Neutral Citation Number: [2025] EWHC 2394 (Comm)

Case No: CL-2025-000230

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/09/2025

Before :

MR JUSTICE CALVER

- -

Between :

VXJ	**Claimant**
- and -	
(1) FY	
(2) RH	
(3) XL	
	Defendants

- -
- -

Angeline Welsh KC (instructed by **Herbert Smith Freehills Kramer LLP**) for the **Claimant**
Charles Kimmins KC (instructed by **Three Crowns LLP**) for the **First Defendant**
Ricky Diwan KC, Thomas Sebastian (instructed by **Quinn Emmanuel Urquhart Sullivan UK LLP**) for the **Second and Third Defendants**

Hearing dates: 10/09/2025

- -

JUDGMENT

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 10:30 on Monday 22 September 2025.

Mr Justice Calver :

Application and Factual Background

1. This is an application by the Claimant ("**C**") for the production of certain documents or categories of documents by the Second Defendant ("**D2**") and Third Defendant ("**D3**") (i) by way of court-ordered witness summonses pursuant to section 43 of the Arbitration Act 1996 ("**the Act**"), alternatively (ii) by way of a court order for the copying of documents (it is said) under Section 44(2)(c) of the Act. The arbitration in support of which the orders are sought is a London seated arbitration (under the 2013 UNCITRAL arbitration rules) brought by D1 (being a subsidiary of D3) against C by Notice of Arbitration dated 19 February 2020. D2 and D3 are not parties to that arbitration (only C and D1 are parties to the arbitration agreement), which is brought under an Investment Agreement between C and D1 dated 6 November 2009 ("**the Investment Agreement**") concerning a valuable minerals mining project ("**the mining project**").

2. At the time of the conclusion of the Investment Agreement, the mining project was a joint venture between company X (which was majority owned by D2) and company Y, being a company owned by C. In 2022, D3 acquired X and accordingly D3 now indirectly holds 66% of the shares in D1. D2 and its parent, D3, are both English incorporated companies. C sought to join D2 and X to the arbitration but the Tribunal rejected that application in its Partial Award dated 11 February 2022.

3. On 10 January 2018 C issued a Penalty Notice by which it purported to impose taxes, fines and penalties on D1 despite (according to D1) the existence of a tax stabilised regime contractually committed by the parties to under the Investment Agreement. C subsequently purported to impose further taxes and penalties on D1, with the total sum imposed being several hundred million dollars. D1 claims these sums by way of damages in the arbitration, alleging a breach of the Investment Agreement by C.

4. On 30 April 2021, C filed a Defence and Counterclaim, subsequently amended on 13 August 2024 ("**ASoDC**") by which it advanced two counterclaims:

    a. The first counterclaim (at paragraphs 75-123 and 538-543) was in respect of the alleged corruption of eight ex-government officials of C (and one other

person), at or around the time that the Investment Agreement was entered into and subsequently. C infers that this corruption necessarily implicated the Defendants.

b. The second counterclaim concerns allegations (at paragraphs 755-766 and 773-777) of a breach of a duty of care by D1 by reason of project delays caused by the alleged mismanagement of the mining project, which adversely affected the timely receipt of revenues.

Tribunal's Procedural Order 15

5. These counterclaims were the subject of document production requests by C by way of disclosure in the arbitration, and gave rise to decisions by the Tribunal pursuant to Procedural Order No.15 dated 21 January 2025 ("**PO15**"). In respect of documents held by C's controlling shareholders and affiliated companies, including D2, D3 and X, the Tribunal stated at paragraphs 28-29 of PO15 as follows:

> "*28. … As the companies which (through predecessors as applicable) initially made investment decisions regarding the [mining] project, and which set up [D1] as a joint operating company to perform the Investment Agreement with [C], [D2/D3] and [X] would be expected to have certain documents in their files that are relevant and material to certain issues in dispute.*
>
> *29. Of course, the fact that [D2/D3] and [X] may have responsive documents does not ipso facto mean that [D1] has legal authority to direct them to search those files and produce documents. In general, the fact that a parent company has the power to instruct its subsidiary with respect to document production does not mean the same legal authority necessarily exists in reverse, for a subsidiary to instruct its parent company to cooperate. But even so, tribunals have certain tools they can use to try to obtain access to relevant materials in the hands of controlling shareholders*."

6. Accordingly, the Tribunal concluded at paragraph 31 as follows:

> "*Taking these matters into account, the Tribunal declines to deny outright (as [D1] urges) certain document requests aimed at materials presumptively in the hands of [D2/D3] and/or [X]. Instead, where applicable, the Tribunal directs [D1] to make best efforts to obtain responsive documents from [D2/D3] and [X], emphasizing to these shareholders the Tribunal's request that they assist [D1] diligently and in good faith in that regard. [D1] is also directed to report back to the Tribunal, at the time of document production to [C], whether or not [D2/D3] and [X] have agreed to cooperate with these requests by conducting reasonable and diligent searches for material responsive to the Tribunal's inquiries*."

7. The Tribunal further indicated (at paragraph 33) what its likely approach would be in the case of an uncooperative stance being adopted by D2/D3 and X to any requests for assistance made of them by D1 in obtaining relevant documents:

> *"…it would weigh with the Tribunal if it were ultimately to transpire that [D2/D3] and [X] had been selective in their assistance to these proceedings, willing to provide evidentiary support only to the extent it advanced the Claimant's cause, while refusing reasonable searches for and production of other relevant material when it appeared less advantageous. The Controlling Shareholders' relationship with the Claimant and their possession of relevant evidence should not be used as a sword while invoking corporate separateness as a shield. For this purpose, the Claimant is directed to share this Order with [D2/D3] and [X], along with the Tribunal's rulings in Annex B*."

8. Annex B of PO15 sets out the document production requests of C together with the Tribunal's rulings in respect of the same. In particular it contains the following requests and rulings:

> Document Request 6
>
> *"[C] requests the production of all Documents, including Communications, of or connected to the [mining] Project, concerning any reporting, whistleblowing, notifications or similar, regarding breaches, violations, non-compliance with, suspicions, red flags of violation of anti-money laundering and/or anti-corruption guidelines, standards, rules, laws, policies or similar."*
>
> Decision of Tribunal
>
> *"The request as framed is denied as overbroad and unduly burdensome. However, [D1] shall produce, from its own files or as obtained from [D2/D3] and [X] pursuant to the Tribunal's general ruling in PO15 … about "best efforts" requests to the Controlling Shareholders:*
>
> *(a) documentation of any investigations undertaken (internally or through the hiring of external agents) of the potential involvement of [D1-D3 or X] personnel in the specific instances of corruption that [C] has alleged against nine former Government officials (ASoDC, ¶¶ 71-123); and*
>
> *(b) any reports generated as a result of such investigations.*
>
> *Given the sensitivity of such investigations, responsive material may be produced subject to a mechanism for restricted dissemination…"*

The parties have referred to these documents compendiously as the "**Corruption Investigation Documents**".

Document Request 18

"[C] requests the production of all Documents that were submitted in [certain US Proceedings to which X was a party], excluding those that are publicly available or have already been submitted in this proceeding[1]*."*

Decision of the Tribunal

"Request granted, subject to the Tribunal's general ruling in PO15 … about "best efforts" requests to the "Controlling Shareholders," and on the understanding that responsive material may be produced (a) subject to a mechanism for restricted dissemination (see generally PO15 …) and (b) subject to redaction of any information not pertaining to [C's] counterclaim.

The Tribunal emphasizes that the grant of this request does not require [X] or anyone else to apply to the court to obtain documents from the sealed file. The Tribunal expects that [X] would have its own copy of the litigation file, and nothing in the court's sealing of the as-filed version, to protect against access by the broader public, would restrict what [X] may do with its own copies."

The parties have referred to these documents compendiously as the "**US Proceedings Documents"**.

Document Request 22

"*[C] requests the production of the following Documents referred to in the ICG Report:*

1) All TEG and BED reports from January 2016, as referenced in the ICG Report …" [together with 13 other identified documents or categories of documents referred to in sub-requests 22(2)-(14)]

Decision of Tribunal

"Sub-request Nos. 22(2)-22(14) are granted; these are specific documents referenced in the ICG Report and [D1] does not object on the basis of relevance or breadth…

Sub-request No. 22(1) is granted, subject to the Tribunal's general ruling in PO15 … about "best efforts" requests to "Controlling Shareholders." With respect to [D1's] invocation of confidentiality and commercial sensitivity, see the Tribunal's general ruling in PO15 … about a mechanism for restricted dissemination."

[1] For the purposes of this application, C has broken down this broad-ranging request for disclosure of all such documents by reference to more specifically described documents or classes of documents - see further below.

9. These were the Tribunal's disclosure rulings as against D1 which are relevant to the present applications. By these rulings the Tribunal determined that for the purposes of disclosure in the arbitration the documents to which it referred were relevant and material to the dispute (see paragraph 28 of PO15).

Tribunal's Procedural Order 16

10. On 31 March 2025 C submitted an application to the Tribunal alleging that D1 had failed to comply with these rulings in PO15 (in particular in respect of Document Requests 6, 18 and 22) and seeking the Tribunal's permission to apply to this court for "*disclosure under sections 43 and 44 of the Act*". To be more precise, the Tribunal's permission was required under section 43(2) and 44(4) of the Act. Moreover, and importantly, it is not permission to apply for *disclosure* which is being sought. Rather, it is permission to seek an order to secure the attendance of a witness to give oral testimony or to produce documents or other material evidence (section 43(1)) and permission to seek an order for the inspection, photographing, preservation, custody or detention of property which is the subject of the proceedings or as to which a question arises in the proceedings. Neither the Tribunal nor the court has jurisdiction to order disclosure against a non-party, such as D2/D3. This is an important distinction which must be borne firmly in mind in the proper disposal of this application.

11. As the Tribunal recorded in paragraphs 14 and 15 of PO16:

"In their separate letters to [D1] dated 18 February 2025, which [D1] copied to both [C] and the Tribunal, both [D2/D3 and X] included a general objection to [C's] requests, including that (1) neither was a party to the arbitration and therefore they were "not under any obligation to produce documents in connection with the arbitration"; (2) neither should "be required to search for and produce documents already in [C's]possession, custody or control"; and (3) "many of the Requests are overly broad and unduly burdensome."…

15. D2/D3 stated as follows with respect to specific requests:

…

In respect of Request 6, we have been informed by our legal team that the [Defendants] instructed external counsel, Baker & McKenzie LLP, to conduct a confidential internal investigation of certain of the allegations to which the Request relates. The "documentation" and "reports" resulting from external counsel's investigation are strictly protected by legal professional privilege and are being withheld on that basis.

In respect of Request 18, which seeks sealed and redacted documents submitted in the [US Proceedings], the sealed or redacted materials are being withheld on the grounds of commercial sensitivity and PII that persuaded the U.S. Court to seal or redact them.

In respect of Request 22, which seeks documents purportedly "referred to" in the ICG Report, we note that the decision to appoint ICG and the commissioning of the ICG Report were undertaken by a Special Committee of [D1's] Board of Directors which specifically excluded [D2/D3].

> *• In respect of sub-request 1, which seeks "all TEG and BED reports from January 2016", we note that any such documents were not relied upon in the ICG Report (and, in fact, the ICG confirmed that it did not review any such reports). […] Any documents prepared by TEG or BED are highly confidential, contain commercially sensitive information, and are accessible only to certain senior [D2/D3] decision-makers and are not shared beyond, including with [D1].*
>
> *• In respect of sub-requests 2-14, the relevant documents were already provided to the ICG (and the Special Committee) at the time and therefore they are in the possession, custody or control of [D1]."*

12. I consider that there was force in these objections.

13. The Tribunal gave its ruling in respect of this application in PO16 at paragraphs 94-105. Whilst D1 contended that any application to this court was bound to fail, the Tribunal stated that it could not prejudge the outcome of a potential application by precluding C even from requesting the assistance of the court in the first place. However, the Tribunal drew a distinction between documents which D1 had already searched for but could not find (for which its permission was withheld) and documents withheld by D2 and D3 as controlling shareholders either on grounds of legal privilege or commercial sensitivity (for which permission was granted).

14. In particular, so far as the *Corruption Investigation Documents* are concerned, the Tribunal stated that any privileged analyses or recommendations prepared by D1's external counsel, as a result of their investigations of potential involvement in corruption, would constitute documents (or passages of documents) that need not be produced. However, if the investigations resulted in uncovering underlying evidence regarding past corruption or bribery, this factual evidence – which would not have been privileged to begin with – is not rendered retroactively privileged, simply because it was discovered by external counsel and subsequently discussed in their reports (or included as exhibits or appendices to those reports). That is obviously

correct. The Tribunal granted C leave to seek the assistance of the English courts with respect to non-privileged information (including non-privileged passages of otherwise privileged documents) uncovered by, or reflected in, the *Corruption Investigation Documents*.

15. So far as the *US Proceedings Documents* are concerned, the Tribunal stated that D2/D3 were withholding the documents on grounds of commercial sensitivity (and not lack of access). It reminded the parties that in PO15 it drew a distinction between documents in sealed court files in the US and copies of those documents which D2/D3 may have. It pointed out that D2/D3 had made no request of the Tribunal for heightened confidentiality protections for these documents as had been offered by the Tribunal. Accordingly the Tribunal therefore granted C leave to seek the assistance of the English courts with respect to these documents. The Tribunal did not advert, however, to the fundamental objection that the category of documents sought was overly broad.

16. Finally, so far as the *TEG and BED Reports* are concerned, the Tribunal referred to the fact that these too had been withheld by D2/D3 on grounds of commercial sensitivity and yet D2/D3 had made no request of the Tribunal for heightened confidentiality protections for these documents as had been offered by the Tribunal. Accordingly the Tribunal granted C leave to seek the assistance of the English courts with respect to these documents.

17. In its concluding remarks at paragraphs 112-114 of PO16, the Tribunal stated, in refusing C's application for bifurcation of the proceedings to allow for the time required to have its application to the court heard, that it was "*alive to the possibility that the English courts may not grant any additional disclosure*" and that if the application to this court resulted in the availability of additional documents, then "*the Tribunal will consider an application for leave to place those documents into the arbitration record, together with supplemental submissions by both Parties regarding the relevance of the additional documents*." I agree with Mr. Diwan KC that whilst the Tribunal has given its permission for this application to be made (at least under section 43(2)), it was obviously not ruling on the application and it did not determine that production of the documents sought is necessary for there to be a fair resolution of the issues in the arbitration. Had the Tribunal done so, that might have had some

relevance to the determination of the application[2], although even were that so, I would not have granted this application because of the many objections to the same discussed below.

18. The arbitration is due to commence on Monday 15 September and to run until 26 September. This application came before me as late as Wednesday 10th September (in the legal vacation). It was set down for a 1 day hearing but that was an underestimate of the time required to hear it. The consequence was that the parties were compelled to make their submissions at speed and they did not have time to deal orally with important aspects to the application, in particular the detail of the relevance and materiality of the many individual documents sought in respect of the US Proceedings. The court has been left to do that as best it can in the limited time available to it after the conclusion of the hearing.

The application before this court

19. The application as originally made by C was an application under section 43 and 44(2)(a) and (b) of the Act. However, in its skeleton argument for this hearing, C put its case differently. It now wishes to advance its application under sections 43 and 44(2)(c) and not under 44(2)(a) and (b) (recognising that those two sub-paragraphs are of no application on the facts of this case), and Ms Angeline Welsh KC for C provided the court with an amended draft Order to that effect. Mr. Ricky Diwan KC, who appeared together with Thomas Sebastian as counsel for D2/D3 upon the application, objected to this course. I return to the validity of this objection below.

(i) Application under section 43 of the Act

20. The first way in which Ms Welsh KC put C's application was for an order under section 43 of the Act. That section provides as follows:

[2] In *Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd* [2017] EWHC 44 (Comm) at [53] Males J expressed the view that this would be "likely to be" a "highly relevant" factor. I would prefer to say that it *may be* a relevant factor, and that it may be even a highly relevant factor, but whether that is so always depends on the particular facts of the case. In this case it would be of little relevance in view of the way in which the production requests are formulated.

> *"**43.— Securing the attendance of witnesses**.*
>
> *(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*."

21. As I have explained, this is not an application for disclosure against a non-party to the arbitration. Neither the Tribunal nor the court has jurisdiction to order disclosure against a non-party, such as D2/D3: see *Tajik Aluminium v Hydro Aluminium* [2006] 1 WLR 767, in which the Court of Appeal approved the approach adopted by Morison J in *BNP Paribas v Deloitte & Touche LLP* [2004] 1 Lloyd's Rep 233; of Sir Donald Nicholls VC in *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] Ch 142 at 153; and of Gross J in *South Tyneside BC v Wickes Building Supplies Ltd* [2004] EWHC 2428 (comm), in which the Judge made clear in paragraph 23(i) of his judgment that a witness summons must specifically identify the documents to be produced and must not be used as an instrument to obtain disclosure. The Court of Appeal in *Tajik* (at [25g-h]) approved that approach in concluding that "*the documents to be produced had to be specifically identified, or at least described in some compendious manner that enabled the individual documents falling within the scope of the subpoena to be clearly identified*."

22. The Court of Appeal explained (at [24]) that this is to be contrasted with an order for disclosure which "*normally directs the person to whom it is addressed to carry out a reasonable search for documents in his possession falling within classes which are often broadly described and to list them for the information of the parties to the proceedings. Often the documents are described in terms which call for the exercise of a degree of judgment in determining whether a particular document does or does not fall within the scope of the order. Any order of that kind, being an order of the*

court, is one that must be strictly obeyed, but it would be extremely unusual for a penal sanction to be attached to it or for a failure to comply in some material respect to be treated as a contempt of court, save in the case of a contumacious refusal to obey. Moreover, although disclosure is usually a prelude to production for inspection, the person giving disclosure may resist production, if he has grounds for doing so, and in any event has no obligation to do more than make the documents available to the party who has obtained the order. A witness summons to produce documents, by contrast, involves the exercise of the court's coercive powers. The person to whom it is addressed is at risk of being in contempt of court if he fails to comply in any material respect, as the summons itself makes clear. He is obliged to bring the documents to which the summons refers to court, not simply to list them or make them available for inspection. In substance a witness summons to produce documents is no different from a subpoena duces tecum…".

23. The application for a witness summons was refused in *Tajik*. In that case the applicant sought a witness summons pursuant to section 43 of the Act for the production to the court of documents described as follows: "*Any documents relating to supplies of alumina … to the claimant*"; "*any documents relating to supplies of aluminium… by the claimant to Hydro*"; *Any documents passing between…*" and so forth. Moore-Bick LJ explained at [29] that the documents were accordingly described in broad terms of the kind that would be appropriate to an application for disclosure but which failed to identify the documents with sufficient certainty to enable the witness to know what was required of him.

24. Similarly, in *In re Asbestos* [1985] 1 WLR 331, the documents sought under the analogous section 2(4)(b) of the Evidence (Procedure in Other Jurisdictions) Act 1975 consisted of, in particular, "*the written instructions from respondents or their agents to [the brokers] to obtain [the insurance] policies*". There was no evidence that there was usually a document or set of documents by which written instructions for policies were transmitted to the brokers. In the light of that fact, the court held that this was effectively a request for the production of "written instructions *if any*", that is to say for conjectural documents which may or may not exist.

25. To like effect in *Refco Capital Markets v Credit Suisse* [2002] CLC 301 (CA) a reference to "*specific agreements*" between the banks and a variety of persons "*relating to payment of fees or commission*" was said to be a request to search for

documents and disclose them; it was not "*an identification of particular documents which are known to exist and which should be produced. To put it another way, it is not a request for "the" agreements, it is a request for "any" or "all"*."

26. Accordingly:

(1) Each document should be individually identified in the witness summons, although a compendious description of several documents will suffice provided that the exact document in each case is clearly indicated (*Tajik* at [27]).

(2) Justice demands that the person to whom the witness summons is addressed should be told clearly when and where he must attend and what he must bring with him. The documents must be identified with sufficient certainty to leave no real doubt in the mind of the person to whom the summons is addressed about what he is required to do (*Tajik* at [27]-[28]).

(3) The particular documents must be actual documents, about which there is evidence which has satisfied the court that they exist, or that they did exist, and that they are likely to be in the respondent's possession. Actual documents are to be contrasted with conjectural documents which may or may not exist: *In re Asbestos* [1985] 1 WLR 331at 338 per Lord Fraser and *Refco Capital Markets v Credit Suisse* (*supra*) at 311 per Waller LJ. It is sufficient to show that the specified documents are *likely to exist*, but it is not sufficient to show that they may or may not exist: *Omar v Omar* [1996] Lexis Citation 5348 per Peter Gibson LJ. See also *Wakefield v Outhwaite* [1990] 2 Lloyds Rep 157 at 165 in which Potter J referred to the basic purpose of a subpoena being "*to obtain production at trial of specified documents the existence or likely existence of which is demonstrable and which are necessary for the just disposal of the cause*" (emphasis added).

(4) It follows that where the applicant has not seen the documents sought and does not know what they contain, the application can be more readily characterised as a discovery exercise, unless the applicant can demonstrate that it is *likely* that specific, relevant documents exist.

27. This brings me to the question of relevance: the documents which are sought must also be shown by the applicant to be relevant to the proceedings and accordingly necessary for the fair disposal of the matter: see *Omar* (*supra*) and *Panayiotou v Sony*

(*supra*) at p. 151. Thus, the applicant is not entitled to seek production of documents with a view to ascertaining whether they *may be useful* rather than with a view to adducing them in evidence of proof of some fact; and the fact that the material before the arbitrator might be *improved* by the production of the documents does not necessarily justify the conclusion that the arbitrator is unable to dispose fairly of the arbitration without them. Moreover, the witness must not be required to undertake an unfairly burdensome search through his records to find this or that document or to see if he has any documents relating to a particular subject matter.

28. Gross J (as he then was) helpfully sought to pull together the various requirements of a valid witness summons by reference to the position under the "old" Rules of the Supreme Court in *South Tyneside* (*supra*) at [23], which it is worth setting out here as follows:

"

i) *The object of a witness summons is to obtain production at trial of specified documents; accordingly, the witness summons must specifically identify the documents sought, it must not be used as an instrument to obtain disclosure and it must not be of a fishing or speculative nature.*

ii) *The production of the documents must be necessary for the fair disposal of the matter or to save costs. The Court is entitled to take into account the question of whether the information can be obtained by some other means. It is to be remembered that, by its nature, a witness summons seeks to compel production from a non−party to the proceedings in question.*

iii) *Plainly a witness summons will be set aside if the documents are not relevant to the proceedings; but the mere fact that they are relevant is not by itself necessarily decisive in favour of the witness summons.*

iv) *The fact that the documents of which production is sought are confidential or contain confidential information is not an absolute bar to the enforcement of their production by way of witness summons; however, in the exercise of its discretion, the Court is entitled to have regard to the fact that documents are confidential and that to order production would involve a breach of confidence. While the Court's paramount concern must be the fair disposal of the cause or matter, it is not unmindful of other legitimate interests and that to order production of a third party's*

confidential documents may be oppressive, intrusive or unfair. In this connection, when documents are confidential, the claim that their production is necessary for the fair resolution of proceedings may well be subjected to particularly close scrutiny.

v) The Court has power to vary the terms of a witness summons but, at least ordinarily, the Court should not be asked to entertain or perform a redrafting exercise other than on the basis of a considered draft tendered by the party's advocate."

29. With the legal principles set out above firmly in mind, I turn next to consider the merits of the application for witness summonses under section 43 in respect of the documents or classes of documents which C seeks in the Amended Schedule A to its Arbitration Claim Form (appended to this Judgment as a confidential annex).

Merits of application under section 43 of the Act

The Corruption Investigation Documents: Document Request 6

30. The final amended version of this document request is at item 1 of Schedule A. It reads "*Documents cited, quoted, exhibited, appended or annexed to any work product(s) or report(s) of Baker & McKenzie, regarding the specific instances of corruption that [C] has alleged against [9 named individuals]*."

31. Under the heading "relevance and materiality" in Schedule A, C refers in particular to a letter dated 18 February 2025 from D2/D3 in which it states:

> "*In respect of Request 6, we have been informed by our legal team that [D2/D3] instructed external counsel, Baker & McKenzie LLP, to conduct a confidential internal investigation of certain of the allegations to which the Request relates. The "documentation" and "reports" resulting from external counsel's investigation are strictly protected by legal professional privilege and are being withheld on that basis*."

32. In paragraphs 19-24 of Ms Jennett's second witness statement, she provided further clarification of this statement as follows:

> "*19. The Report resulted from a wide-ranging investigation, which covered various topics that are unrelated to the individuals referenced in [C's] First*

Counterclaim, and are irrelevant to that counterclaim. The investigation underlying the Report took place over four years. As part of that investigation, Baker McKenzie produced a substantial number of privileged work products. The Report is a high-level summary and guide to those privileged work products, and how they were produced. It quotes no underlying factual evidence. It annexes or exhibits no underlying factual evidence. Rather, it describes (at a high-level) privileged findings set out in privileged work products produced by external legal counsel.[3] *It also describes the document collection / review process followed to enable the generation of those privileged work products.*

[C's] request for documents "referred to in" the Report

20. Given that [C] is not entitled to copies of privileged work products, we understand [C's]request for documents "referred to in" the Report to include the various categories of documents collected and reviewed to produce the Report (and the various legally privileged work products otherwise referred to in the Report), albeit none of the documents within those categories are directly quoted from in the Report.

21. This would be a highly substantial quantity of documents. The various categories of documents collected for the Report are contained in an archive (that is not presently accessible as explained at paragraph 28 below) (the "Archive"). That Archive is over 2.5 terabytes in size. I understand that the Archive contains primarily email data.

22. The highly substantial quantity of these documents is also evidenced by the scope of the collection exercise that gathered those documents. According to the Report itself, that exercise was conducted as part of a four-year investigation, across an eight-year date range.

23. Accordingly, as set out at paragraph 16 of Julianne Hughes-Jennett 1, any Request in these terms is excessive and overbroad, and as set out at paragraph 18 of Julianne Hughes-Jennett 1, that Request is likely to capture substantial numbers of irrelevant documents. That follows directly from the highly substantial number of documents subject to collection for the Report. It also follows from the wide-ranging nature of the Report, which covers various topics that are unrelated to the individuals referenced in [C's] First Counterclaim, and are irrelevant to that counterclaim. Moreover and as set out at paragraph 19 of Julianne Hughes-Jennett 1, that Request would be expected to capture substantial numbers of privileged documents, not least because some custodians referenced in the Report are legal counsel.

[3] Emphasis added.

> *24. Given paragraphs 21-23 above, the Claimant's Request would require a lengthy and onerous review for relevance and privilege, over a highly substantial set of documents. That review would equal or exceed a disclosure exercise in a high-value commercial trial. As will be addressed in submissions, that is not an appropriate request for non-party disclosure."*

By this last sentence, I take Ms Jennett to be saying (or meaning to say) that this is a request for non-party disclosure which is inappropriate on an application for a witness summons.

33. So far as the Archive is concerned, Ms Jennett explains in paragraphs 27-28 of her witness statement that:

> "*the documents in the Archive were collected from a variety of network drives, hard drives, hard copy documents, and tapes, spanning a period of eight years and collected during the course of a four-year investigation. I understand that the Archive is currently stored on tape, and would have to be extracted and hosted digitally before it could be accessed. The Archive was created specifically for the purposes of the Report (and its associated collection and review), and holds the documents collected and reviewed for the purposes of the Report. The Archive is held by a third party law firm called Dorsey & Whitney LLP, who provided e-discovery services for the Report and its associated review."*

She continues:

> "*The Archive is presently inaccessible. I understand that restoring the Archive may result in not only an initial payment for transferring the files from tape to a cloud environment, but also a further payment of approximately $17,000-$18,500 per month of ongoing hosting. The process of restoring the Archive alone would take approximately 2-3 weeks. These figures do not take into account the cost or time involved in conducting the extensive disclosure exercise necessitated by the Claimant's request (referenced at paragraph 21-24 above). I have had extensive professional experience of analogous disclosure exercises. Given the volume of data contained in the Archive, reviewing that Archive could be expected (at a minimum) to take months, and to cost hundreds of thousands of pounds. Logistically, I understand that it would require restoring the files from tape, copying them into a network environment, reconnecting the files, upgrading the database to the most current version, and then reindexing the database. Moreover, I understand that the Archive consists of three SQL databases and randomized un-foldered zip-files from across the database, requiring the Respondents to restore the entirety of the archive and to sift through each document."*

34. By letter dated 21 August 2025, Herbert Smith Freehills Kramer, solicitors for C, asked Quinn Emanuel ("**QE**"), solicitors for D2/D3, in particular (i) how many of the substantial number of privileged work products prepared by Baker McKenzie concerned certain of the relevant corruption allegations and (ii) how many underlying documents are cited, quoted, appended, exhibited or referred to in the Baker McKenzie privileged work products, as opposed to the high level summary and guide to those privileged work products referred to by Ms Jennett.

35. QE's response dated 27 August 2025 was as follows:

    (1) The Report, itself privileged, is a high level summary and guide to other privileged work products, resulting from a wide-ranging investigation which covered various topics unrelated to the individuals referenced in the C's First Counterclaim, as well as certain of the individuals to which the Request for *Corruption Investigation Documents* relates.
    (2) QE anticipated that only a small minority of the privileged work products referred to by the Report would pertain to individuals related to the Request for *Corruption Investigation Documents*. However, absent a full review of those work products, it is not possible to assess how many of them may pertain to those individuals. QE stated that it had not reviewed those work products, "*including because they are not presently accessible to [D2/D3] and because they are privileged and non-disclosable in any event*".
    (3) Given there has been no review of the privileged work products to which the Report refers, it is not possible to specify how many underlying documents are cited, quoted, appended, exhibited or referred to in the subset of those privileged work products, which may pertain to individuals related to the Request for *Corruption Investigation Documents*. However, QE consider this subset of privileged work products will be limited. This will in turn limit the number of documents cited, quoted, appended, exhibited or referred to in that subset.

36. In my judgment this request – "*Documents cited, quoted, exhibited, appended or annexed to any work product(s) or report(s) of Baker & McKenzie, regarding the specific instances of corruption that [C] has alleged against [9 named individuals]"* - is in the nature of an impermissible request for non-party disclosure. The request does not identify specific documents. Rather it is a request for D2/D3 to carry out a reasonable search for documents, and the request calls for the exercise of a degree of judgment in determining whether a document falls within the scope of the request – namely is the document cited etc in a Baker McKenzie work product or report "*regarding the specific instances of corruption that [C] has alleged against [9 named individuals]"*. It is a request for any or all documents cited etc in any work product or report of Baker McKenzie. It will require a burdensome relevance review and a privilege review of the work products, reports and any documents themselves.

37. Yet further, the request refers to conjectural documents which may or may not exist: even if it be the case that there are a "limited" number of documents cited etc in the various work products and reports of Baker McKenzie "*regarding the specific instances of corruption that [C] has alleged against [9 named individuals]",* it does not follow that those documents will necessarily be relevant to the pleaded allegations against D1. Indeed, in its disclosure ruling on Request 6, the Tribunal itself made clear that its order for disclosure against D1 was in respect of "*documentation of any investigations undertaken (internally or through the hiring of external agents) of the potential involvement of [D1-3] and [X]in the specific instances of corruption that [C] has alleged against [the 9 identified individuals]*" (emphasis added).

38. Nor has C made any attempt to satisfy the court that the Tribunal would be unable to dispose fairly of the arbitration without these documents. It already has a body of material to support its case concerning the implication of the Defendants in the alleged corruption of the 9 individuals.

39. I should add that I agree with the submission of Mr. Diwan KC that the Tribunal has not itself determined that these documents are necessarily relevant (that is why it expressly referred to (i) the Defendants' *potential involvement* in the specific instances of corruption and (ii) the fact that the English court might not grant any "additional disclosure" against D2/D3), and nor could it in circumstances where it is not known

whether these documents exist and, if they do, what they say. As I have already stated above, even if the Tribunal had determined the issue of relevance, that would not have persuaded me to grant the witness summons sought in view of the valid objections to its issue to which I have referred.

40. Further still, these documents are now held on an inaccessible archive maintained by a third party law firm. The archive would have to be restored at considerable cost and then presumably searched by key word searches. This is typical of a disclosure exercise. Ms Welsh KC was unable to explain precisely how, in the context of a witness summons order, which would have a penal notice attached, it would be explained to the individual subject to the summons what he or she was required to do in order to retrieve these documents from this inaccessible archive so as to comply with the court's order.

The US Proceedings Documents: items 4, 6, 9, 17, 19, 20, 22, 23, 25, 26-46 of Amended Schedule A.

41. These items consisted of one documentary request before the Tribunal, being request 18 (above), which was plainly too broad a request to form the subject matter of a witness summons, namely: "*All Documents that were submitted in [certain US proceedings to which X was a party], excluding those that are publicly available or have already been submitted in this proceeding."*

42. In the Amended Schedule A, this has been reformulated into a number of individual requests as set out in the sub-heading above. These documents are sought in support of the mismanagement counterclaim referred to above.

43. C contends that each of these requests identifies specific documents referred to in the Third Amended Complaint ("**TAC**") of the lead plaintiff ("**FP**") in a class action brought by former shareholders of X in a US court. That may be partly true, but the requests are much broader than that.

44. The TAC was advanced against D3 as the main manager of the mining project (and as the ultimate parent of D1 and X) and two former managers of D3. The plaintiffs in the US Proceedings claimed that the defendants made false and/or misleading

statements and/or failed to disclose information about mismanagement, delays, and costs overruns of the mining project and, as a result, the minority shareholders had sustained considerable damage. The plaintiffs claimed damages for alleged US securities law violations relating to the timing of D3 and X's public disclosures of costs overruns and delays affecting the mining project. I consider that it can be said, based upon a consideration of the TAC (see, by way of example, paragraphs 4, 8, 10, 16, 26, 92, 104, 112, 139 and 174-208 of the same) and C's pleaded case, that there is, in part at least, and in a very broad sense a degree of overlap between the subject matter of the US Proceedings and the Mismanagement Counterclaim, but it is also important to recognise, as Mr. Diwan KC submitted, that the US Proceedings were not so much concerned with issues of mismanagement as with issues of non-disclosure of the various delays on the mining project, contrary to US securities laws.

45. In support of its pleaded case C has adduced expert evidence and also relies upon (i) a contemporaneous ITE independent expert report submitted by C and (ii) a 2014 audit report, with both reports being produced in the arbitration: see C's Reply dated 22 April 2025 at paragraphs 207, 273, 322[4] and 334 (which refers to the ICG Report, commissioned by D1). D1 has already produced over 500 documents in the arbitration on the issue of alleged mismanagement. As Mr. Diwan KC rightly submits, no explanation has been tendered as to what fact or facts the documents now sought (which include individual emails about delays to particular aspects of a very large project; witness statements in other proceedings; and various consultants' reports) would establish beyond the evidence already disclosed and why production of these additional documents is necessary for a fair resolution of the dispute, despite D2/D3 specifically raising this point in witness evidence from the outset[5].

46. Thus, by way of example, the ICG report, which C already has, is said to "echo" the emails production of which is sought in Request 6 in Amended Schedule A: see the TAC at paragraphs 104 and 106; and the ICG Report is said to "confirm" the

[4] *"To distinguish between unavoidable delays and those attributable to D1's mismanagement, the Independent Technical Experts were instructed to assess what would have occurred had [D1] performed competently. Based on the 2016 Feasibility Study, the expert identified which delays and costs were inevitable and which stemmed from [D1's] deficient planning, execution, and governance. This analysis forms the basis of a revised project timeline and cost profile that reflects competent performance while incorporating only necessary adjustments for external or unforeseeable events."*
[5] Jennett 1 at [26].

allegations made in the witness statement of which production is sought by C at Request 20. It might be *useful* to C additionally to have these documents but that is not the test: C must show that it requires to adduce them in evidence in order to prove a particular fact and that they are *necessary* for the fair disposal of the proceedings. It has not done so. That provides good reason in itself to refuse an order for a witness summons in respect of each of these documents which simply refer to various complaints about particular aspects of the work done on the mining project at a particular moment in time over a very lengthy period.

47. It is no answer to this objection to production merely to assert that "*the Tribunal considers that the production of the US Proceedings Documents is necessary for the determination of the Second Counterclaim."*[6] The Tribunal ordered disclosure by D1 of the entirety of the documents submitted in the US Proceedings. It was not considering the question of whether, unless these non-parties are ordered to produce these specific documents, a fair trial of the proceedings will not be possible.

48. But there are other valid objections to production of these documents. The parties have grouped the numerous requests which are still advanced by C for production of the *US Proceedings Documents* (which can be seen from Amended Schedule A, annexed to this judgment) into groups and accordingly I will adopt the same approach.

Requests 6 and 9

49. The Tribunal gave permission to C to apply for an order for production of those documents which were "submitted in" the US Proceedings, excluding those that are publicly available or have already been submitted in the arbitration.

50. The documents falling within Requests 6 and 9 were not submitted in the US Proceedings and accordingly I accept the submission of Mr. Diwan KC that they fall outside the scope of the Tribunal's consent: see Jennett 2 at [38]. It is not a sufficient answer to this point to say, as did Ms Welsh KC, that this is nonetheless a document that ought to be within D2/D3's control and that they do not say that they do not have

[6] Nacimiento 2 at [31].

it. This is not a disclosure exercise. The document must fall within the scope of the permission given by the Tribunal.

Requests 4, 17, 20

51. The documents which are the subject of these requests were submitted under a protective order in the US Proceedings. That reads as follows:

> "*Nothing in this Protective Order will prevent any person subject to it from producing any Confidential Discovery Material in its possession in response to a lawful subpoena or other compulsory process, or if required to produce by law or by any government agency having jurisdiction, provided, however, that such person receiving a request, will provide written notice to the producing person before disclosure and as soon as reasonably possible, and, if permitted by the time allowed under the request, at least 10 days before any disclosure. Upon receiving such notice, the producing person will have the right to oppose compliance with the subpoena, other compulsory process, or other legal notice if the producing person deems it appropriate to do so.*"

52. It became apparent during the course of discussion between the court and Ms Welsh KC that C does not know which party submitted the documents which are the subject of the protective order. Accordingly, as the court put to Ms Welsh KC, it must assume that there would (or at least might) be an objection to the disclosure of the same. In circumstances where C has failed to establish a case that disclosure of these documents is necessary for the fair disposal of the proceedings, the fact that the non-party would have to take steps to obtain the consent of the producing party to permit disclosure of the documents which might not be forthcoming is another factor which weighs against the granting of a witness summons, backed by a penal notice.

53. In particular, Request 17 is, once again, more in the nature of an application for broad, non-party disclosure of any or all reports, much of which is likely to be irrelevant to the issues for determination in the arbitration. The Request is not sufficiently precise: it fails to identify specific reports and the relevance of the same. It appears that C wishes for any reports which are found to be produced in order to see whether there is

anything useful in them which might support its case, by way of references to mismanagement. That is impermissible.

Requests 19 and 25

54. In the Amended Schedule A, C states in relation to the relevance and materiality of Request 19, merely that in a presentation provided by a Mr. [B], he identified hundreds of millions of dollars in costs overruns and months in delays. C does not sufficiently identify the relevance of this presentation to its mismanagement claim and why it is necessary for a non-party to be ordered to produce this document in order for there to be a fair disposal of the arbitration.

55. C's case for relevance and materiality to its mismanagement claim in respect of the documents referred to in Request 25 is even weaker. All it states is that "*Exhibits F and G reflect (i) [D2/D3's] methods and procedures of tracking costs and budgets; (ii) [D2/D3's] methods and procedures of tracking mine development progress; (iii) [D2/D3's] procedures for reviewing past development progress and potential shortfalls; and (iv) press strategies.*"

56. Again, what C wants is to review these documents to see if it can find material concerning mismanagement that is useful to its counterclaim against D1. That is impermissible.

Requests 22-46

57. These documents were sealed by the US court on the application of the defendant by reason of the fact that they contain commercially and competitively sensitive information. As was stated by Gross J in *South Tyneside*, when documents are confidential the claim that their production is necessary for the fair resolution of the proceedings may well be subjected to particularly close scrutiny. Applying that close scrutiny in the present case, I consider that C has failed to establish that their production is indeed necessary. I agree with Mr. Diwan KC's submission that it is unclear what allegations of mismanagement these documents might be relevant to, and if so in what way, or why there are said to be necessary for the fair disposal of the action. None of these requests according to their generic descriptions relate to

allegations of mismanagement, rather they are said to relate to the project's schedule, progress and budget.

58. Ms Welsh KC asserted in general terms that of these requests "*it's hard to think of documents which may not be more relevant to the mismanagement counterclaims because they directly go to scheduling, budget, delays, strategy in relation to it*". I do not accept that submission. Simply because the documents concern scheduling and budgeting issues, and simply because they refer to delays, does not lead to the conclusion that they must be relevant to the allegations of mismanagement set out in the counterclaim in the arbitration. The burden rest firmly on C to establish relevance and necessity in respect of each document or class of documents sought and it has not done so.

Requests 47-48: TEG[7] and BED[8] Reports

59. Finally, the Tribunal gave permission to C first, to apply for an order for production of "*Reports prepared by TEG from 2016 onwards which relate to the [mining] project, including any reports which form the basis of the information or notification referred to at paragraphs 10 and 174 to 179 of the TAC or dated 8 October 2018*" (Request 47). Those paragraphs of TAC refer to various reports and papers in November 2017; May 2018; and October 2018 concerning delays in the project. The references to reports dated November 2017 and May 2018 have been deleted by C as Ms Jennett has explained in Jennett 1 at [34] that no TEG Reports with those dates have been found to exist.

60. Second, the Tribunal gave permission to C to apply for an order for production of "*reports prepared by BED from 2016 onwards which relate to the [mining project]*" (Request 48).

61. In the section of Amended Schedule A which contains the alleged relevance and materiality of the documents, C states that "*it is understood that TEG was responsible for technical evaluation whereas BED focussed on financial evaluation of impacts of costs overruns on the project budget and feasibility*."

[7] Technical Evaluation Group.
[8] Business Evaluation Department.

62. As for Request 47, the request is in the nature of an impermissible request for non-party disclosure. The request does not identify specific documents. Rather it is a request for D2/D3 to carry out a reasonable search for documents from 2016, including any reports referred to in specified paragraphs of the TAC. This requires the exercise of a degree of judgment in determining whether a document falls within the scope of the request. It is not known which of the reports, if any, are relevant to the mismanagement plea in this case (as opposed to the issue of delay generally[9]). In other words, it is an impermissibly broad request for any or all reports which are relevant to the mismanagement plea, including any referred to in the TAC. It is known that the *TEG and the BED Reports* concern not only the mining project but many of the Defendants' other international mining projects: see Jennett 1 at [35]. The Request will accordingly require a relevance review and a privilege review. The Reports are commercially sensitive and C has made no real attempt to explain why it is necessary for these reports to be produced for the fair disposal of the claim[10], rather it has simply asserted that "*the reports prepared in respect of the [mining project] will be "highly relevant to the Mismanagement Counterclaim*""[11].

63. The same is true of Request 48. Any or all reports from 2016 which "relate" to the mining project would need to be searched for and the same objections apply. This is not a request for specific documents. It is a broad disclosure request requiring the exercise of judgment as to whether a document falls within it. It is impermissible.

64. In all the circumstances, the application under section 43 of the Act is dismissed.

Merits of application under section 44(2)(c) of the Act

[9] See Jennett 1 at [36.2].
[10] Indeed, Jennett 1 at [36] asserts that in view of the disclosure already given in the arbitration they are not.
[11] C skeleton argument at [48].

65. The second way in which Ms Welsh KC put C's application was for an order under section 44(2)(c) of the Act. That section provides as follows:

> *"**44 Court powers exercisable in support of arbitral proceedings.***
>
> *(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 (whether in relation to a party or any other person) 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;*
>
> *(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."*

66. In paragraph 27 of C's skeleton argument, it states that the order now sought by it is for the copying of the identified documents. Ms Welsh KC argues that, under 44(2)(c), C is entitled to an order for the photographing of property, namely the documents, as to which questions arise in the proceedings. She invites the court to apply the approach taken by Colman J in the *Tasman Spirit* [2004] EWHC 3005 (Comm) at [12] and [14], contending that an order for production of documents under section 44 is materially similar to the approach taken under section 43. She accordingly accepts that standard disclosure is not available against a non-party under section 44 but instead the documents must be capable of specific description[12], as Colman J himself

[12] C skeleton argument at [28].

made clear.[13] The documents cannot simply be defined by reference to their relevance to particular issues, as with ordinary disclosure[14].

67. On the facts of *The Tasman Spirit*, the Judge considered that "*the preservation of the contents of [the] documents for the purpose of resolving the issue in the arbitration [was] … a consideration of such weight as to justify the exercise of the Court's jurisdiction under s. 44. If an order is not made at least for copying of the documents in question, those documents may cease to exist or be rendered unobtainable"*[15].

68. In this case by contrast, in view of my findings in respect of section 43 above, the application under section 44(2)(c) must fail, since the documentary requests are more in the nature of an application for disclosure by a non-party; they are not sufficiently precise; and they have not been shown to be relevant and necessary for the fair disposal of the issues in the arbitration. This is certainly not a case where the preservation of the contents of the documents sought for the purpose of resolving the issues in the arbitration is a consideration of such weight as to justify the exercise of the Court's jurisdiction under section 44.

69. Moreover, as explained above the *Corruption Investigation Documents* are now held on an inaccessible archive maintained by a third party law firm. No application was made to the Tribunal for permission to apply to the court for inspection of this archive and I do not consider that such a procedure falls within the scope of the permission granted by the Tribunal.

70. Furthermore, the court's power to order inspection or imaging of a database or archive with associated access to a third party's computer requires consideration of (at least) whether it is necessary and proportionate for the court so to order: see *Patel v Unite* [2012] EWHC 92 (QB). As Mr. Diwan KC points out, had the application been put on that basis D2/D3 would have wanted to put in evidence concerning the practicalities of that course, but they have not done so because the application was put on a different basis, namely under section 44.2(a) and (b). Accordingly I consider that it

[13] *The Tasman Spirit* at [12].
[14] Ibid at [14].
[15] Ibid at [13].

would be unfair for C to be allowed to put its application on this basis (without any evidential basis to support it and without the opportunity for D2/D3 to serve evidence in response), so far as the *Corruption Investigation Documents* are concerned. I would add that I do not consider that this particular objection applies to the other two categories of documents, namely the *US Proceedings Documents* and the *TEG and BED Reports*, which as I understand it are not held on the archive.

71. In any event, and contrary to the approach of Colman J in *The Tasman Spirit*, I do not consider that the court has jurisdiction under section 44(2)(c) in a case such as this to order the production of documents by a non-party for copying in aid of an arbitration. Section 44(2)(c) concerns the making of an order relating to property which is the subject of the proceedings or as to which a question arises in the proceedings, for its inspection, photographing, preservation, custody or detention. This provision is not concerned with an order for the disclosure of documentary evidence (that is, disclosure of the *information* contained within a document) but rather with inspecting, photographing, safeguarding or preserving the actual property (which could in principle be the document itself) which forms the subject matter of the proceedings or where a question arises in the proceedings in respect of that property.

72. In *re Saxton decd* [1962] 1 WLR 859, Wilberforce J. ordered inspection by a handwriting expert of an alleged agreement in writing under the then-rules of court which provided for the inspection of "*any property which is the subject matter of the cause or matter or as to which any question might arise therein*." The important feature of that case was that the signature on the agreement was alleged to have been forged. Since the authenticity of the document itself would be an issue in the case, Wilberforce J. had no difficulty in holding that the document was "property". That is readily understandable.

73. However, as Hoffmann J explained in *Huddleston v Control Risks Information* [1987] 1 WLR 701 at 703, the position is very different where the issue in the case concerns the *information* which the document conveys – “the message” – as then the application is likely to be for documentary disclosure which must satisfy the requirements of section 43. If, in contrast, the issue in the case concerns the actual physical object which carries the information – “the medium”- then the application

may be said to be to inspect "property" within section 44(2). Thus, the important issue in the proceedings in *Saxton* was whether the document itself – the medium - was genuine or a forgery. In *Huddleston* by contrast[16], where the applicants sought an order for the disclosure of a study which they believed was likely to contain defamatory material, the application was for disclosure, not for the inspection of property. That is also the position in the present case and so section 44(2)(c) is of no application.

74. In the circumstances, despite the skilful submissions of Ms Welsh KC, the application under section 44(2)(c) also fails.

75. Finally I add only this for the avoidance of doubt. This judgment is concerned only with whether C has met the strict requirements which a party must satisfy in order to persuade a court to order a witness summons, backed by a penal notice, under section 43. It has not done so. It remains open, of course, to the non-party Defendants voluntarily to provide further disclosure via D1 *if* they hold relevant documents which are necessary to the fair disposal of the reference. *If* C were to persuade the Tribunal that that is so but the non-party Defendants have chosen not to do so, it is then a matter for the Tribunal as to what, if any, inferences it should draw in that respect, as envisaged in paragraph 33 of PO15. However, it is not for the court to express any view on any of these matters and it does not do so.

[16] See also *Dun & Bradstreet v Typesetting Facilities Ltd* [1992] FSR 320 at 322-323 (the applicant did not want inspection of the disc but rather its contents: "*No doubt a document is itself a piece of property. Pieces of paper are themselves chattels which may have an owner, but when one has inspection of documents, it is not looking at the pieces of paper as pieces of paper one wants but to read the contents. In substance I believe that is what this motion is really about*" per Harman J) and *Hollander, Documentary Evidence* (15th edn) at 5-23.