BNP Paribas s v Deloitte & Touche LLP [2003] APP.L.R. 11/28

Mr Justice Morison: 28th November 2003

1. There is an arbitration in being between BNP Paribas and Avis arising out of an agreement under which BNP effectively acquired a group of Avis' companies recently bought by Avis from Cendant, which itself subsequently merged with Avis. The arbitration is governed by the ICC Rules and three distinguished arbitrators have been appointed. The place of the arbitration is London and the 1996 Arbitration Act applies to it. The Agreement, pursuant to which the companies were acquired, is governed by the Laws of the State of New York. In the most general terms, BNP allege that Avis made false and fraudulent misrepresentations about the value of the business of the companies and, in consequence, they paid substantially over the odds for them. The amounts involved in the claim are very substantial [hundreds of millions of US$]. Avis deny that they misrepresented the value of the businesses and rely, in part, on the fact that BNP conducted its own due diligence inquiries [through accountants Ernst & Young] and also rely on the fact that the Avis' accounts for 1999 and 2000 were audited by Deloitte & Touche LLP(D & T), English auditors, and signed off without qualification. In support of Avis' case in the arbitration, a witness statement made by the relevant audit partner of D & T [Mr Mullins] has been filed. It is on the basis of the defence and the witness statement that this application has been made. No allegations are being made against D & T in the arbitration and none has been suggested in correspondence by either of the two parties.

2. The terms of the application are:

   "that the Claimants [BNP] do have permission pursuant to CPR Rule 34.4 to issue and serve the witness summons in the form attached to this Application Notice because

   1. The Defendant [D & T] has in its power, possession custody or control documents which are relevant to arbitration proceedings to which the [BNP] are a party and/or which are referred to in the witness evidence served in those arbitration proceedings.

   2. The application complies with section 43 of the Arbitration Act 1996 and CPR Rules 31.14(1)(b), 31.17 and/or 34.4 and paragraph 7.1 of the Practice Direction to CPR Part 62.

   The draft witness summons addressed to D & T shows that a witness is summoned to attend the Court on a date to be specified "to produce the following documents – The documents set out in Appendix 1 to the Arbitration Claim Form in this matter issued on 24 October 20003, a further copy of which is served herewith". The schedule contains some 20 items of which two have been dropped.

3. As part of the background, I was shown a copy of an agreement made between Avis and D & T called a *"Joint Defence Agreement"*. This agreement recited the role played by D & T, namely that they performed *"certain services for Avis, including services rendered in connection with efforts to finalise an agreed post-closing balance sheet pursuant to the [Acquisition Agreement]"* and *"in order to pursue an effective defence of the Arbitration, [D & T] and Avis have concluded that from time to time their interests will be best served by sharing or generating documents, factual material, mental impressions, memoranda, interview reports, litigation strategies and other information including the confidences of [D & T] or Avis – all of which will hereafter be referred to as "Defence Materials" and "it is the purpose of this Agreement to ensure that any exchange and/or disclosure of Defence Materials does not constitute a waiver of any privilege or immunity otherwise available to [D & T] and Avis respectively"*. This Agreement was made on April 2 2002, shortly after BNP had demanded arbitration in accordance with ICC Rules.

4. The other part of the background material to which I was specifically referred was a letter from the arbitral panel dated May 28 2003. The panel expressed their belief that the documents listed in the schedule shown to them [the same as that annexed to this application] *"are or may be relevant to the issues in dispute in this arbitration and gives its permission to the parties to request their production from [D & T], if necessary, pursuant to section 43 of the Arbitration Act 1996 Arbitration Act 1996."* Both BNP and Avis were asking for this approval from the arbitrators. The position of Avis has changed to this extent: I am told that Avis neither supports nor opposes the present application. Avis wish to remain neutral and, although served with the Court papers they did not appear or take any part in the arguments which I heard. BNP were represented by Roger Stewart QC and D & T were represented by David Joseph QC. I am grateful to them for their help.

5. This application raises a point of some importance. Does the Court have power under the Arbitration Act 1996 to order a third party [that is a person who is not a party to the arbitration in question] to make disclosure of documents? Strictly, this question only arises were I to conclude that by reason of the extent of the request in this case, this is, effectively, an application for disclosure rather than an application for production of specified documents. Mr Stewart says that it is the latter; Mr Joseph says that it is the former. But as his second argument, Mr Stewart argues that the court has power to make a third party disclosure order in aid of an arbitration.

6. However it is dressed up, it seems to me clear that this is an application for disclosure rather than production in evidence of documents brought to the tribunal under a subpoena. The categories of documents in the Schedule are wide: for example *"notes memoranda and/or other documents relating to the preparation of the statutory accounts for 31 December 1999 and the adjustments included therein"* [item 2A] and items 5, 6, 7A, 13, 14, 16 and 17. Had this been an application in the classic sense of a witness being required to produce documents, the cases show that to be effective a subpoena duces tecum as it used to be called or a witness summons to produce documents as it is now called must relate to specific documents which can be identified. The court must be astute to ensure that *"what is essentially a discovery exercise, whereby the applicant is seeking production of documents with a view to ascertaining whether they may be useful rather than with a view to adducing them in evidence as proof of*

some fact is not disguised as an application to produce particular documents." Per Sir Donald Nicholls VC in **Panayiotou & Others v Sony Music Entertainment (UK) Ltd** [1994] CH 142 at page 153.

As the Vice Chancellor was saying, there is an important distinction between requiring documents to be produced as evidence of some fact, as with a subpoena duces tecum, and asking for disclosure to trawl through documents to see if they support the applicant's case directly or by undermining the value of a witness' testimony. This principle is well entrenched in our law: see ***The Lorenzo Halcoussi*** [1988] 1 Lloyd's Law Reports page 180 at page 184, Steyn J; and Potter J in ***Wakefield v Outhwaite*** [1990] 2 Lloyd's Law reports 157 at 164 where he said: *"On the basis of an exiguous plea as to relevance and probative effect, the defendant calls for disclosure of numbers of substantial files with the intention of going through all of them in the hope of procuring a benefit which is speculative at best and based on an assumption (which I am not prepared to make on the material before me) that Mr Gallafent has not told or will not tell the truth in relation to his dealings with the Note and his understanding of its contents. I see nothing in the authorities which suggests that it is a legitimate excuse to call for files of documents when it is not asserted that the contents or at least the bulk of the contents consist of individually relevant documents."*

In ***In re Asbestos Insurance*** [1985] 1 WLR 331 at page 337/8, Lord Fraser drew a distinction between a request for a class of documents which would not be permissible and a more targeted request for specific documents which would be permissible even if the documents in question were compendiously described.

7. Here, the request is for classes of documents and the plain purpose of the application is to enable BNP to go through them to see if they can undermine the reliance made in the Defence on work done by D & T, and the evidence of Mr Mullins. This is not an application for the production in evidence of specific, identified documents. It is, in my judgment, an application for disclosure from a third party. As Mr Stewart said, what comfort could Avis take from the fact that their accounts were audited without qualification if, for example, it could be shown that they had misidentified a key issue. In other words, as I understood his position, he would wish to have the opportunity to show, by use of the disclosed material, that D & T's work and conclusions have little or no weight because the work was not done properly. Unless the Court has power to order disclosure from a third party, Mr Stewart's objective will be difficult to achieve. This objective applies with greater force in the light of Mr Mullins' witness statement. So I turn to the question whether I have power to order disclosure from D & T.

8. Mr Joseph submits that there is no power under section 43 of the Arbitration Act 1996 for a party to apply to the court for an order of disclosure whether it is third party disclosure or even disclosure from a party. The heading to Section 43 of the Act is "**Securing the attendance of witnesses"** and the section provides, as follows:

"(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."

9. Under the old Arbitration Act of 1950, section 12(4) empowered the court to issue a subpoena ad testificandum or duces tecum, to compel a witness within the jurisdiction to attend before an arbitrator. Subsection (6) gave the High Court the same powers in relation to a reference as it had in relation to an action in respect of, amongst other matters, "*discovery of documents …*". Had that power been currently in existence there is no doubt that the court would have had power to order third party disclosure since that is a power open to the court subject to certain limitations. However, this section was repealed by section 103 of the Courts and Legal Services Act 1990 and was not re-enacted in the 1996 Act. That Act was founded upon certain principles including 'party autonomy'. Section 1(c) provided that "*in matters governed by this Part [effectively the whole of what might be called the working part of the Act] the court should not intervene except as provided for …*".

10. Mr Joseph submits that the court's power to order a witness to produce documents is precisely the form of words in English to replace the Latin *"subpoena duces tecum*". In other words, whilst there is power to order a witness to attend an arbitration to give evidence or to produce documents in evidence, there is no power to order a third party to go through what is tantamount to a disclosure process. Thus, the case law referred to above is still good law. Unless the documents are properly identified with particularity a subpoena to produce documents will not be issued and therefore I should dismiss the application in limine. He also submitted that it was significant that the application form stated that it was in conformity with CPR 31.17 (third party disclosure) and that disclosure was referred to in Mr Stewart's skeleton argument.

11. For the Claimants, BNP, Mr Stewart argues that section 43 is derived from Article 27 of the Model Law, which provides for the tribunal or party with the approval of the Tribunal to request from a competent court, assistance in taking evidence according to the Court's rules on the taking of evidence. Section 43(4) provides an effective mechanism to "control the overly general or unduly burdensome application". It would be surprising if the result contended for by D & T were correct and the court had no power to order third party disclosure, because parties to an arbitration should be no worse off than if they were pursuing court rather than arbitral proceedings. Section 43(4) protected the third party from applications which would not have been granted had the application been

made under CPR 31.17 in court proceedings. Conversely, a third party should not be in a more advantageous position as a result of participating in arbitral as opposed to court proceedings. Although not actually a party, D & T were closely tied in with Avis in the proceedings by the Joint Defence Agreement.

12. In my view, Mr Joseph is right. It seems to me clear that section 43 does not give the court, in respect of arbitration proceedings, power to order disclosure from a third party. The language of section 43(1) is a reflection of the powers which the court possessed under section 12(4) of the 1950 Act. At the time when that Act was passed there was no procedural power to order disclosure from a third party save in odd and exceptional circumstances [eg to discover the name of a wrongdoer]. Subsection (4) of section 43 is simply a reflection of the same words in the old section 12(4) – "*but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action*". The result is not, I think, surprising. Arbitration is a private process of adjudication agreed to by the parties to it. Its proceedings are private and there are mechanisms to ensure that the privacy and confidentiality are maintained. Whilst it might well be possible to ensure that a third party, who was (hypothetically) required to disclose documents could receive similar protection from the parties [viz not to rely on the material otherwise than for the purposes of the arbitration, without the court's leave] that may not be so in every case. In this case, Avis did not participate. Despite Mr Joseph's concerns about confidentiality, I suspect that this difficulty could be overcome. But the fact is that the privacy of the process and the autonomy of the parties distinguishes arbitration from actions in the courts, and there should be no automatic assumption that one can read across from one to the other. I am not aware of any compelling need for the courts to be given an equivalent power to CPR 31.17. There is no academic support for Mr Stewart's views and no case where this issue has been raised and considered. Party autonomy and the removal of what may have been seen as the Court's interference with the arbitral process contained in section 12(6) of the 1950 Act, suggests to me that the policy is to restrict the number of occasions when a litigant in an arbitration can invoke this court's jurisdiction.

13. Furthermore, I do not regard the reference to the Model Law as assisting Mr Stewart's arguments. Model Clause 27 provides: *"The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this state assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."*

    This clause is dealing with the taking of evidence and not with the disclosure process. The taking of evidence is assisted by the issuing of a subpoena to produce, for introduction into the evidence, particular documents. Thus, section 43 gives effect to this Article. There is nothing in the Model Law which suggests that the Court should assist with the process of disclosure. Indeed, disclosure questions have been taken from the court [by the repeal of section 12(6)] and given back to the arbitral tribunal. This is recognised by sections 33 and 34 of the 1996 Act including 34(2)(d). That subsection makes disclosure by the parties a matter for the arbitral tribunal.

14. In summary, therefore, this is an application for the production of classes of documents as opposed to an application for the production in evidence of specific identified documents. Accordingly this is not an application which falls within section 43 because it has been too widely framed. It is an application which in court proceedings would have been apt under CPR 31.17. But that procedure is not available in an arbitration, as section 43 is dealing with production of documents in evidence, and not disclosure, as previously governed by section 12(4) of the 1950 Act. The decided cases make clear that under that procedure it is not permissible to *go 'document hunting'* with a view to trawling though documents to see what turns up. However, I should make it clear that if there were a properly targeted application relating to specific documents which could be said to be required to be adduced in evidence, then any such specific application would have to be considered on its merits. Second, I have not dealt with the details of the defence and Mr Mullin's witness statement because the application fails at the first hurdle. I would have ordered disclosure in this case had I the power to do so because I can quite understand BNP's concerns about their ability effectively to cross-examine Mr Mullins. However, the focus of the panel's attention is not on what D & T did but rather on what Avis said and did. It is for the Tribunal to decide whether Mr Mullins' evidence will be admitted without the disclosure and whether if it is admitted it has any and if so what evidential weight, without the disclosure. I say nothing about either question.

15. The application must be dismissed.

Mr R Stewart QC & Mr G Chapman (instructed by Prettys Solicitors) for the Claimants
Mr D Joseph QC (instructed by Gibson, Dunn & Crutcher LLP) for the Defendant