorsk Hydropower Plant JST LLP** [2013] 1 WLR 1889, [60]).

The commercial background and the dispute

3. As I have stated, Owners and Charterers entered into the Head BBCPs on 13 December 2017, in respect of the Vessels. Charterers sub-chartered the Vessels to **GHH** by bareboat charters dated 11 October 2018 and 5 February 2019 (“**the Sub-Charterers**”) on back-to-back terms. Charterers’ obligations under the Head BBCPs are guaranteed by **SRS** (“**the Guarantor**”).
4. **GHH** in turn sub-sub-chartered the Vessels to **PPM** (“**Sub-Sub-Charterers**”), by bareboat charters also dated 11 October 2018 and 5 February 2019 (“**the Sub-Sub-Charterers**”) who time-chartered the Vessels to **WTB** and **HDN**.
5. So far as the corporate structure is concerned, at the time of the transactions, the Guarantor owned 77.4% of **GHH** (as explained below, it now owns just over 50%). **GHH** is the 100% owner of Charterers, Sub-Charterers and Sub-Sub-Charterers.
6. On 13 December 2017, Owners, Charterers, Sub-Charterers, Sub-Sub-Charterers and the Guarantor entered into a Multipartite Agreement in respect of the Vessels, by which Charterers and Sub-Charterers agreed not to terminate the Sub-Charterparty or the Sub-Sub-Charterparty or withdraw the Vessels from those charters without Owners’ consent. The Multipartite Agreement assigned rights arising under the various charterparties to Owners.
7. The Head BBCPs identify a list of “Termination Events”, on the occurrence of which Owners are entitled to terminate the Head BBCPs. Clause 40(3) of the Head BBCPs provides that “at any time after a Termination Event shall have occurred and be

continuing”, Owners are entitled to serve a Termination Notice terminating the Head BBCPs with immediate effect “and withdraw the Vessel from the service of the Charterer without noting any protest and without interference by the court or any other formality whatsoever, whereupon the Vessel shall no longer be in the possession of the Charterers with the consent of the Owners and the Charterers shall redeliver the Vessel to the Owners in accordance with Clause 37.” Clause 37 requires redelivery at Charterers’ cost and expense to a safe port declared by Owners.

8. A Termination Event occurs, inter alia, if the Guarantor’s shareholding in GHH falls below 77.4%. I understand it to be common ground that this had happened by 2 September 2023, following a re-organisation of the affairs of the group of which GHH formed part in the face of financial difficulties, and that this constituted a Termination Event under the Head BBCPs.
9. Owners contend that they served a valid Termination Notice in respect of that event on Charterers on 5 September 2023, and that they have a contractual right to the return of the Vessels in accordance with clauses 37 and 40 of the Head BBCPs, together with such documentation as is necessary for Owners to effect the re-registration of the Vessels with the Malta Flag Registry, and re-enter them in DNV class (the vessels being currently registered to Sub-Sub-Charterers on the Local Bareboat Charter Registry).
10. On 20 September 2023, Owners appointed Mr Simon Rainey KC as their party-appointed arbitrator. Charterers appointed Mr Alistair Schaff KC as their party-appointed arbitrator on 28 September 2023. Under the LMAA Rules, those appointments are sufficient to constitute a functioning arbitral tribunal, albeit the party-appointed arbitrators can appoint a presiding arbitrator (paragraph 8(b) of the LMAA Rules, 2021).
11. Owners’ entitlement to the relief sought is challenged by Charterers on the merits. By way of a broad outline of the position:
 - a. Charterers say that Owners did not serve a Termination Notice in time, alternatively that Owners are estopped from relying on the change in the control of GHH as a reason for terminating the Head BBCPs.
 - b. Charterers say that they are entitled to relief against forfeiture, contending that it is arguable that this jurisdiction can be invoked when the forfeiting event is not a breach of contract.
 - c. Charterers say that it would be impossible for them to comply with the orders sought, the Vessels not being in their possession or control, but the possession and control of the Sub-Sub-Charterers, and that in itself is a reason not to make them, and that Owners’ alternative order that they take “any and all steps” is too vague.

- d. Charterers say damages would be an adequate remedy for Owners, but not an adequate remedy for Charterers or third parties who would be affected by the immediate redelivery of the Vessels.
- e. Charterers contend that a final order for specific performance would not be granted, and in those circumstances the court should not grant an interim mandatory order which would effectively amount to final relief.

S.44 of the Arbitration Act 1996

12. Section 44 of the 1996 Act provides:

- “(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
- (2) Those matters are—
 - (a) the taking of the evidence of witnesses;
 - (b) the preservation of evidence;
 - (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—
 - (i) for the inspection, photographing, preservation, custody or detention of the property, or
 - (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;
 - (d) the sale of any goods the subject of the proceedings;
 - (e) the granting of an interim injunction or the appointment of a receiver.
- (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
- (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

- (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
- (6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.”
13. The present application is not brought with the consent of the arbitral tribunal, or the agreement of the parties, and it is therefore necessary for the Claimants to bring themselves within the scope of s.44(3) (in addition to complying with s.44(5), as is necessary on all s.44 applications) before relief can be sought from the court under s.44.
14. The limitation to the court’s powers in s.44(3) to orders “for the purpose of preserving evidence or assets” has provoked considerable discussion as to whether s.44 can be used to obtain an interim injunction for the purpose of compelling performance of a disputed obligation under the parties’ contract, or, at least, preventing one party from acting in a manner which would be inconsistent, on the other party’s case, with its contractual obligations. The core instance at which s.44(3) would appear to have been addressed is freezing injunctions and search orders, which do not generally require the court to delve to any great extent into the substantive merits of the dispute.
15. However, it is now established that s.44(3) is not restricted to these core instances. In *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 355, the defendant had agreed to sell certain shares to the claimant. As the transfer of the shares involved the transfer of an indirect interest in a Russian bank, the agreement provided that the agreement would lapse if the consent of the Russian Central Bank to the transfer had not been granted by a certain date. The claimant obtained without notice orders (i) prohibiting the respondent from dealing with the shareholding and (ii) requiring the respondent to make the application for Central Bank authorisation by the specified date. In seeking the mandatory injunction at (ii), Mr Black QC for the claimant had submitted:
- “There is no risk of injustice if the order should not have been made because the order is not dispositive of the parties’ rights, it merely facilitates the administrative processes necessary to give the contract effect. The order will not prevent Mr Tariko or his companies from raising any bona fide objection to completion of the contract. However, not to make an order will allow Mr Tariko to evade his contractual obligations by default.”
- ([2004] EWHC 3175 (QB), [22]).
16. The issue of whether there was jurisdiction under s.44(3) to grant the interim mandatory order was argued before the Court of Appeal who concluded that there was. Clarke LJ held

that the words “for the purpose of preserving evidence or assets” limited the power of the court to grant injunctions within s.44(3) ([45]). However:

- a. It was sufficient that the order was made “for the *purpose* of preserving evidence or assets”, and it was not necessary that the order be one for the preservation or evidence or assets ([49]).
 - b. A contractual right (such as the right to purchase shares) could be an “asset” for this purpose ([57]) (a conclusion which permitted interim injunctions requiring performance of an alleged but disputed contractual obligations to be granted under s.44).
17. Clarke LJ emphasised 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” ([62]) and that the court should exercise the power to grant interim mandatory injunctions “very sparingly”, “particularly in the context of proposed arbitral proceedings” ([63]). The court did not have power under s.44 to grant a final injunction ([64]), and “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.”
 18. Finally, Clarke LJ, echoing the submission made to Beatson J (as he then was) which is quoted at [15] above, observed at [73] that “the order would not be dispositive of the parties’ rights ... Making the order did not prevent RHL from raising such arguments as it wished before the arbitrators to justify refusal to complete the transaction”. While *Cetelem* was concerned, therefore, with an interim mandatory injunction to compel performance of an ancillary contractual obligation which did not itself determine the principal dispute, Clarke LJ accepted that, in an appropriate case, it was open to a court to make an order under s.44(3) of a kind which did compel performance of the principal obligation in dispute, leaving only the issue of whether that order should be reversed to be resolved in the arbitration ([[66]-[67]).
 19. The effect of *Cetelem* is that, in some cases, the “asset” which the court is asked to preserve under s.44(3) can be a disputed contractual right, the very existence of which is the substantive dispute which is to be decided in arbitration. That gives rise to an obvious tension between the court’s desire to give effective relief which the arbitral tribunal is unable to give (or to do so sufficiently promptly), and the policies in s1(b) and (c) of the 1996 Act, and reflected in s.44(4) and (5), that the parties’ agreement that their disputes should be resolved in arbitration should be honoured, and that the court should intervene in the arbitration only where strictly necessary. That tension can become particularly acute where the relief sought is an order for mandatory specific performance, which cannot effectively be re-visited in the arbitration.
 20. Those concerns are reflected in a number of subsequent first instance judgments which have emphasised the need for particular caution before making a s.44(3) order which

would have this effect. In *Zim Integrated Shipping Services Ltd v European Container KS* [2013] EWHC 3581 (Comm), the claimant had sold vessels to the defendant, under an arrangement which involved the claimant advancing the defendant the amounts necessary to complete the sale, and leasing the vessels back on bareboat charter. The claimant sought an injunction under s.44(3) restraining the defendant from taking steps to terminate the charters for non-payment of hire (the claimant claiming it was entitled to deduct unpaid loan instalments from the hire due).

21. The “assets” which the court was asked to preserve were the claimant’s right to repayment of the loan and its right to deduct outstanding loan payments from hire – rights the existence of which was disputed by the defendant, that dispute falling within the arbitration agreement. Males J noted at [21] that:

“While it may sometimes be necessary, in order to preserve an asset in an urgent case, to determine a question which the parties have agreed that the arbitrators should decide; the court must proceed with caution before making an order which may have that effect”.

22. He noted at [24] that “treating these contractual rights as assets within section 44(3) is stretching that term, if not to breaking point, at all events, very nearly to that point” continuing:

“If s.44(3) does indeed extend so far, then it is difficult to see what real limitation is provided by the limitation that the subsection is only there for the purpose of preserving evidence or assets. If Mr Gee is right to say that the contractual rights to which he refers fall within the concept of ‘assets’ in the subsection ... it seems to me at any rate a factor to be taken into account as a matter of discretion ... The closer any injunction comes to determining a matter which it is for the arbitrators to decide, the more wary the court should be as a matter of discretion”.

23. Males J returned to these concerns in *Euroil Ltd v Cameroon Offshore* [2014] EWHC 52 (Comm). In that case, the operator of a joint venture sought a mandatory injunction precluding one of the joint venture partners from communicating with the Cameroon government, the injunction being sought to “preserve” an alleged (but disputed) right to be the sole representative of the joint venture ([15]). At [18] he stated:

“I adhere to the position as I sought to explain it in the *Zim* case to the effect that, even assuming that there is a jurisdiction, it is a factor to be taken into account and the closer any injunction comes to determining a matter which it is for the arbitrators to decide, the more wary the court should be as a matter of discretion”.

24. Finally, in *Aquavita International SA v Indagro* [2022] EWHC 892 (Comm), I had to consider the circumstances in which an application for interim relief from a court other

than the supervisory court would constitute a breach of the arbitration agreement, so as to be susceptible to anti-suit relief. The court order in question was for the discharge of cargo at a particular port which, once discharged, could not be “undischarged”. Holding that an application for this kind of relief did constitute a breach of the arbitration agreement, I stated at [26]:

“The ... Court Order involved in practical terms, the final determination of Indagro’s contention that the Owner was obliged to discharge the relevant portion of the cargo ... When I asked Mr Kulkarni QC what issue remained to be determined in arbitration, his response was that *the Owner* might want to ‘fashion some sort of breach’ claim, alleging that Indagro had breached an implied term of the Charterparty by requiring discharge. He did not suggest that Indagro itself had any relief to seek in the arbitration (“in support of which” it might be said that the ... Court Order had been made). In circumstances in which the only relief which might be sought in the arbitration is a complaint by the respondent to the ... Court Order that the order should not have been made, I do not believe that the order can be said to have been made in support of the arbitration”.

The issues before the court

25. Mr Collett KC for Charterers took three principal points against the proposed order:
 - a. First, that (at least in its original formulation) the order sought would require Charterers to do that which it was not within their power and control to do, because the Vessels were in the control and possession of Sub-Sub-Charterers, which company was not itself in Charterers’ control (see [5]). When Mr Allen KC sought to address this objection by seeking orders requiring Charterers to use their best endeavours and to take “any and all steps” to effect immediate redelivery, and ensure compliance with the ancillary orders sought, he argued that the resultant orders would be too uncertain to be the subject of coercive orders of the court.
 - b. Second, that the conditions for an urgent order under s.44(3) were not met, and in any event the application required the high level of caution referred to by Males J before any order was made because if granted, it would or might involve the final determination by the court of an issue which the parties had agreed should be referred to arbitration.
 - c. Third, because, applying the enhanced *American Cyanamid* test applicable to applications for interim mandatory injunctions which are likely to be final in their effect, the requirements for interim relief were not satisfied.
26. Although Mr Collett KC advanced his submissions in this order, I have concluded that I should address his second argument first. If he is right, and it is not appropriate (or not yet

appropriate) for the court to intervene in the arbitral process, that is equally true of Mr Collett KC's first argument, which raises issues which would inevitably feature before the arbitral tribunal when deciding whether, and in what terms, to grant final relief.

Should the court make an order under s.44(3)?

27. In support of his contention that the application is urgent, Mr Allen KC submits that the Head BBCPs grant his client a right to immediate redelivery, and by definition, any significant delay in redelivery will have finally deprived his client of its right to immediate redelivery. However, that submission can be made of any obligation which must be performed by a particular date, but is capable of being performed thereafter (albeit not capable of being timeously performed thereafter). I do not accept that the mere fact that it will take longer to obtain any relief from the arbitrators than interim relief from the court, and that on Mr Allen KC's case Owners will have been deprived of that to which they were contractually entitled in the meantime, is itself sufficient to establish urgency in a case such as this. While Mr Allen KC pointed to the risks to which the Vessels could be exposed during any period prior to redelivery, and the ongoing loss of the opportunity on the Owners' part to trade the Vessels, these adverse consequences are progressive in their effects, and the mere fact that leaving the matter until the arbitral tribunal can act involves some delay, and some adverse consequences of this kind, is not in my view sufficient to satisfy the s.44(3) urgency requirement on its own. This is not a case, like *Cetelem*, in which there was a "drop dead" date.
28. Clearly, however, the delay involved in leaving the matter to the arbitral tribunal in a case such as the present might be of such a degree as to satisfy the requirements of urgency. Mr Allen KC submits that the arbitral tribunal does not have the power itself to grant interim relief, with the result that the arbitral tribunal will only be able to determine this issue by way of a final award, "weeks or months" hence. In particular, Mr Allen KC argued that s.38(4) of the 1996 Act did not give the arbitral tribunal power to grant interim relief of the kind sought in this case. This provides:
- "(4) The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings—
- (a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or
- (b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property."
29. I accept that s.38(4) does not give an arbitral tribunal power to order the interim enforcement of substantive rights in dispute in the arbitration in the guise of "preserving ... property". The language of s.38(4) does not lend itself to the expanded reading given to

s.44(3) – in particular the express power to grant interim relief in s.44(2)(e), which the Court of Appeal in *Cetelem* relied upon (at [67]) is absent. Rather, the language of s.38(4) tracks that of s.44(2)(c) (save that, unlike the latter, it does not authorise interference with the rights of third parties). Further, the reference to the tribunal “giving directions” is not suggestive of an injunctive power. If the arbitral tribunal is to have the power to grant interim injunctive relief, the parties must confer that power expressly (s.39), something which the LMAA Rules do not do: *Zim Integrated Shipping Services Ltd v European Container KS* [2013] EWHC 3581 (Comm) [17]). This view as to the scope of s.38 is supported by the decision in *Kastner v Jason* [2004] EWCA Civ 1599, [16] and it was not challenged by Mr Collett KC.

30. That means that the arbitral tribunal could only grant the relief sought in this case by way of final relief. Mr Allen KC and Mr Collett KC offered different estimates, based on their own experience, as to how long this might take, ranging from “months” to “six weeks”. I am sure that they could have exchanged positions, and each remained faithful to supportive examples from their own experience. In this case, I am satisfied that it is realistic, if the arbitrators’ diaries allow it, for an arbitral hearing to proceed to an award in six to eight weeks. The issues between the parties are, principally but not exclusively, issues of law or the consequences of undisputed facts (save for limited issues as to when Owners became aware of the Termination Event, the Guarantor’s financial condition and whether Charterers controlled Sub-Sub-Charterers). The two party-appointed arbitrators are commercial barristers and arbitrators of great expertise and distinction, and the court has particular confidence in their ability to conduct the hearing efficiently and to proceed speedily to an award.
31. Clearly a delay of that order will involve some prejudice to Owners on their case. However, the October hire instalments have been paid in advance, and I am told that the “BETA” will be in drydock in November, and not capable of earning under time chartered employment. I was not persuaded that there was any significant risk of a physical deterioration in or damage to the Vessels during a period of this length: the material relied upon by Owners to suggest otherwise was thin, and largely speculative, and the fact that the Vessels remain in class and are both subject to time charters at significant daily rates itself provides assurance that they are in working condition.
32. To be set against that is the fact that the relief sought seeks to preserve disputed contractual rights, and would effectively be final in nature. The consequences of such an order would be that issues which the parties have agreed are matters for the arbitral tribunal – whether the obligation to redeliver had arisen, and whether and in what terms it should be specifically enforced – would, in practical terms, be finally determined by the court. Further, if the Vessels were redelivered now, that would bring charters in the sub-charter chain to an end, and would inevitably involve Owners deploying the Vessel for their own purposes. It is not realistic to suppose that this state of affairs could be reversed, and no undertakings were formulated which it was said might permit this. In this respect, the case is a stronger one than what was described as the “extreme” example given in *Cetelem* of an

order for the transfer of shares ([66]-[67]), which at least could be on terms obliging the transferee to retain them, and re-transfer them if the arbitral tribunal so ordered. These matters suggest considerable caution before any s.44(3) order is made.

33. Against that background, and weighing the factors I have identified, I am satisfied that there is not sufficient urgency in this case to make it appropriate to make an order of the kind sought under s.44(3).

The possibility of a further application to the court

34. It is, of course, possible, that after having an opportunity properly to consider the position, the arbitral tribunal decides that the case cannot fairly be brought to a final determination within anything like the period referred to above, but only on the basis of a very significantly longer timetable. It would then be open to the arbitral tribunal, if it thinks fit, to give Owners' permission to bring an application to the court under s.44(5).
35. An application under s.44(4) would still involve the court being asked to reach an effectively final decision on matters which the parties have agreed to refer to arbitration, and, for that reason, is clearly less satisfactory than the arbitral tribunal addressing these matters, with the court's enforcement mechanisms being made available under s.66 of the 1996 Act as appropriate.
36. However, court intervention in the arbitral process which is sanctioned by the arbitral tribunal can more readily be reconciled with the policy in s.1 of the Arbitration Act 1996 than applications made without the arbitral tribunal's consent. Further, I would not regard the fact that the LMAA tribunal does not itself have the power to grant interim injunctive relief as precluding it, to the extent it thought appropriate, from expressing its views on the merits of such an application when ruling on an application by one party for permission to apply to the court for s.44 relief. If, as the tribunal charged with granting final relief, the arbitral tribunal thought that the prospects of a final award for specific performance were slim, they might well conclude that it would not be appropriate to consent to an application to court in those circumstances.
37. It has been held that an arbitral tribunal with responsibility for deciding the facts which one party is relying on in support of a petition to wind up a company on just and equitable grounds should not express a view on whether it would be just and equitable to wind-up the company because this would constitute an "ineffective legal judgment" which could not bind the court (*FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33, [81]). However, an arbitral tribunal which is asked to give its consent to the court's intervention in the arbitral process for the purpose of seeking an order which would, in practical terms, resolve one of the issues which is for the final determination of the arbitral tribunal, is in my view entitled to explain its reasons for permitting the application.

38. If such permission is granted, the decision whether or not to grant relief will be a matter for the court, but, for my part at least, an understanding of the views of the arbitral tribunal would be of assistance in a case in which the court's ruling will effectively be final, and the option in s.44(6) of allowing the arbitral tribunal to revisit the decision unavailable.

The other issues raised by Charterers

39. In the light of the conclusions I have reached, it would not be appropriate for me to address the other matters relied upon by Mr Collett KC, which, for the moment at least, are matters for the arbitral tribunal.

Conclusion

40. For these reasons, Owners' application for relief under s.44(3) of the 1996 Act, both in its original and in its revised form, is refused.