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Annual Review of developments in English oil and gas law

2022 Edition

Contents

Previous editions

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Welcome to the 2022 edition of the CMS Annual Review of developments in English oil and gas law.

If the industry was expecting uncertainties to reduce after a tumultuous couple of years full of uncertainties posed by the global pandemic, fluctuating oil prices, and climate change, the past twelve months have seen those uncertainties taken to an unprecedented level.

It may seem an age ago, but the international energy markets were already showing signs of supply side stress prior to Russia's invasion of Ukraine on 24 February 2022. By that date, oil was already trading above USD 92 bbl (Brent) and the JKM LNG price marker was above USD 30 MMBtu.

The Russian invasion of Ukraine, resulting sanctions, and decisions of companies to reduce Russian supplies have placed the industry and the contracts through which it operates under pressure. The fact that this has happened at the same time as enhanced warnings of climate change and a material step change towards energy transition has resulted in the most complex and challenging energy market within our lifetimes.

The past year has continued to see an impressive body of guidance developed by the English courts and arbitral tribunals that is relevant to all oil and gas lawyers. The 'energy trilemma' (achieving a balance between security, affordability, and sustainability) is the greatest issue facing all energy companies and many societies. In turn, issues arising from that energy trilemma are now being played out before the English courts. In the past twelve months there have been significant developments in the law, and guidance from the English courts, in relation to: the relevance of Scope 3 emissions to certain regulatory decisions and strategies concerning hydrocarbon developments, whether and when it is appropriate to injunct environmental protestors from disruptive (and sometimes dangerous) protest activities and the extent to which force majeure clauses will operate in the event of sanctions. That trend is likely to continue.

Alongside the energy trilemma issues, the English courts continue to grapple with issues that arise on a day-to-day basis in the industry, concerning matters such as disputes over the quality in oil sales and the extent to which a demurrage clause will liquidate all damages for delay.

Outside the English courts, for those involved in the EU energy market, the latest developments in relation to the Energy Charter Treaty have the effect of seriously undermining its effectiveness, likely giving investors pause before placing any significant reliance on the Treaty and potentially prompting them to look for separate state assurances. In the context of Brexit, those issues have not yet played out in English law. It remains to be seen whether the United Kingdom will benefit from the stance adopted by EU law.

As always, this Oil and Gas Annual Review seeks to capture as much of relevant material as possible. As previously, any given case summary might relate to a multitude of issues. As a result, many articles that are contained within specific chapters of this year's Oil and Gas Annual Review could equally be applicable to other chapters. They are in chapters for convenience only. Also, the publication includes some non-energy cases that are of relevance and interest to oil and gas lawyers.

I would like to thank the many contributors across CMS for their articles, comments and assistance. Involving teams in London, Rio, Dubai, Singapore, Edinburgh and Aberdeen, the Oil and Gas Annual Review continues to be a global effort. It is not possible to mention all of those who have contributed to this year's edition by name. However, I would like to give particular thanks to Anna Rose, Julia Czaplinska-Pakowska and Aleksandra Gajewska, for their considerable efforts in assisting with the collation of this year's Annual Review. I would also like to thank David Rutherford, Aidan Steensma and Phil Reid, for their considerable contribution in writing Law-Now publications throughout the year on which much of this Oil and Gas Annual Review is based. Finally, but by no means least, I would like to thank Valerie Allan for again providing the update on the UK regulatory regime – which is a critical issue for those dealing with the oil and gas sector on the UK Continental Shelf.

This Oil and Gas Annual Review has been prepared by our lawyers to be relevant to you, with a direct focus on legal developments affecting companies in the oil and gas industry. We hope that you find it interesting and of assistance in dealing with the legal challenges and opportunities faced in the industry. Please do not hesitate to contact us if you have any questions or feedback.

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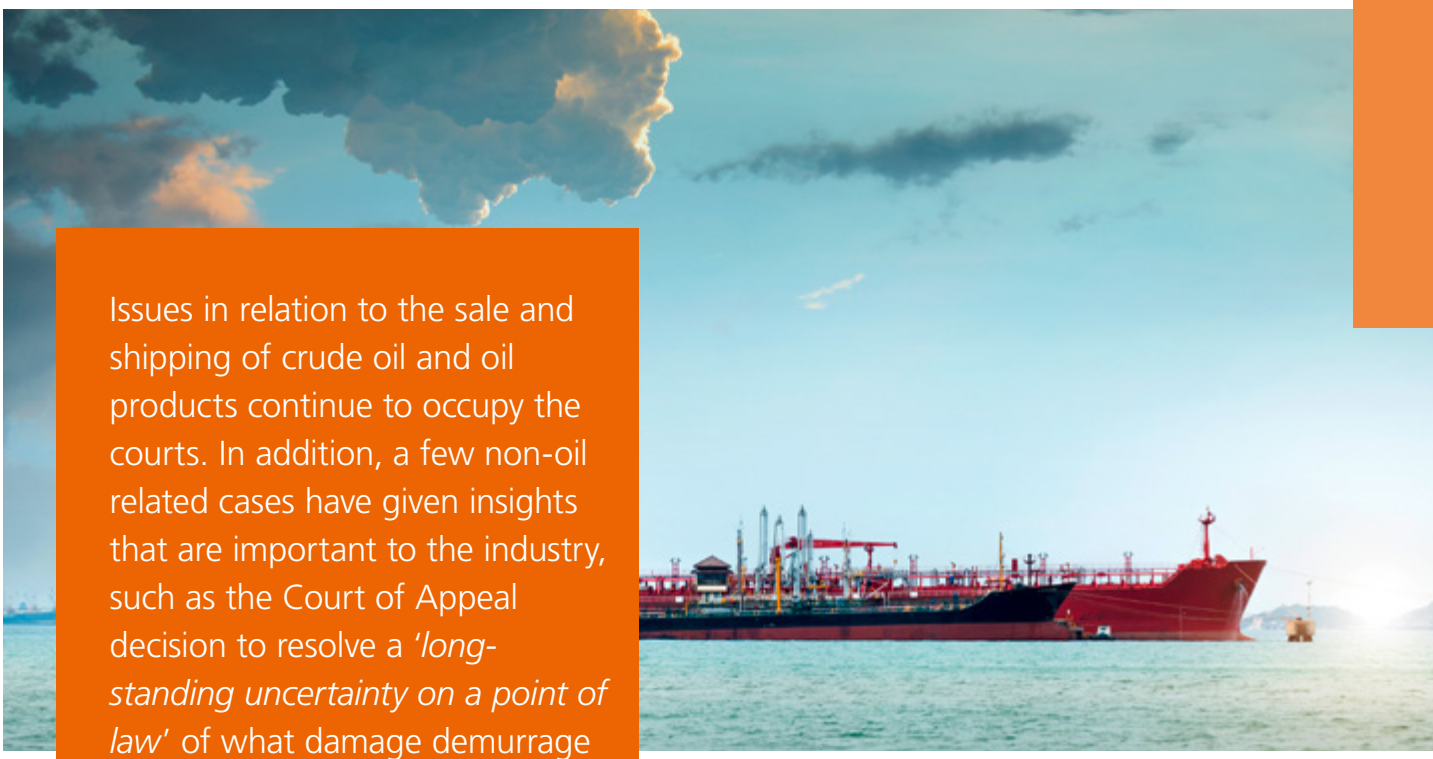
Chapter 1

Shipping and Commodities



Issues in relation to the sale and shipping of crude oil and oil products continue to occupy the courts. In addition, a few non-oil related cases have given insights that are important to the industry, such as the Court of Appeal decision to resolve a '*long-standing uncertainty on a point of law*' of what damage demurrage liquidates:

— In *Aquavita International SA v Indagro SA* [2022] EWHC 892 (Comm) the Commercial Court upheld an anti-suit injunction restraining a party from circumventing an arbitration clause by seeking 'interim' relief from the local Brazilian courts requiring a cargo to be unloaded.

— In *K Line PTE Ltd v Priminds Shipping (HK) Co Ltd ('Eternal Bliss')* [2021] EWCA Civ 1712 the Court of Appeal has revisited the Commercial Court decision that sought to resolve a '*long-standing uncertainty on a point of law*' in the shipping and offshore industries of what damage demurrage liquidates.

— In *Addax Energy SA v Petro Trade Inc* [2022] EWHC 237 (Comm) the Commercial Court considered an application concerning whether an alleged oral contract for the supply of petroleum products contained an English court jurisdiction clause such that it may be litigated in the English courts.

— In *Navig8 Chemicals Pool Inc v Aeturnum Energy International Pte Ltd* [2021] EWHC 3132 (Comm) the Commercial Court held that specific performance was the appropriate remedy where a party had breached its obligations under a letter of indemnity.

— In *BP Oil International Ltd v Glencore Energy UK Ltd* [2022] EWHC 499 (Comm) the Commercial Court considered what happens when it is unclear on what terms an oil sale agreement is concluded, and there is subsequently a dispute about the quality of oil supplied.

— In *Vitol SA v Genser Energy Ghana Ltd* [2022] EWHC 1812 (Comm) the Commercial Court decided that a propane sales contract had a '*significant connection*' with England, for the purposes of The Late Payment of Commercial Debts (Interest) Act 1998, where the payments were made in England and where major decisions in relation to the contract were made in England.

When may local courts intervene?

In *Aquavita International SA v Indagro SA* [2022] EWHC 892 (Comm) the Commercial Court upheld an anti-suit injunction restraining a party from circumventing an arbitration clause by seeking 'interim' relief from the local Brazilian courts requiring a cargo to be unloaded.

Facts

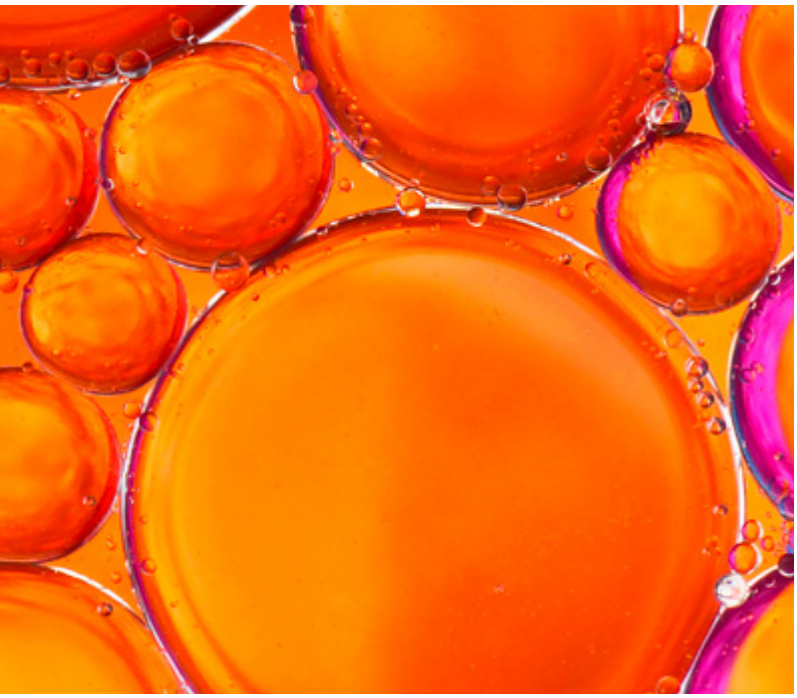
The applicant, Aquavita, owned a vessel ('**Aquavita Eternity**') chartered by Indagro under a charterparty dated 25 November 2021 (the '**Charterparty**') to carry a cargo of ammonium sulphate from Qinhuangdao in China to three ports in Brazil. Some of the ammonium sulphate was shipped under bills of lading issued to a shipper, Yantai Jiahe Agriculture Means of Production Co ('**Yantai**') (the '**Bills of Lading**'). Yantai was also the seller of a portion of the cargo of ammonium sulphate to Indagro under a sales contract.

In late January 2022, Aquavita received a notice from Yantai claiming that Indagro had failed to make payments due for the sale of Yantai's portion of the cargo of ammonium sulphate, with the result that the Bills of Lading had not been released to Indagro. As a result, Yantai instructed Aquavita, as the vessel owner, not to discharge the cargo unless presented with the Bills of Lading.

Indagro obtained an order from the Civil Court in the city where the first portion of the cargo of ammonium sulphur was to be discharged, Sao Francisco do Sul, Brazil, which required Aquavita to discharge the cargo notwithstanding Yantai's instruction, or face a daily fine of about USD 100,000 as well as possible criminal sanctions (the '**Sao Francisco do Sul Civil Court Order**').

The Charterparty was governed by English law, with disputes, including those relating to any Bill of Lading issued under the Charterparty, to be '*referred to the arbitration of three persons in London*'. Aquavita argued that Indagro's application for the Sao Francisco do Sul Civil Court Order was a breach of the Charterparty's arbitration agreement and applied without notice for an anti-suit injunction requiring Indagro to withdraw the proceedings in Brazil, to set aside the Sao Francisco do Sul Civil Court Order, and to refrain from commencing similar proceedings in relation to the remainder of the cargo.

Mr Justice Fraser refrained from granting an anti-suit injunction in respect of the discharge of cargo at Sao Francisco do Sul or those proceedings, as the discharge was almost complete. However, Mr Justice Fraser did grant an anti-suit injunction, on a without notice basis, in relation to the balance of the cargo to be discharged at a different Brazilian port. As the anti-suit injunction was issued on a without notice basis, it was reheard at the appropriate 'return date'.



The Issues

The Parties agreed on the principles to be applied in determining whether to grant an anti-suit injunction. These are:

1. The Court has the power to grant such an injunction to restrain proceedings brought in breach of an arbitration agreement under section 37 of the Senior Courts Act 1981, even if no arbitral proceedings are on foot or in prospect.

2. The applicant must show a '*high probability of success*' that the pursuit of the foreign proceedings involves a breach of the arbitration agreement.

3. If the applicant makes out such a case, it is for the respondent to show a '*strong reason*' why relief should not be granted.

4. Finally, it must be just and convenient for an anti-suit injunction to be granted.

The issue in this instance was whether or not Aquavita had established a high probability of success that further proceedings in Brazil forcing Aquavita to discharge the cargo would be a breach of the arbitration agreement. Indagro argued that the proceedings relating to the discharge of cargo were interim in nature and as such were not in breach of the arbitration agreement.

Decision

In deciding upon the application, the Commercial Court emphasised that the fact that the Brazilian Court, as a non-contractual forum, had granted an order for the interim performance of a substantive obligation was not of itself sufficient to render those proceedings a breach of an arbitration provision, stating that '*it has long been established that proceedings which are brought elsewhere than the agreed forum (a '**non-contractual forum**') for the purposes of security for a claim to be advanced in the agreed forum will not generally be made the subject of anti-suit injunctive relief by the English Court.*'

This principle is applied where proceedings are commenced in a non-contractual forum to obtain security for a claim. There are three features of these proceedings in non-contractual forums, namely:

1. The non-contractual forum is not generally concerned with reaching a final decision on the merits of the claim, merely an interim decision that the merits are sufficiently arguable.

2. The relief sought does not involve (even on an interim basis) the granting of the relief which would follow from the final enforcement of the parties' substantive rights and obligations: for example, the payment of a debt to the putative creditor or the provision of disputed contractual performance.

3. The relief can be said to be in aid of the substantive proceedings in the agreed forum, with limited value if no such proceedings are prosecuted to settlement, judgment, or award.

Considering these three features, and whether the Sao Francisco do Sul Civil Court Order was capable of being granted without breach of the arbitration provision, the Commercial Court determined that the Sao Francisco do Sul Civil Court Order was, in practical terms, a final determination of Indagro's position that Aquavita must discharge the relevant portion of the cargo. As such, it was satisfied both that it was an attempt to outflank the arbitration agreement, and, as a matter of substance, to obtain relief which would effectively be final from the Civil Court in Brazil rather than the arbitration tribunal. Furthermore, the order had not been made in support

of the arbitration agreement, as the only relief that could be sought in a subsequent arbitration was a determination that the order should not have been made.

As such, applying the principles for determining whether to grant an anti-suit injunction, the Commercial Court was satisfied that the applicant, Aquavita, had shown a high probability of success that the Brazilian Court proceedings involved a breach of the arbitration agreement, and that there was no strong reason not to grant such relief. In making its determination, the Commercial Court stated that '*If the public policy of minimal curial intervention reflected in s.1(c) of the 1996 Act has the effect that the English supervisory court will not or cannot act in matters which trespass too closely onto the arbitral tribunal's jurisdiction, that same public policy strongly supports holding the parties to the arbitration agreement, and restraining proceedings before a foreign court which would not be similarly inhibited*'.

Ultimately, the Commercial Court was of the view that Indagro could seek relief from the arbitration tribunal or English (supervisory) Court under section 44 of the Arbitration Act 1996. As such the application for an anti-suit injunction was upheld.

Comment

The risk of a party seeking relief from their local court to seek to gain some strategic benefit (whether perceived or otherwise) where arbitration provisions have already been agreed is an inherent risk with international trade. In particular, in the international shipping and commodities arena, given the international identities of the parties involved as well as the changing location of the tangible product (and consequent movable jurisdictional considerations), this is a scenario that occurs frequently.

Where commodities are concerned, it is important that parties choose a procedural seat of arbitration that robustly deals with attempts to circumvent the stipulations of the arbitration agreement, and instead strives to uphold the parties' original intentions. As the Commercial Court stated, English Courts will strive, for reasons of public policy, to uphold not only the jurisdiction of the tribunal but also parties' common intentions to arbitrate, restraining foreign proceedings in breach of this where necessary.

In this respect, importantly, the decision of the Commercial Court draws a clear distinction between (i) seeking an injunction from a local court that has the effect of finally resolving the issue in dispute and (ii) seeking an interim measure to '*hold the ring*' pending the determination of the issues in dispute in arbitration. The Commercial Court's decision is reassuring that the English Courts will not permit the former.

Permission to appeal before the Court of Appeal was applied for and the appeal is now outstanding.

Judge: Foxton J.

Demurrage revisited: What loss does it liquidate?

In *K Line PTE Ltd v Priminds Shipping (HK) Co Ltd ('Eternal Bliss')* [2021] EWCA Civ 1712, the Court of Appeal has revisited the Commercial Court decision that sought to resolve a '*long-standing uncertainty on a point of law*' in the shipping and offshore industries of what damages demurrage liquidates. In overturning the Commercial Court decision, the Court of Appeal has seemingly given a wide interpretation to the losses that demurrage will liquidate, absent express words to the contrary. Significantly, the Court of Appeal decided that the existing case law did not provide a decisive answer. Also, there was no clear consensus in the textbooks. Therefore, it approached the issue as one of principle. The case represents new law on a key feature of charterparties.

Facts

The parties entered into a contract of affreightment that provided for a number of separate voyages on an amended Norgrain form. The Owners nominated the Eternal Bliss for a June 2015 laycan, loading 70,133 metric tons of soybeans at Tubarao for discharge in China. Loading was completed and bills of lading issued on 11 June 2015.

The Eternal Bliss arrived at the discharge port anchorage and tendered a Notice of Readiness on 29 July 2015. However, she was kept at the anchorage for about 31 days due to port congestion and lack of storage space ashore for the cargo.

Discharge only commenced on 30 August 2015. As is the terrible fate with many beans appearing in the case law, the perishable cargo was found to have suffered mould damage and caking. After posting security in favour of receivers as security for their cargo claim, the vessel sailed away on 11 September 2015. The Owners settled the receivers' claim for c.USD 1.1m and then sought to recover this cost from the Charterers.

Commercial Court Decision

The Commercial Court was asked a question of law for determination: whether, in addition to paying demurrage, the Charterers were also in principle liable to compensate the Owners for other losses by way of damages for breach in failing to complete discharge within the permitted laytime. In other words: '*[t]he main point of principle asks what is it that demurrage liquidates*'.

Demurrage is '*a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading, generally referred to as the laydays or laytime*' (*Scrutton on Charterparties*, 24th Edition (2020), Art 170).

The Commercial Court decided that the demurrage rate was intended to be an agreed measure of the value of the ship's lost time – but no more than that. The

Commercial Court decided that it would not occur to '*commercial parties unaware of the case law that agreeing a demurrage rate liquidated, for example, claims in respect of physical injury to ship, cargo or crew, as they would understand … that the demurrage rate simply compensated the owner for the use of the ship beyond the laytime, that use not being paid for by the freight*'.

The Commercial Court rejected the suggestion that a demurrage rate liquidates all damages recoverable, whatever the nature of the loss suffered, in respect of a breach of the obligation to complete within the laytime.

As such, the response to the question of law was that, in principle, the Owners were entitled to be compensated in respect of their losses and expenses arising out of the cargo damage claim.

The decision of the Commercial Court was appealed.

Court of Appeal Decision

The Court of Appeal decided that the existing case law did not provide a decisive answer. Also, there was no clear consensus in the textbooks. Therefore, it approached the issue as one of principle.

Its conclusion was that, in the absence of any contrary indication in a particular charterparty, demurrage liquidates the whole of the damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime and not merely some of them. Accordingly, if a shipowner seeks to recover damages in addition to demurrage arising from delay, it must prove a breach of a separate obligation.

The Court of Appeal's reasons were, in summary, as follows:

First, it is possible for contracting parties to agree that a liquidated damages clause should liquidate only some of the damages arising from a particular breach.

Second, however, that struck the Court of Appeal as an unusual and surprising agreement for commercial people to make which, if intended, ought to be clearly stated. Such an agreement forfeits many of the benefits of a liquidated damages clause which, in general, provides valuable certainty and avoids disputes. There is nothing in the charterparty or in the standard definitions of demurrage (including that from Scrutton on Charterparties) to suggest that the parties in this case had such an intention.

Third, statements can be found in the case law to the effect that demurrage is intended to compensate a shipowner for the loss of prospective freight earnings suffered as a result of the charterer's delay in completing cargo operations. However, the cases show that demurrage is frequently either higher or lower than an estimated daily freight rate. It is more accurate to say that the demurrage rate is the result of a negotiation between the parties in which the loss of prospective freight earnings is likely to be one factor, but is by no means the only factor. Moreover, it appears that while freight rates move up and down sensitively to market conditions, the same is not necessarily true of demurrage rates.

Fourth, if demurrage quantifies 'the owner's loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of laytime, nothing more', as the Commercial Court decided, and does not apply to a different 'type of loss', there will inevitably be disputes as to whether particular losses are of the 'type' or 'kind' covered by the demurrage clause.

Fifth, the cost of insurance is one of the normal running expenses which the shipowner has to bear. Thus, a shipowner will typically have insurance against cargo claims, while a charterer will not typically have insurance against liability for unliquidated damages resulting solely from a failure to complete cargo operations within the laytime. Accordingly, the consequence of the shipowner's construction is to transfer the risk of unliquidated liability for cargo claims from the shipowner who has insured against it to the charterer who has not. That seems to us to disturb the balance of risk inherent in the parties' contract.

Sixth, in The Bonde [1991] 1 Lloyd's Rep 136, the Commercial Court decided: 'where a charter-party contains a demurrage clause, then in order to recover damages in addition to demurrage for breach of the charterers' obligation to complete loading within the lay days, it is a requirement that the plaintiff demonstrate that such additional loss is not only different in character from loss of use but stems from breach of an additional and/or independent obligation'. This decision has now stood for some 30 years, apparently without causing any dissatisfaction in the market.

Seventh, the Court of Appeal did not accept the Commercial Court's criticisms of The Bonde.

Finally, to allow the appeal will produce clarity and certainty, while leaving it open to individual parties or to industry bodies to stipulate a different result if they wish to do so.

Comment

Recognising the significance of its decision, the Commercial Court noted: '*From time to time, a case provides the opportunity to resolve a long-standing uncertainty on a point of law of significance in a particular field of commerce. This is such a case*'. The practical impact of the Court of Appeal's decision would seem to be that, absent words to the contrary, demurrage clauses in a charterparty will usually be construed as liquidating all losses arising from delay.

The decision of the Court of Appeal takes on even more significance as, being a decision of the Court of Appeal, it constitutes new law and is (generally speaking) binding on all other English Courts, save the Supreme Court. That said, each contract will remain to be interpreted on its own terms.

The Court of Appeal stressed that the issue before it depended on the meaning of the word '*demurrage*' as that would be understood by those involved in the shipping business.

For that reason, it was not helpful to consider how liquidated damages clauses in other fields (such as construction law) have been construed: '*[t]he question is what these parties have agreed by the charterparty in the present case (and because their agreement is in standard terms, what commercial people generally have agreed by using such terms).*'

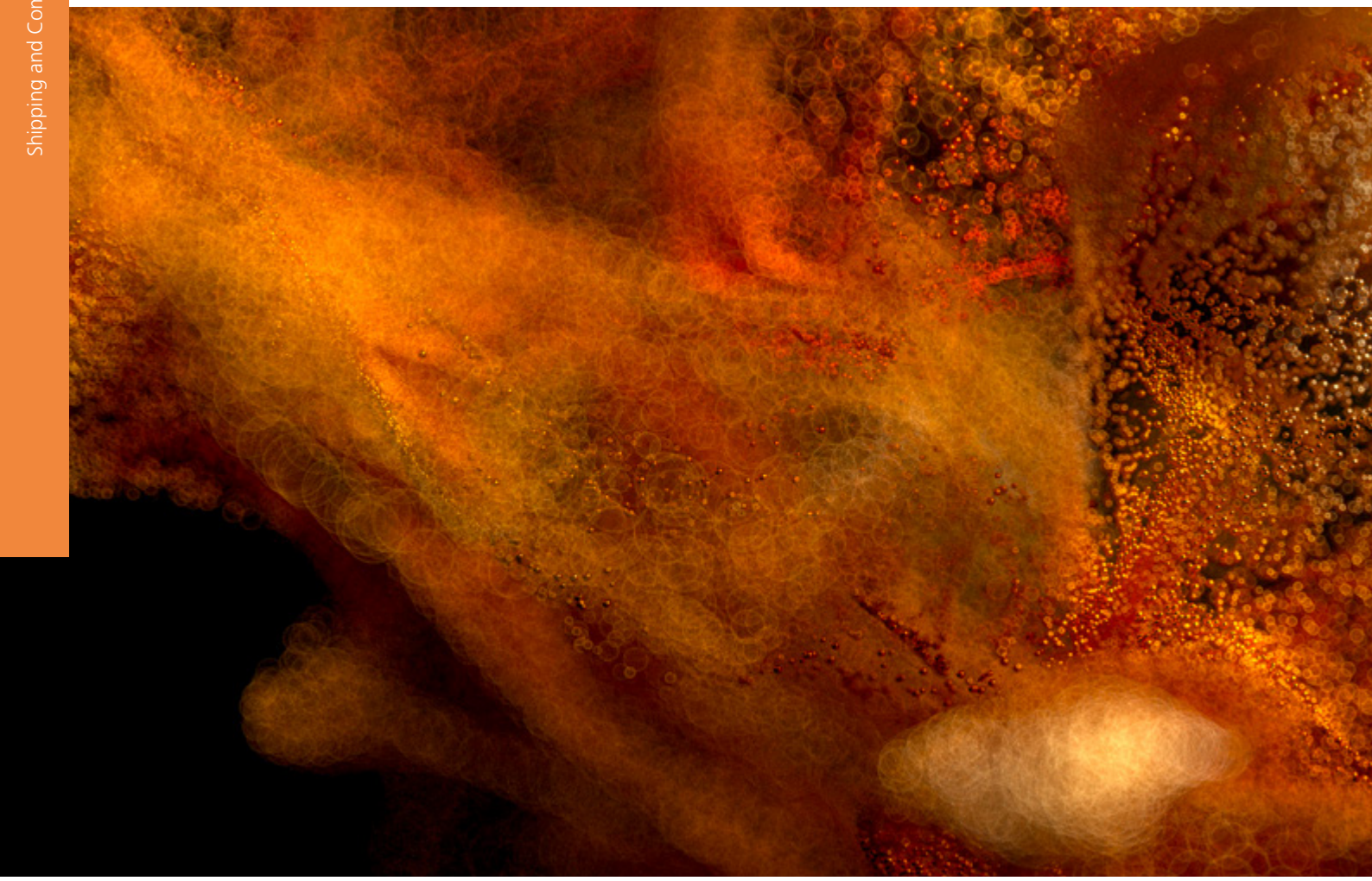
The Court of Appeal noted that it was open to the parties to agree that a liquidated damages clause should cover all or only some of the losses flowing from a breach of contract.

In light of that consideration, it was significant that the demurrage provision did not indicate whether demurrage was intended to cover all or only some of the losses flowing from a failure to complete cargo operations within the laytime. If the parties intended demurrage to cover only some such losses, they gave no express indication of which losses were intended to be covered and which were not.

The Court of Appeal's final reason for its decision – that it would produce clarity and certainty – underlines the importance of clear drafting. Whether the decision proves popular in the market or not, should a party wish to limit the reach of a demurrage provision such that it liquidates some but not all losses arising from a failure to complete cargo operations within the laytime, this will likely need to be expressly set out in the charterparty in question.

High Court Judge: Baker J.

Court of Appeal Judges: Sir Geoffrey Vos MR, Newey LJ and Males LJ.



Oral contract - which court may hear the case?

In *Addax Energy SA v Petro Trade Inc* [2022] EWHC 237 (Comm), the Commercial Court considered an application concerning whether an alleged oral contract for the supply of petroleum products contained an English Court jurisdiction clause. The Commercial Court determined that the claimant had a good arguable case that an English jurisdiction clause was incorporated into the alleged contract by way of a previous course of dealing, such that the jurisdictional challenge failed. In reaching its conclusion, the Commercial Court decided that a course of dealing does not need to be extensive or entirely consistent, so long as the course of dealing has a plausible evidential basis in light of all of the facts.

Facts

The claimant, Addax Energy SA ('**Addax**'), was a Swiss petroleum supplier. The defendant, Petro Trade Inc ('**Petro Trade**'), was a major Liberian petroleum importer. Addax and Petro Trade entered into a written secured distribution agreement pursuant to which Addax would deliver petroleum to third party tanks in Monrovia, Liberia from which Petro Trade could then obtain that petroleum (the '**SDA**'). The SDA was not a contract for the sale of goods between the parties. The SDA envisaged that Addax and Petro Trade would enter into subsequent sale contracts.

As contemplated by the SDA, Addax and Petro Trade subsequently entered into 15 supply and spot agreements, which were agreed informally by telephone. The parties would agree the product, quantity, price and delivery of the petroleum. Addax usually, but not always, recorded the essential terms in a recap email which was sent to Petro Trade. The recap emails did not themselves contain any provision as to jurisdiction; however, Petro Trade often responded to Addax's recap emails accepting those essential terms. Occasionally, after Addax sent the

recap emails, it also sent a 'spot contract' which contained more extensive written terms including an English governing law clause and an English jurisdiction clause.

It was common ground between the parties that on or around 3 January 2018, the parties held a telephone call regarding the conclusion of a long-term contract for the sale of petroleum covering multiple shipments (the '**Term Agreement**'). The parties disagreed about whether a contract was formed at all on the call; Addax claimed it was and Petro Trade claimed it was not and that it merely asked Addax to provide draft terms that could form the basis of negotiations. It was common ground between the parties that there was never any discussion about which court would have jurisdiction.

A dispute subsequently arose between the parties pursuant to which Addax brought two claims against Petro Trade:

— A claim for USD 532,506.86 plus interest under a contract allegedly concluded on 25 August 2016 (the '**Gas Oil Contract**'); and

— a claim for USD 2,228,901.92 plus interest under the alleged Term Agreement.

Addax served Petro Trade in Liberia, without permission, relying on CPR Rule 6.33(2B)(b), which enables a claimant to serve a claim form on a defendant outside of the jurisdiction without the court's permission if there is an English jurisdiction clause in the contract.

Petro Trade took no issue on jurisdiction in relation to the Gas Oil Contract but challenged Addax's entitlement to serve outside of the jurisdiction in relation to the Term Agreement. It did so on the basis that it claimed that Addax had no good arguable case that the alleged Term Agreement contained an English jurisdiction clause. The case before the Commercial Court was essentially whether it went without saying that at the time of the parties' January conversation, an English jurisdiction clause was incorporated because of a previous course of dealings.

Decision

It was common ground between the parties that the claimant must show that there is a good arguable case that the contract being sued upon has in it a term to the effect that the court shall have jurisdiction to determine the claim in respect of the contract (*Marubeni Hong Kong v Mongolian Government* [2002] 2 AE (Comm) 873 at [15] by Aikens J). In determining whether there is a 'good arguable case' the Commercial Court referred to the Court of Appeal case of *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA* [2019] 1 WLR 3514 at [70], which quoted Lord Sumption JSC in *Goldman Sachs International v Novo Banco* [2018] 1 WLR 3683. Lord Sumption JSC held that the test for determining an issue about jurisdiction was that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway.

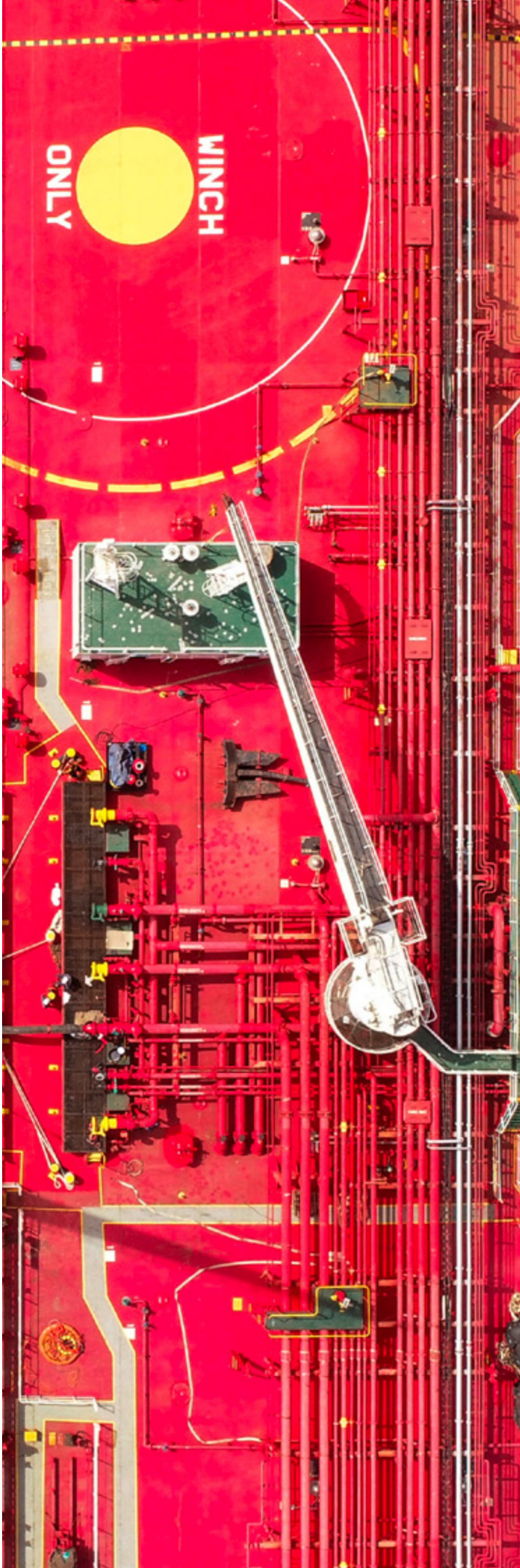
On that basis, the Commercial Court confirmed that the key issue between the parties related to whether Addax was able to supply a plausible evidential basis for the application of the relevant jurisdictional gateway, i.e. whether Addax's terms in its written spot contract document had, by 2018, become the standard terms on which Addax and Petro Trade traded because of a previous course of dealings.

The Commercial Court determined that Petro Trade's jurisdictional challenge must fail.

In making its decision the Commercial Court referred to the test in Chitty on Contracts 34th Ed. in relation to a course of dealings (at paragraph 15-15) which states:

'*Conditions will not necessarily be incorporated into a contract by reason of the fact that the parties have, on previous occasions, dealt with each other subject to those conditions, but they may be incorporated by a course of dealing between the parties where each party has led the other reasonably to believe that they intended that their rights and liabilities should be ascertained by reference to the terms of a document which had been consistently used by them in previous transactions.*'

In addition, the Commercial Court referred to a number of authorities including, *Transformers & Rectifiers Ltd v Needs Ltd* [2015] 159 ConLR 33 *and Circle Freight International (T/A Mogul Air) v Medeast Gulf Exports Limited(T/A Gulf*



Export) [1988] 2 Lloyd's Rep 427, confirming that it was clear from those authorities that the course of dealings need not be extensive nor consistent but what matters is whether there is sufficient consistency. The Commercial Court emphasised the importance of stepping back and reviewing the facts of the case against the type of relationship and the type of transaction which is occurring. In taking this step, the Commercial Court noted that the alleged oral Term Agreement arose in the context of a series of contracts occurring within the petroleum industry where, as anyone familiar with the industry would be aware, parties often agree supply contracts informally. In the case before it, the Commercial Court reiterated that it was common ground that the parties had traded informally throughout, substantially over the telephone, talking about commercial essentials only, with confirmations of agreed trades following in the form of written recaps sometimes accompanied by spot contracts.

The Commercial Court determined that it was perfectly plausible that a Term Agreement was reached and that the question before it was in relation to the course of dealing. Taking into account the background between the parties, the Commercial Court held that there was a plausible evidential basis that there was a course of dealing between the parties such that there existed a jurisdiction clause within the Term Agreement. In making its determination, the Commercial Court, amongst other things, held that: (a) there were numerous contracts on terms which contained the English jurisdiction clause; (b) the terms of the spot contract (which were key in that they contained the jurisdiction clause) were terms effectively contemplated between the parties when they negotiated their long-term SDA and there was no suggestion of any other competing set of terms between the parties; (c) although there was a lull in the degree of consistency in sending the spot contact terms, there was no suggestion between the parties that when terms were not sent anybody argued that there was no contract; and (d) Petro Trade never questioned why recap emails had not been sent by Addax.

Comment

Documenting the Agreement

From a practical perspective, this case serves as a useful reminder as to the benefits of: (i) a legally binding 'framework agreement' (or 'master agreement') for hydrocarbon transactions to be subsequently carried out between traders; (ii) that such 'framework agreement' (or 'master agreement') contain a governing law and jurisdiction/arbitration provision (as appropriate) to ensure that there is a clearly applicable legal test for whether a binding obligation to sell and purchase is subsequently entered into and that the jurisdiction for enforcement of rights is clear; and, (iii) possibly, the provision in such 'framework agreement' (or 'master agreement') for formalities by which an oral trade/recap becomes a legally binding obligation.

Taking such steps not only reduces the issues which the parties found themselves disputing in this case, but also reduces the risk of satellite ligation, which for all parties involved is highly undesirable. In respect of LNG trades, the AIPN provides a model master sales agreement. There is less of a common market practice in respect of oil producers and crude oil trades.

The case is notable for addressing a point which might have been considered to be outside the main commercial deal, i.e., the jurisdiction for disputes. Provisions concerning how an agreement works and which addresses legal matters common to many commercial transactions ('boilerplate clauses') will, for understandable reasons, rarely receive as much attention as the commercially sensitive items. But this case serves as a reminder that such provisions are important and perhaps, at the very least, parties should be clear as to the jurisdiction and the governing law for disputes, both of which can have a significant impact on the interpretation and effect of the 'commercial' terms.

Evidence for Course of Dealing

This case also highlights the relatively low threshold required to be met for the purpose of determining an issue about jurisdiction; all that the claimant must supply is a '*plausible evidential basis*' as set out in *Goldman Sachs*.

In respect of what is necessary to show the incorporation of written commercial terms by a course of dealing, the Commercial Court was able to distinguish a number of authorities raised by Petro Trade on the basis that they were limited to different situations (such as battle of the forms including transmission by fax or issuance of invoices which referred to terms but did not send them) and that parallels could not be drawn. On the facts of this case, the Commercial Court was able to establish that the documents did contain standard terms and that there was a clear course of dealing that did not need to be extensive or entirely consistent.

Of particular interest to those in the oil and gas industry, the Commercial Court referred to the decision of the Technology and Construction Court in *Transformers*, which explains that where trade or industry standard forms exist for the type of transaction in question, it will usually be easier for a party contending for those conditions to persuade the Commercial Court that they should be incorporated. This case demonstrates though that the threshold for incorporation of terms is also relatively low when considering a party's standard terms applied in previous dealings. In either case, reasonable notice of the application of the terms should be given by one party to the other (see also *Circle Freight*).

Judge: Cockerill J.

Enforcing letters of indemnity

In *Navig8 Chemicals Pool Inc. v Aeturnum Energy International Pte Ltd* [2021] EWHC 3132 (Comm), the Commercial Court held that specific performance, as opposed to only damages, was the appropriate remedy where a party had breached its obligations under a letter of indemnity ('**LOI**'). The case also explores whether cargo had been delivered in accordance with the defendant's instructions and whether the defendant was bound by the terms of the LOI.

Facts

Navig8 Chemicals Pool Inc ('**Navig8**') was the charterer of a chemical tanker from the Navig8 Chemical Tankers 4 Inc (the '**Owners**') (the '**Time Charter**'). The Time Charter was on the SHELLTIME 4 form together with rider clauses. Clause 87A of the Time Charter entitled Navig8 to request Owners to discharge cargo without production of the original bills of lading by invoking the Owners' P&I Club LOI wording.

Pursuant to a voyage charterparty contained in and/or evidenced by a fixture recap (the '**Recap**'), the Navig8 sub-chartered the vessel to Aeturnum Energy International Pte Ltd ('**AEI**') for a single voyage carrying light naphtha from 1 safe port Map Ta Phut Thailand to 1-3 safe ports / STS Singapore-Tanjung Langsat-Tanjung Bin Pengerang range (the '**Charterparty**').

The Charterparty incorporated an amended BPVOY4 form and (with amendments) AEI Additional Clauses and Amendments (the '**Additional Terms**').

By reason of the amendments effected by the Recap, clause 30.3 of the Charterparty provided as follows:

'…if Charterers [AEI] require Owners [Navig8] to deliver cargo to a party or at a port other than as set out in the Bill of Lading, then Owners shall nevertheless discharge such cargo in compliance with Charterers instructions, upon presentation by the consignee nominated by Charterers (the Receiver) of reasonable identification to the Master and in consideration of Charterers indemnifying Owners in the manner prescribed in the form of letter of indemnity of Owners' P&I Club wordings

agreed and published from time to time by the International Group of P&I Clubs addressing the relevant circumstances.'

Navig8's P&I Club was the North of England P&I ('**NEPIA**'). NEPIA's Standard Form LOI provided that AEI would indemnify Navig8 against any loss, damage, or expense incurred as a result of delivering in accordance with AEI's instructions; and would provide sufficient funds to defend against proceedings and provide security to release the vessel should it be arrested as a result of the same. The LOI required:

'In consideration of your complying with our above request, we hereby agree as follows:

1. *To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.*

2. *In the event of proceedings being commenced against you or any of your servants or agents in connection with the delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.*

3. *If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.*

4. *If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.*

5. *As soon as all original bills of lading for the above cargo shall have come into our possession to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.*

6. *This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.'*

The vessel left Thailand and was bound for Singapore. While the vessel was mid-voyage, an agent of AEI contacted Navig8, invoking the terms of the LOI, and requested that delivery be made to Hin Leong Trading Pte Ltd ('**Hin Leong**') without presentation of the bill of lading. This request was duly passed on to Owners and delivery was made.

Shortly thereafter, solicitors acting on behalf of ING Bank N.V ('**ING**') sent a letter to the Owners alleging that ING was the lawful holder of the bills of lading and the person entitled to the cargo and requesting its delivery. AEI later explained that, in their understanding, a financial dispute had arisen between ING and Hin Leong. A warrant of arrest was granted over the vessel.

Navig8 called on the indemnity provided by AEI. AEI failed to provide security. Navig8 provided substitute security to release the vessel. Navig8 sought a mandatory interim injunction and specific performance.

The Issues

The Commercial Court had to decide the following issues:

— Was delivery effected in accordance with AEI's instructions and terms of LOI?

— Was AEI obliged under the LOI to indemnify Navig8 against loss, and to provide funds to defend proceedings against Navig8, and funds for release of the vessel?

— Had AEI breached the LOI, and was Navig8 therefore entitled to a final mandatory injunction and/or order for specific performance?

Decision

AEI put Navig8 to proof that a contract on the terms of the LOI came into existence. It contended that no such contract could come into existence under clause 30.3 of the Charterparty unless the consignee presented *'reasonable identification to the Master'*.

However, the Commercial Court decided that:

1. The obligation on the part of the master was to deliver to the party who he reasonably believed to be the party identified by AEI - here Hin Leong. It was clear from the evidence adduced by AEI that delivery was indeed effected to Hin Leong.

2. In addition, delivery to the bulk tanks was good delivery by reason of the fourth paragraph of the LOI. These was a presumption that operated concerning valid delivery when it was to specified places.

3. Also, the production of identification was not a condition precedent to the triggering of AEI's obligations under the LOI. Instead, those obligations are triggered by the delivery of the cargo to the party identified by AEI when such delivery is made, at AEI's request, without production of the bill of lading.

The Commercial Court therefore held that AEI's reciprocal indemnity obligations had been engaged. As a result, AEI failed to comply with any of its obligations under the LOI:

— It had not indemnified Navig8 in respect of its loss and damage incurred by reason of delivering the cargo in accordance with its instructions.

— It had not provided Navig8 or the Owners with any funds to defend the arrest proceedings.

— It had not provided substitute security to take the place of the security put up by Navig7 and the Owners to procure the release of the vessel.

The extent of the indemnity was self-explanatory and was set out in the LOI.

Finally, AEI tried to argue that damages alone were the appropriate remedy due to Navig8.

In these circumstances, the Commercial Court noted that a final mandatory injunction / order for specific performance sought by Navig8 were, in the present case, one and the same.

It is settled law that the obligations imposed on the indemnifier under a maritime contract of indemnity are amenable to enforcement by a mandatory injunction / order for specific performance: see *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd* [2020] EWHC 726 (Comm) (Henshaw J) at [31], *Harmony Innovation Shipping Ltd v Caravel Shipping Inc* [2019] EWHC 1037 (Comm) (Sir Ross Cranston) at [30], *The Bremen Max* [2009] 1 Lloyd's Rep. 81 (Teare J) at [21] and *The Laemthong Glory (No. 2)* [2005] 1 Lloyd's Rep. 632 (Cooke J) at [51]-[52]. Damages are not an adequate remedy in this context.

The Commercial Court decided that it should exercise its discretion to grant interim relief for the reasons argued by Navig8, which included:

1. That damages were not an adequate remedy was accepted by the Commercial Court in previously granting an interim injunction (which had been ignored by AEI).

2. Navig8 is prima facie entitled to an order for an injunction / specific performance, which it was granted on an interim basis. Nothing substantive had changed since that interim relief was granted.

3. No defence of impossibility can now be raised.

4. It remained possible that AEI would comply with the Commercial Court's order. In particular, the prospects of contempt proceedings against AEI and/or its directors may prompt such compliance. Conversely, if the injunction is not granted, AEI's strategy of non-compliance and non-participation to date will have been rewarded by the Commercial Court.

Comment

Indemnities, and letters of indemnity, remain a powerful remedy when included in contractual relations. As set out above, the Commercial Court has shown itself repeatedly willing to enforce the obligations imposed on the indemnifier under a maritime contract of indemnity by a mandatory injunction and/or order for specific performance. As also shown in this case, that remedy may include an interim injunction pending a full trial.

Although an indemnity will only ever be as good as the ability to enforce the indemnity in practice, it should be remembered that enforcement measures may stretch as far as the court issuing an injunction with a penal notice – such that a failure to comply with the injunction will constitute a criminal office in England. That penal notice may be granted against the directors of the indemnifier, as well as the company, giving the indemnity. The practical impact of failing to comply with such a penal notice would be that a director flying through the United Kingdom could be arrested for contempt of court and imprisoned.

The other aspect of this case that remains of relevance to drafters is the potential importance of security for indemnified obligations. In the absence of security, the indemnified party may find itself financing the defence of a claim and/or cost of release of vessel pending the enforcement of any indemnity.

Judge: Hancock QC.

A recap on recaps – what is the contract and what are the consequences?

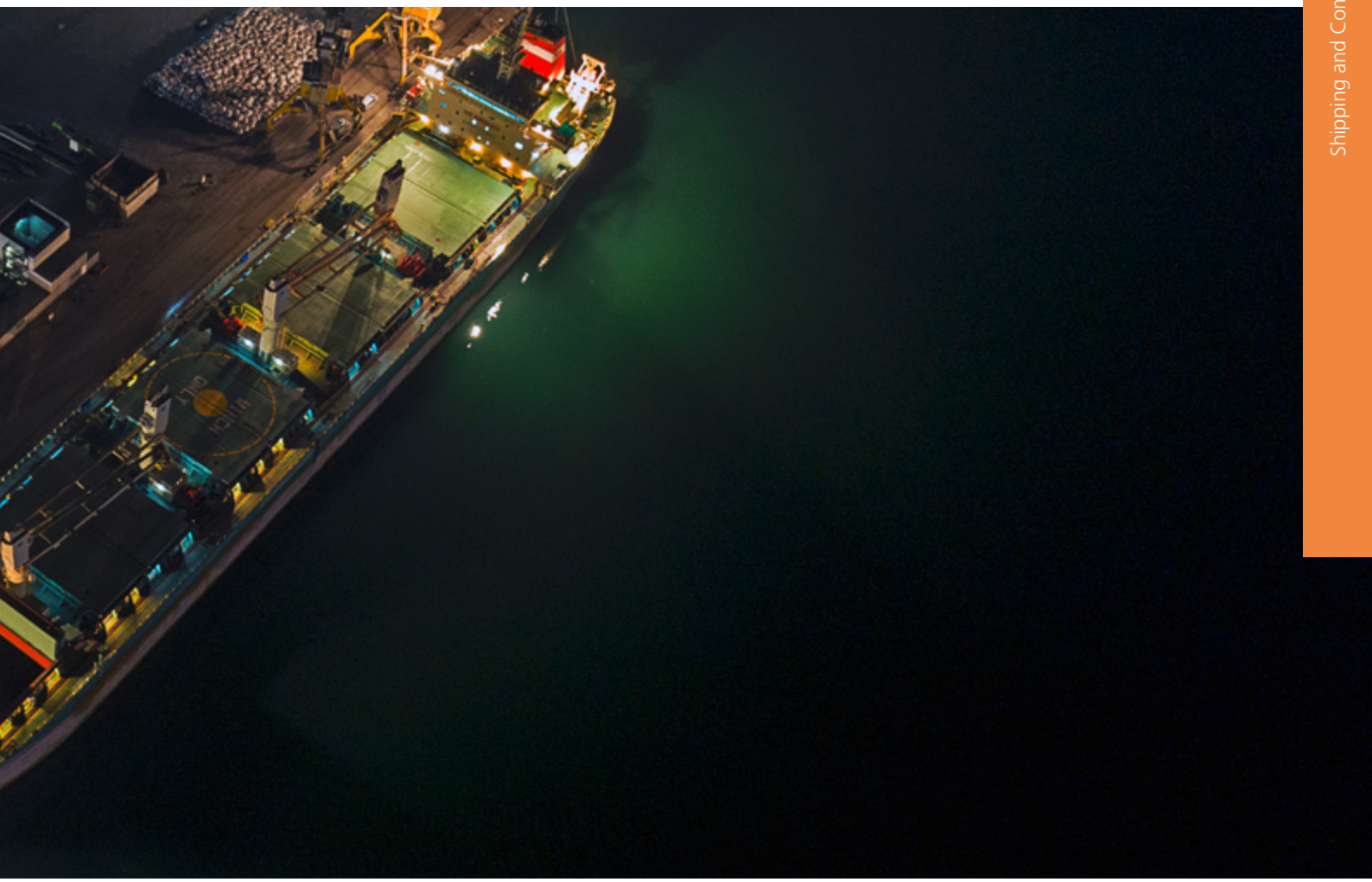
In *BP Oil International Limited v Glencore Energy UK Limited* [2022] EWHC 499 (Comm), the Commercial Court considered what happens when it is unclear on what terms an oil sale agreement is concluded, and subsequently, there is a dispute about the quality of oil supplied. The Commercial Court's decision will be of interest to parties that trade crude oil and oil products, as it identifies the principles applied to determine the terms of contract and how provisions as to quality are interpreted.

Facts

BP Oil International Limited ('**BPOI**') is part of the BP group of companies and operates as a crude oil and petroleum products trading entity within that group. Glencore Energy UK Limited ('**Glencore**') is a commodity trading company, engaged in the sale and purchase of commodities, including crude oil.

In April 2019, Glencore agreed to sell, and BPOI agreed to buy, 100,000 metric tons (+/-10%) of Russian Export Crude Oil ('**RECO**') at a price of *'Dated Brent + 0.53 USD per barrel'*. Also in April 2019, BPOI re-sold the cargo of RECO to an affiliated company, BP Europa SE ('**BPESE**'). The sub-sale from BPOI to BPESE was agreed on materially back-to-back terms as the sale by Glencore to BPOI, save that the purchase price was *'Dated Brent + 0.43 USD per barrel'*. It was intended that BPESE process the RECO at its refinery in Gelsenkirchen, Germany, following arrival of the cargo from Russia (on or around 22 April 2019). Glencore and BPOI appointed Cargo Inspections Group as independent load port inspectors.

BPOI brought a contractual claim against Glencore when it was discovered, upon carrying out sampling tests, that the RECO was contaminated with organic chlorides at a concentration of around 11.9 to 15.7 parts per million (as discovered by way of tests in April and May 2019). Having discovered the contamination, BPOI re-purchased the RECO from BPESE at a price of *'Dated Brent – USUSD8 per barrel'* (on/around 20 June 2019) and re-sold it to BP Oil Espana SA ('**BPOESA**') (which had knowledge of the defective goods), for treatment.



The Issues

The main issues in dispute before the Commercial Court were:

1. What were the applicable terms of the contract between BPOI and Glencore?

2. Had there in fact been a breach of the contractual provision as to quality of the oil?

3. If there was a breach, what was the applicable measure of damages payable?

Decision

The Applicable Contractual Terms

There had been exchanges between BPOI and Glencore from 1 April 2019 to 9 April 2019 concerning negotiation of the contractual terms. In brief, the sequence of relevant communications was as follows:

1. On 1 April 2019, Glencore sent a recap to BPOI, stating '[…] *below please find the recap of what was agreed to your approval and acceptance* […]'. The recap expressly incorporated the BP General Terms and Conditions 2015 ('**BPGT&Cs**').

2. On 2 April 2019:

   a. BPOI sent an email stating '*Confirm the deal and thanks!*' which was subsequently followed by a further email from BPOI stating *'please find attached confirmation of trade E190006544/1*'. Enclosed was a confirmation accepting the parties' deal; and

   b. Glencore responded enclosing a contract (the '**Glencore Sales Contract**') and subsequent exchanges took place from 3 to 8 April 2019 between the parties concerning the terms of the Glencore Sales Contract.

3. On 8 April 2019, Glencore told BPOI that there were still disputed clauses in the Glencore Sales Contract, in relation to which Glencore stated that it would not engage further.

Notwithstanding the above, documented instructions were given by BPOI on 9 April 2019 and the RECO, together with the relevant shipping documents, were subsequently delivered:

1. BPOI contended that the contract was concluded on 2 April 2019: the ordinary principles of contractual offer and acceptance applied, whereby Glencore had made an offer based on the recap dated 1 April 2019, and BPOI had accepted that offer on 2 April 2019. BPOI said that it was the '*express and objective intention of the parties, as stated in the relevant exchanges*' to create a binding contract as at this date; and

2. Glencore argued against this interpretation, proffering instead several alternatives based on the premise that its correspondence on 2 April 2019 and subsequent proposed amendments to the contractual terms thereafter amounted to counter-offers, which were later accepted by BPOI.

The Commercial Court held that a binding contract had been formed on 2 April 2019, following the correspondence from Glencore on 1 April 2019, and the response by BPOI on 2 April 2019. In reaching this decision, the Commercial Court: (i) accepted that whilst there was a general, and widely accepted, rule that a traditional offer and acceptance analysis applied in 'battle of the forms' cases; (ii) however, it did not consider this case to give rise to a 'battle of the forms' issue. The parties were not in dispute as to whether or not the Glencore Sales Contract terms or the BPGT&Cs should apply; rather, both parties had accepted when the recap was agreed that the BPGT&Cs applied. A negotiation had then ensued (i.e. from 2 April onwards), as to whether or not the contract already agreed should be varied to reflect the terms of the Glencore Sales Contract; and the Commercial Court noted that it cannot be the case that any negotiation regarding contractual terms which gives rise to a dispute can be said to amount to a 'battle of the forms' merely because one party sends a draft contract to the other, and there is back-and-forth correspondence. For the reasons set out above, the 'last shot' principle, commonly applied in 'battle of the forms' cases, was not engaged.

In addition to this analysis, the Commercial Court said that '*the question is what the parties must objectively be taken to have intended*', and in answering this gave weight to wording which was used by BPOI in an email sent on 4 April 2021, as follows:

'*[…] only terms which have been expressly agreed by both parties, at the time of trade or subsequently, shall be binding for the agreement. We hereby reject any proposed amendments unless expressly agreed by us in writing. Neither failure or delay in responding, nor performance of the agreement, shall constitute acceptance to any terms which have not been expressly agreed between the parties*'.

The Commercial Court said this wording was '*clear and unambiguous*' – BPOI would not be bound by the disputed clauses in the Glencore Sales Contract by reason of either: (i) a failure to respond; or (ii) performance of the agreement. Glencore did not in its response reject this position: rather, Glencore said in respect of the clauses being negotiated in the Glencore Sales Contract that '*nothing shall be deemed or constitute acceptance or consent of the clauses in dispute*'. This wording simply indicated to the Commercial Court that the correspondence between the parties after 2 April 2019 did not amount to any variation of the contract terms already agreed.

By reason of the above, the Commercial Court found: (i) that there was no agreement reached by the parties on any or all terms of the Glencore Sales Agreement; and (ii) there was a contract formed on 2 April 2019.

Terms Relating to Quality of the RECO

The terms of the recap stated that Glencore would supply '*Quality: Urals ex Primorsk / UL in Seller's option*'. The two key clauses in the BPGT&Cs in this regard were:

Clause 59.1, which provided:

'59.1 Quality

59.1.1 Unless otherwise stated in the Special Provisions, the quality of: (i) the Crude Oil delivered hereunder shall be the quality of such Crude Oil as usually made available at the time and delivery point as specified in the Special Provisions; and (ii) Product delivered hereunder shall not be inferior to the specification (if any) set out in the Special Provisions […]'

Clause 9, which provided:

'*[…] the taking of samples and analysis thereof for the purposes of determining the compliance of the Crude Oil or Product with the quality and quantity provisions of the Special Provisions shall be carried out in the following manner… by the Loading Terminal's own qualified inspector(s) in accordance with the good standard practice at the Loading Terminal at the time of shipment […]*'

'*9.1.1 Measurement of the quantities and the taking of samples and analysis thereof for the purposes of determining the compliance of the Crude Oil or Product with the quality and quantity provisions of the Special Provisions shall be carried out in the following manner:*

(a) where the Loading Terminal is operated by the Seller or the Seller's Affiliate, […]

(b) where the Loading Terminal is not operated by the Seller or the Seller's Affiliate and if jointly agreed upon by the Buyer and Seller, by an independent inspector […]

(c) should the parties fail to agree upon an independent inspector, or should the Loading Terminal refuse access to any independent inspector appointed by the parties, then by the Loading Terminal's own qualified inspector(s) in accordance with the good standard practice at the Loading Terminal at the time of shipment […]'

'*9.2.1 Provided always that certificates of quantity and quality… of the Crude Oil or Product comprising the cargo are issued in accordance with Sections 9.1 and 9.2.2 then they shall, except in cases of manifest error or fraud, be used for invoicing purposes and the Buyer shall be obliged to make payment in full in accordance with Section 63 but without prejudice to the rights of either party to make any claim pursuant to Section 59*'. [Emphasis added]

Taking first Clause 59.1, each of the parties advanced a different meaning as to the phrase '*as usually made available at the time and delivery point*':

1. BPOI placed weight on the word '*usually*': (i) it was said that whilst there is scope for variance, it does not entitle Glencore to deliver RECO that is wholly unusual at any time; and (ii) Glencore's interpretation (see below) is unreasonable and absurd, because if right, there could never be a claim for quality – it would mean that whatever cargo was actually loaded is by definition 'usual'; and

2. Glencore placed weight on the phrase '*at the time*': the cargo to be supplied need only be of the quality then available (including RECO with elevated levels of organic chlorides) 'at the time' of loading it at port. This was said to reflect the allocation of risk between the parties, whereby it had been agreed that the buyer should bear the risk of uncertainty regarding the quality of the RECO.

The Commercial Court found that the natural meaning of the words '*usually made available*' was what typically or normally happened. Clause 59.1.1 did not mean (as per Glencore), the oil which was available at a given time, because that would not give effect to the term '*usually*'. The Commercial Court also rejected Glencore's allocation of risk point, on the basis that, if correct, most (if not all) protection for BPOI would be removed regarding the quality of RECO to be delivered. There was no evidence to suggest this was intended by the parties.

Further, when considering an interpretation dispute, the Commercial Court acknowledged that the wider contractual provisions and the factual background are important. Clause 9 required that the parties had agreed that the RECO should be tested. It was to be inferred that the purpose of that test was to ensure that the RECO was of the '*usual*' quality. Accordingly, Glencore was obliged to supply RECO that was '*usual*' in quality – it did not permit delivery of RECO with increased levels of organic chlorides, which was not '*usual*' within the meaning of clause 59.1.1.

Secondly, Clause 9 deals with sampling, measurement, and certificates of quality. The Commercial Court acknowledged that if there was any ambiguity in the wording '*for the purposes of determining the compliance of the Crude Oil or Product […] with the quality provisions*', the natural meaning of the words should be considered against the contract in its entirety:

1. The Commercial Court acknowledged that there was no express provision in Clause 9.1, that samples and analysis taken by the Loading Terminal inspectors would be conclusive of the quality of the RECO: there is a procedure for testing and analysis, but no provision that this would be conclusive of quality; and

2. Clause 9.2.1 subsequently provides for certificates of quality and quantity to be issued for the purposes of

invoicing (which by implication reflect the results of the analysis and sampling under Clause 9.1). Clause 9.2.1 is subject to a caveat: *'but without prejudice to the rights of either party to make any claim pursuant to Section 59'*. There is no provision (express or implied) that these certificates are binding or final regarding claims disputing quality.

In the circumstances of Clause 9, and the contract as a whole, neither party was precluded from challenging the quality of the RECO by reference to other evidence, in determining whether it complied with the contractual specification.

On the evidence before it, the Commercial Court found that there was a breach of the contractual provisions regarding quality of the RECO, by virtue of contamination by organic chlorides.

Measure of Damages

The delivery of contaminated RECO in breach of contract amounted to a breach of warranty as to quality. The relevant provisions for damages were those in sections 53(2) and 53(3) of the Sale of Goods Act 1979, as follows:

'(2) The measure of damages for breach of warranty is the estimated loss directly and naturally arising, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of a warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty of quality'.

The Commercial Court determined that cost of cure was not appropriate – BPOI is a trading company with no ability itself to 'cure' the defect (the company that treated the contaminated RECO was BPOESA which was not a party to the contract).

However, the Commercial Court did not consider that the appropriate measure of damages was BPOI's liability to BPOESA. It was held that the correct measure, was the difference between the market value of 'sound' crude and the value of the contaminated crude as at the date of delivery. As to this second point, the Commercial Court said that if it was problematic to ascertain the value of the contaminated crude on delivery, then the value of the contaminated crude as repurchased by BPOI from BPESE and sold to BPOESA should be used instead. In effect, the Commercial Court adopted a quasi-section 53(3) measure.

The Commercial Court went further to explain that there was an alternative measure of loss (if it was wrong on the above), namely BPOI's liability to BPESE under the sub-sale. In determining the value of the contaminated cargo, the Commercial Court had regard to the price at which BPOI, as the buyer, had been able to resell the goods to BPOESA,

as the sub-buyer who had knowledge of their defective condition, describing this as an independent data point and a compelling piece of evidence. Therefore, the value of the contaminated oil was Dated Brent minus USD 8 per barrel.

Comment

There are several points of interest which arise from this decision. Taking them in turn:

Establishing the Contractual Terms

Crude oil and oil product trades are regularly carried out by traders electronically or by telephone – followed by a recap.

Where the terms of those communications display: (i) the relevant facets of offer and acceptance; (ii) an objective intention to be legally bound; and (iii) sufficient terms to make the arrangement legally certain, a legally enforceable contract will come into existence. In this case, that was the consequence of the recap and acceptance of the terms set out in the recap.

The benefit of referencing industry recognised terms and conditions (such as the BPGT&C's) in a recap, is that if a contract arises from the terms of the recap, the parties will have detailed terms and conditions on issues such as quality.

However, care must be taken not to enter into an oral agreement followed by accepting a recap on terms where one party is not satisfied. Once a contract arises it will be necessary to show a variation to the contract, should a party wish to change its terms. In this respect:

(i) a battle of the forms issue (and therefore the corresponding 'last shot' principle), will simply not arise where it is deemed that parties are negotiating variations to an already agreed contract; and (ii) the parties' ability to vary the terms may be restricted by a no oral modification clause.

Quality

Disputes concerning the contractual specification for an oil product, and more particularly, the finality or otherwise of the certificate of quality, are not uncommon. The same issue was recently considered by the Court of Appeal in *Septo Trading Inc v Tintrade Limited* [2021] EWCA Civ 718 ('**Septo**'). See *CMS Annual Review of developments in English oil and gas law* (2021 Edition), page 80.

Notwithstanding the incorporation of the BP General Terms and Conditions 2007 ('**BP General Terms**'), in *Septo*, the clear meaning of the recap was that the parties had expressly agreed that a certificate of quality was binding on both parties – '[…] *such result to be binding on the parties […]*'. The practical effect of these words is that, once a quality certificate for the fuel oil has been issued, the buyer cannot subsequently bring a claim for failure to comply with the contractual spec. This is a point of distinction with *BP v Glencore*:

1. The recap in *BP v Glencore* did not contain a provision similar to *Septo*.

2. The Commercial Court acknowledged that on a natural reading of Clause 9.1, there was nothing which expressly provided that taking samples and analysis by the loading terminal's inspectors would be conclusive – such wording was simply not included.

3. As a result, there was nothing in Clause 9 (or the contract more widely) which precluded a future challenge by reference to other evidence.

The Court of Appeal in *Septo* acknowledged that the BP General Terms provided for a plainly different scenario than that as set out in the recap: under the BP General Terms a quality certificate is '*conclusive and binding for invoicing purposes*'. [Emphasis added]

The reason for the different findings in *Septo* and *BP v Glencore*, is that in Septo the recap had the legal effect of dispensing with the position that would otherwise apply under the BP General Terms. The key message is that the terms of a recap might have significant importance.

Damages

The approach of the Commercial Court to damages seems to reflect what *McGrigor on Damages* would refer to as the '*normal measure*' – that is, the value of the goods at the time of delivery absent a breach less the market value in the context of the breach. The 'normal measure' of damages is a reflection on the rules of mitigation. In the usual course of events, the buyer will be expected to mitigate its loss by selling the cargo at the market price. As a result, its true loss, as a result of the breach, all other things being equal, will be the difference between the two values.

The key determinants of establishing quantum in these circumstances is to: (i) establish whether the contractual price was originally a market price at the time of delivery (if so, it will be a proxy for the value of the goods at the time of delivery); and (ii) the value of the goods at the time of delivery in the context of the breach. In respect of the latter, the court may find a contemporaneous actual arms-length sale of a contaminated cargo (absent compelling evidence to the contrary) to be a fair proxy for the true market value.

The above difference between market values, as a proper measure of damages for direct loss, should be distinguished from special (consequential) losses arising from the buyer breaching an onward sales contract – which may (or may not) be subject to specific exclusions.

Judge: Moulder J.

Punitive interest where there is 'Significant Connection with England'

In *Vitol SA v Genser Energy Ghana Ltd* [2022] EWHC 1812 (Comm), the Commercial Court decided that a propane sales contract had a '*significant connection*' with England, for the purposes of The Late Payment of Commercial Debts (Interest) Act 1998, where the payments were made in England and where major decisions in relation to the contract were made in England. This is despite the fact that neither party was incorporated in the U.K. and the propane was to be delivered to the buyer in Ghana.

Facts

Vitol SA ('**Vitol**') agreed to sell propane to Genser Energy Ghana Ltd ('**Genser**') under a trading agreement (the '**SPA**').

The SPA was governed by English law and was amended numerous times.

One of the amendments provided for the right of either party to terminate the SPA for breach by the other party, and for the party in breach to pay a '*Settlement Amount*' to the non-breaching party, calculable by the non-breaching party in a '*commercially reasonable manner*'. Vitol brought a claim for a Settlement Sum of around USD 3.5m. Genser challenged the Settlement Amount claim on various grounds.

Another amendment (the '**Seventh Addendum**') purported to introduce a late payment interest provision of 8% above LIBOR. Vitol sought to claim interest on the Settlement Amount of around USD 20,000. However, the Seventh Addendum was never signed and the Commercial Court held that, on the facts, it was not agreed, nor did the Commercial Court consider that '*any general agreement to pay interest on late payments*' had been made. As a result, Genser was not obliged to pay the interest invoice.

However, the issue then arose as to whether Genser was liable to pay interest under the Late Payment of Commercial Debts (Interest) Act 1998 (the '**1998 Act**'). Article 4 of the Late Payment of Commercial Debts (Rate of Interest) (No 3 Order 2002 (SI 2002/1675)) provided for a rate of 8% over the Bank of England base rate.

Genser argued that it was not liable, as section 12 of the 1998 Act provided that:

'*This Act does not have effect in relation a contract governed by a law of a part of the United Kingdom by choice of the parties if:*

(a) there is no significant connection between the contract and that part of the United Kingdom; and

(b) but for that choice, the applicable law would be a foreign law'

The issue for determination was whether the SPA had a '*significant connection with England.*'

Decision

Purpose of the 1998 Act

The Commercial Court first examined the purposes of the 1998 Act. It was considered that the statutory interest rate was not intended to be compensatory as it exceeded the rate at which most commercial creditors would be likely to have to borrow whilst being kept out of their money.

Rather, it was properly to be regarded as a penal rate which was intended to act as a deterrent and to promote: (i) the need to protect commercial suppliers whose financial position made them particularly vulnerable if their debts were paid late; (ii) the general deterrence of late payment of commercial debts; and (iii) a domestic socio-economic policy in seeking to promote the benefit of prompt payment of debts on the economic life of the United Kingdom.

A Significant Connection

The Commercial Court then considered that a '*significant connection*' was one which connected the substantive transaction itself to England. Whether connections provide a significant connection, singly or cumulatively, was a question of fact and degree in each case, but they had to be of a kind and a significance which made them capable of justifying the application of a domestic policy of imposing penal rates of interest on a party to an international commercial contract.

A disputes clause providing for English jurisdiction could not be a relevant connecting factor because that did not in itself connect the substantive transaction itself to England and because choice of forum governs procedural rights and remedies, not the substantive obligations.

Case Law

Finally, the Commercial Court turned to the relevant case law guidance in the judgment of Popplewell J in *Martrade Shipping & Transport GmbH v United Enterprises Corpn* [2014] EWHC 1884 (Comm), including his list of 'non-exhaustive factors':

'*(1) Where the place of performance of obligations under the contract is in England. This will especially be so where the relevant debt falls to be paid in England. But it may also be where other obligations fall to be performed in England or other rights exercised in England…*

(2) Where the nationality of the parties or one of them is English…

(3) Where the parties are carrying on some relevant part of their business in England. It may be thought that persons or companies who carry on business in England should be encouraged to pay their debts on time and not use delayed payment as a business tool even in relation to transactions which fall to be performed elsewhere… The policy of the 1998 Act may be engaged in the protection of suppliers carrying on business in England, whether financially vulnerable or not, even where the particular debts in question fall to be paid by a foreign national abroad.

(4) Where the economic consequences of a delay in payment of debts may be felt in the United Kingdom. This may engage consideration of related contracts, related parties, insurance arrangements or the tax consequences of transactions'.

Application to the Facts

Vitol argued that there was a significant connection, as: (i) invoices were payable to Vitol in London; and (ii) critical decisions in relation to the SPA were taken in, and the key decision makers were based in, London.

Genser argued that the SPA itself did not require payment to be made to Vitol in London and that the invoices were not a permissible aid to the construction of the payment obligation. In any event, the invoice was said to be payable to a New York bank account:

'TO : JPMORGAN CHASE BANK NEW YORK (SWIFT: CHASU33)

IN FAVOUR OF : JPMORGANCHASE BANK LONDON (SWIFT:CHASGB2L)'

There was also a provision in the SPA that the '*Payment Due Date*' was to be determined by reference to New York Federal Reserve banking days, which, Genser argued, meant that the proper construction was that the payment obligation was in the USA.

The Commercial Court rapidly came to the conclusion that the ultimate beneficiary of the payments was Vitol in London and, as such, '*Vitol is right to point to: (a) the ultimate payment obligation being payment of the debts in England and (b) the fact that Vitol was carrying on relevant parts of the commercial business in London as conferring a sufficient connection between the UK and the SPA for the purposes of the 1998 Act.*'

Comment

In a wide-ranging and detailed judgment, the decision on '*significant connection*' was only a small part, which may explain the relatively brief analysis given by the Commercial Court. The decision may come as a surprise to a number of participants in the energy sector.

The decision raises a number of issues:

1. Connecting Factors: many 'international' contracts in the energy sector, including product sales contracts, have little to do with England other than the choice of governing law, the payment into London bank accounts and the physical location of managerial staff making decisions in relation to the contract – such a 'typical' set of circumstances could now be said to trigger the possibility of statutory interest, even if a reasonable commercial bystander might have said: '*this contract has nothing to do with England*'.

2. Location of Payment Obligation: where a contract is silent on invoicing instructions, the default position is that the debtor must seek out the creditor (in this case, the Vitol entity was incorporated in Switzerland) – i.e. the act of performing payment would be conducted in the creditor's territory – it might now be argued that this 'default' position can be ousted by invoicing instructions within the invoice itself.

3. How to oust Statutory Interest:

    a. As noted in the judgment, section 12 recognises that subjecting parties to a penal rate of interest on debts might be a discouragement to those who would otherwise choose English law to govern contracts arising in the course of international trade, and accordingly does not make such consequences automatic.

    b. Although parties cannot agree to waive statutory interest, under section 8 statutory interest can be 'ousted', provided that the contract in question provides a '*substantial remedy*' for late payment of the debt. Where the parties agree a contractual remedy for late payment of the debt that is a substantial remedy, statutory interest is not carried by the debt.

    c. Any contractual remedy can be a '*substantial remedy*', unless it is: (a) not sufficient either to compensate the seller for late payment or to deter a late payment; and (b) unreasonable to allow the remedy to be used to circumvent statutory interest.

    d. As a result, the inclusion of a reasonable interest provision for late payment of sums due will almost certainly mean that penal interest under the 1998 Act cannot be claimed.

The judgment highlights the potential breadth of the application of statutory interest and comes as a warning to parties to consider expressly addressing the issue of remedies for late payment under English law governed contracts.

Judge: Anderson QC.

Chapter 2

Projects and supply chain

Since last year's Annual Review there have been a number of significant cases relevant to oil and gas projects and supply chains, including the consideration of a project's Scope 3 emissions in light of the Paris Agreement. An interesting non-energy related case also provides useful guidance on liquidated damages:

- In *Eco World – Ballymore Embassy Gardens Company Limited v Dobler UK Limited* [2021] EWHC 2207 (TCC) the Technology and Construction Court enforced a liquidated damages clause which did not allow for a proportionate reduction in liquidated damages following partial possession of completed sections of a development. It rejected arguments that the clause was a penalty.

- In *R (on the application of Friends of the Earth Limited) v (1) The Secretary of State for International Trade / Export Credits Guarantee Department (UKEF) (2) Chancellor of the Exchequer* [2022] EWHC 568 (Admin) the Divisional Courts' two-judge bench was split on the question of whether the Secretary of State for International Trade and Chancellor of the Exchequer had breached their obligations under the Paris Agreement, which would make the decision to provide finance for an LNG field in Mozambique an error and/or unlawful.

- In *Geoquip Marine Operations AG v (1) Tower Resources Cameroon SA and (2) Tower Resources plc* [2022] EWHC 531 (Comm) the Commercial Court decided that the provider of a Vessel was not entitled to standby costs when it was unable to work due to the charterer not having the relevant licences and consents.

Liquidated damages and partial possession

In *Eco World – Ballymore Embassy Gardens Company Limited v Dobler UK Limited* [2021] EWHC 2207 (TCC) the Technology and Construction Court enforced a liquidated damages clause which did not allow for a proportionate reduction in liquidated damages following partial possession of completed sections of a development. It rejected arguments that the clause was a penalty. The Technology and Construction Court also considered a number of alternative arguments of general interest, including whether the employer had an obligation to consider levying a reduced amount of liquidated damages and whether an otherwise invalid liquidated damages clause could nevertheless operate as a cap on liability.

Facts

Eco World engaged Dobler to carry out the design, supply and installation of façade and glazing works for a residential development in Nine Elms, London (the '**Contract**'). Dobler were engaged on three parts of the development: Block A, comprising high value residential apartments and Blocks B and C, comprising affordable housing units. The contractual date for completion was 30 April 2018.

After an initial grace period after the date for completion, the Contract provided for a single weekly liquidated damages sum as follows:

'Liquidated damages will apply thereafter at the rate of GBP 25,000 per week (or pro rata for part of a week) up to an aggregate maximum of 7% of the final Trade Contract Sum…'

The Contract also contained a provision that required Eco World to notify that it required Dobler to pay liquidated damages at the rate stated in the Contract '*or lesser rate stated in the notice*.'

On 15 June 2018, Eco World took over Blocks B and C. On 20 December 2018 all of Dobler's works were certified as achieving practical completion.

Following practical completion, a dispute arose as to the level of liquidated damages Eco World were entitled to for Dobler's delay.

Eco World commenced proceedings in the Technology and Construction Court seeking declarations as to (1) the validity and/or enforceability of liquidated damages in circumstances where Eco World had taken possession of Blocks B and C and there was no mechanism for a proportionate reduction in the amount of the damages, and (2) if the clause was void, whether it nonetheless imposed a cap on the level of general damages Eco World were entitled to claim for delay.

Decision

The Technology and Construction Court determined that the liquidated damages provision was valid and enforceable. Whilst the provision did not provide for a reduction in liquidated damages on partial possession, there was no uncertainty as to the amounts payable.

The full amount of liquidated damages was payable for each week of delay regardless of any partial possession taken by Eco World.

The Technology and Construction Court then considered whether such a clause offended the rule against penalties laid down most recently by the Supreme Court in *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67. That required the Technology and Construction Court to consider whether the clause was '*extravagant, exorbitant or unconscionable*' and whether it was '*out of all proportion to*' Eco World's legitimate interest in securing timely completion of the works. Applying this test, the Technology and Construction Court determined that the provision did not amount to a penalty for the following reasons:

— The clause was negotiated by commercial parties and their lawyers and enabled each party to better manage the risk of delay in the completion of the project.

— Eco World had an interest in enforcing completion of the works as a whole by the contractual completion date as late completion would have an adverse impact on the rest of the project by delaying following trades, exposing Eco World to liability and put at risk prospective sales of the apartments.

— Alternative quantification of Eco World's damages would be difficult, particularly following partial possession. Different combinations of partially incomplete blocks could result in a wide range of loss scenarios. Stipulating a single rate for all scenarios avoided these complexities.

— No evidence had been submitted to suggest that the level of liquidated damages agreed was unreasonable or disproportionate to the likely losses in the event of late completion to any one or more of the blocks.

Did Eco World have an obligation to reduce the rate of liquidated damages?

Dobler also contended that there was a contractual mechanism for reducing the level of liquidated damages payable. They relied on the wording noted above, which allowed Eco World to stipulate a '*lesser rate*' of liquidated damages. Dobler claimed this language conferred a discretion on Eco World as to the amount of liquidated damages to be levied and that this discretion was required to be exercised reasonably and not in a capricious or irrational manner. It claimed that Eco World could not reasonably insist on the full amount of liquidated damages in circumstances where it had taken partial possession of Blocks B and C.

The Technology and Construction Court rejected these contentions, finding that the ability of Eco World to levy a reduced amount of liquidated damages was an absolute contractual right, not one conferring a discretion with implied limitations.

Did the liquidated damages clause set a cap on liability even if penal?

Dobler also argued that if the liquidated damages clause was found to be penal/unenforceable then general damages should be capped at the level of liquidated damages otherwise payable. The Technology and Construction Court agreed. Despite *Makdessi* providing support for the view that general damages should not be limited to the amount of any penalty found to be unenforceable, the Technology and Construction Court considered the clause in this case had two parts; firstly containing a weekly rate for liquidated damages but also stipulating an overall cap on liability for delay. Were the rate of liquidated damages to be struck down due to the rule against penalties, the overall cap on liability could nonetheless be given effect.

Comment

Even before the *Makdessi* decision, successful challenges to liquidated damages clauses on the basis that they offended the rule against penalties were extremely rare, though they were often attempted.

Since the *Makdessi* decision such challenges have become even more difficult. Although the leading construction texts, *Keating on Construction Contracts* (11th Edition) (2021) *at paragraph 10-023* and *Hudson's Building and Engineering Contracts* (14th Edition) (2020) at paragraph 6-024, expressed the view that the absence of a mechanism for reducing liquidated damages on account of partial possession would cause a claim for liquidated damages to fail, it always seemed likely that such view would not survive the Supreme Court's reasoning in *Makdessi*. The Technology and Construction Court's analysis arguably aligns with the commercial reality that there are good reasons why a single liquidated damages sum might be agreed despite (and precisely because of) the prospect of many different partial possession scenarios.

The other interesting aspect of the decision was the unwillingness of the Technology and Construction Court to accept the argument that the provision allowed the employer to levy a '*lesser rate*', finding that the ability of Eco World to levy was a reduced amount of liquidated damages was an absolute contractual right, not one conferring a discretion with implied limitations (Lewison, *The Interpretation of Contracts* 7th Ed., para 14.11). As the law on this area has developed, it had begun to converge with the usual test for an implied term, such that the party seeking the implication must show (amongst other things) that (i) the implication is necessary to give business efficacy to the contract, or (ii) it goes without saying. In a commercial contract agreed between sophisticated parties, legally advised, these circumstances will rarely arise.

Judge: O'Farrell J.

Court challenge to LNG Project funding

In *R (on the application of Friends of the Earth Limited) v (1) The Secretary of State for International Trade / Export Credits Guarantee Department (UK Export Finance) (2) Chancellor of the Exchequer* [2022] EWHC 568 (Admin) the High Court was asked to overturn a decision of UK Export Finance ('**UKEF**') to provide up to USD 1.15bn export credit support in relation to a USD 20bn liquefied natural gas ('**LNG**') facility in Mozambique. In refusing to overturn the decision, the High Court reaffirmed that public authorities were granted a wide margin of discretion in such decisions due to them being a complex, policy laden exercise, with no predetermined or recognised methodology for the assessment. That said, it will be important for energy industry participants to understand that the decision also makes clear that there are boundaries to the exercise of such discretion.

Facts

The claimant, Friends of the Earth ('**FoE**'), brought an application in the High Court for a judicial review challenging the decision of the First Defendant, UKEF, supported by the Second Defendant, the Chancellor of the Exchequer, to provide up to USD 1.15bn in export finance and financial support in relation to an LNG project in Mozambique.

UKEF's remit is to ensure that no viable UK export fails for lack of finance. UKEF provides no finance itself, nor does it have any net cost to the taxpayer; instead, it operates like a financial institution, carrying out banking and insurance business in support of UK exports. No public funds are used by UKEF nor does it make investments itself – rather, UKEF provides export credits (whether that is guarantees, insurance, grants or loans) in relation to the supply of UK goods and/or services to overseas buyers, essentially 'shoring up' the UK export.

Under the Export and Investment Guarantees Act 1991, UKEF has delegated powers from the Secretary of State under section 1(1) to '*make arrangements which the Secretary of State considers are conducive to supporting*

or developing (whether directly or indirectly) supplies or potential supplies by persons carrying on business in the United Kingdom of goods, services or intangible assets (including intellectual property) to persons carrying on business outside of the United Kingdom.' Under section 1(4) of the Export and Investment Guarantees Act 1991, '*the arrangements that may be made under this section are arrangements for providing financial facilities or assistance for, or from the benefit of, persons carrying on business; and the facilities or assistance may be provided in any form, including guarantees, insurance, grants or loans.*'

The investment decision in question that FoE wished to challenge was UKEF's decision to provide up to USD 1.15bn in export finance and financial support to a development of offshore deepwater gas production facilities, 50km from the coast of Northern Mozambique, connected to an onshore gas receiving and liquefaction facility (the '**Project**'). The Project is operated by Total E&P Mozambique Area 1 Limited and financed by MOZ LNG1 Financing Company Limited, who both appeared in FoE's judicial review proceedings as interested parties, making submissions in common cause with the two defendants.

Whilst the investment decision (in the affirmative) was made by UKEF, the Chancellor of the Exchequer's consent to the decision was also required as the proposed support for the Project was planned to exceed GBP 200m. Consent was also required because the funding of the Project, given its environmental impact, was recognised to be contentious. The Treasury duly consented, following consultation with UKEF.

FoE brought judicial review proceedings to challenge UKEF's decision, and the Chancellor of the Exchequer's consent thereto, on a number of grounds.

The Issues

Following permission being granted by Thornton J in April 2021, FoE applied to the High Court for a judicial review of UKEF's decision on the following two grounds:

1. The decision was based on an error of law or fact, specifically that funding for the Project was based on the erroneous consideration that the Project was compatible with the UK's obligations under the Paris Agreement and / or Mozambique's ability to meet its commitments under the Paris Agreement.

2. The decision was otherwise unlawful, as in reaching its conclusions, UKEF failed to take into account material considerations.

Both grounds were based on the premise that UKEF's climate change report in connection with the Project was inadequate, primarily because it did not quantify the Scope 3 emissions arising from the use of the LNG that would be produced by the Project. In fact, the Project would produce 805m tonnes of CO2 over its lifetime, using 0.1-0.2% of the world's remaining carbon budget – this was not set out in UKEF's climate change report.

FoE argued that UKEF, in order to determine whether providing UK public finance for the Project was consistent with the UK's obligations under the Paris agreement, should have considered whether (i) the Project was consistent with the long-term temperature goals of the Paris Agreement and (ii) the Project was compatible with the UK's obligations to make finance decisions consistent with a pathway towards low greenhouse gas emissions and climate resilient development and/or to provide financial resources to assist Mozambique to mitigate, adapt and to achieve a speedier reduction in its emissions than would otherwise be possible.

In furtherance of its argument, FoE asserted a number of factual grounds on which UKEF's climate change impact assessment was deficient, based on issues that FoE claimed it did not deal with or take into consideration.

In response, the defendants disputed FoE's '*hard-edged*' approach to the interpretation of the Paris Agreement. The defendants contended that the Paris Agreement contains broad objectives, rather than strict obligations, and that the correct test was '*tenability*' – was UKEF's interpretation of the Paris Agreement tenable? They argued that it was, as it was based on the judgement that the Project would foster climate change resilience in Mozambique and increase the country's ability to adapt to the adverse impacts of climate change.

Furthermore, the defendants asserted that compliance with the Paris Agreement was not at any stage a decisive or determining criterion for their decision – rather climate change impacts and the Paris Agreement were considerations that ought to be taken into account alongside other factors in reaching their decision. Specifically, the defendants pleaded that the Paris Agreement did not require any contracting party to meet any specific emission reduction level or take any particular action to reduce emissions – in fact it imposes no enforceable obligation on individual states to implement its goals in any particular or specific way.

In addition, the defendants contended that the scope of enquiry that should be undertaken and the factors to

consider were matters for UKEF as decision maker to decide, subject only to irrationality limits. They argued that most of the matters relied upon by FoE were in fact considered by the defendants. However, there was no obligation at law, as such, to take these factors into account and there was no established methodology setting out how a decision maker such as UKEF should evaluate projects with regard to their climate change impact or consistency with the Paris Agreement.

Decision

In reaching his decision, Stuart-Smith LJ had regard to the principle set out in *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 66, known as the '*Tameside* principle'. The *Tameside* principle requires that public bodies undertake a sufficient inquiry prior to making a decision, per Lord Diplock at 696 [1977] AC 1014 at 1065: '*[T]he question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable himself to answer it correctly?'* However, Stuart-Smith LJ affirmed that, as set out in *R (Refugee Action) v SSHD* [2014] EWHC 1033, what needs to be taken into account and what enquiries should be made are highly contextualised, and are matters for the decision maker.

In Stuart-Smith LJ's summation, UKEF's decision depended on the assessment of the climate change effects of a long-term project. This was a complex, policy laden exercise, with no predetermined, or recognised, methodology for the assessment. As such, UKEF should be afforded a wide degree of discretion. FoE's arguments were that UKEF failed to have proper regard to the climate impacts of the Project. However, in any event the Project would go ahead, with or without the funding. The decision was therefore not about emissions. It was about whether or not to provide finance. This was a multi-faceted decision, involving political, economic and scientific factors. Since a high degree of policy judgment was involved, it was appropriate for the decision maker to adopt a less rigorous approach to climate change analysis than if that had been the only material factor.

Stuart Smith LJ stated that the nature and scope of the enquiry that a decision maker is required to undertake depends upon the nature of the decision which that decision maker is making. Where it is a complex political decision, a wide margin of appreciation will be given. The Court should be wary of reaching a '*hard-edged*' interpretation of international treaties. In interpreting the Paris Agreement, Stuart Smith LJ took the view that the test to be applied was whether or not the view that the defendant took is '*tenable*', as per *Heathrow Airport Ltd and others v HM Treasury and HMRC* [2021] EWCA Civ 783. The language of the Paris Agreement was too opaque and high level to generate 'hard-edged' legal obligations. In this regard a less strict approach to interpretation will be applied where the language of a treaty is aspirational. The Paris Agreement should be approached as a composite package of aims and aspirations. As such, UKEF's application and interpretation of the Paris Agreement was acceptable, as it was based on an understanding that the Project would bolster climate change resilience and adaptability in Mozambique.

Stuart-Smith LJ was of the view that UKEF was entitled to a significant margin of appreciation on the facts, conducting an exercise of assessing climate change in the context of a long-term foreign Project – the first government department in the UK to do so, with no established or internationally recognised policy for evaluating climate change impacts of a project. Therefore, whilst UKEF did not, on the facts, undertake a full blown environmental assessment, it did consider climate change factors, took account of the Paris Agreement and took steps to inform itself about the impacts from outside bodies. Their analysis led them to understand that the emissions would be significant. UKEF decided to proceed anyway. It had the discretion to do so, and according to Stuart Smith LJ, a more rigorous analysis was unlikely to have had an impact on this decision.

Mrs Justice Thornton's view

Mrs Justice Thornton agreed with Stuart-Smith LJ that the Court was bound to afford considerable respect to UKEF's decision making. However, Mrs Justice Thornton was of the view that UKEF failed to discharge its duty of inquiry in relation to the calculation of Scope 3 emissions, and erred in its judgment that a high level qualitative review of the impact was sufficient – it was not. Mrs Justice Thornton concluded that UKEF failed to make reasonable and legally adequate enquiries in relation to a climate risks in decision making, depriving minsters of a legally adequate understanding of the scale of the emissions of the Project.

Mrs Justice Thornton concluded that UKEF's Climate Assessment and its failure to quantify Scope 3 emissions, as well as other deficiencies, meant that it did not fulfil its stated purpose and deprived UKEF and Ministers of the full evidence on which to base decisions. She concluded that there was no rational basis by which to demonstrate that funding of the Project was consistent with the Paris Agreement's commitments, given the Climate Assessment's omissions and flaws.

As two judges heard the application and there was no consensus between them, ultimately the claim failed given the judgment of Stuart-Smith LJ.

Comment

It is notable that, despite the undeniable political interest in this dispute, both judges stressed that their conclusions did not, and were not intended to, address the merits of the Project or the climate change considerations at play in the decision-making. Whilst this is not unexpected, in the highly politicised and fast-evolving sphere of climate change, this will be disappointing to activists, pressure groups and prospective claimants seeking to bring challenges of this nature. That said, Mrs Justice Thornton's comments regarding Scope 3 emissions may encourage further challenges seeking to broaden the scope of the considerations a public body must bear in mind when making decisions where similar environmental and climate change factors arise.

The UK has committed, through the Climate Change Act 2008 (as amended in 2019) and the Paris Agreement, to meet certain targets with relation to greenhouse gas emissions. Further, the Environment Act 2021 sets targets for improvement of various environmental features, including air and water quality. The use of judicial review, anchored to these commitments, as a tool to hold the government to account, and to call into question governmental approvals, consent or support for energy sector projects with an environmental impact, is significantly on the rise.

Although there have been no notable successes so far, the potential for delay or derailment of projects or policies is significant, and there are signs that the cases are gaining traction, with permission being granted for judicial review. Examples include:

— *Cox & Ors, R (On the Application of) v the Oil and Gas Authority and others* [2022] EWHC 75 (Admin) (judicial review of OGA's strategy for UK oil and gas on the basis it did not align with the UK's climate change commitments – challenge dismissed),

— *R (Plan B Earth & Others) v The Prime Minister & Others* [2021] EWHC 3469 (Admin) (permission refused for a judicial review claim in relation to government action on climate change),

— *Bennett v Cumbria County Council* (judicial review of council's decision to grant planning permission for a new coal mine – the case ultimately settled),

— *R (on the application of Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52 (Supreme Court reversed decision that the planned expansion of Heathrow Airport was unlawful on climate change grounds, determining that the UK Government had taken proper account of the UK's climate change commitments).

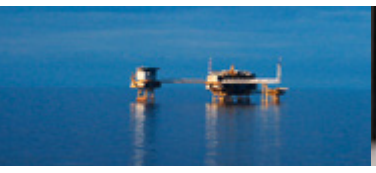
In addition, the threat of judicial review to projects, such as the development of the Cambo field in the North Sea, has been used as a mechanism by climate change activists to seek to drive corporate behaviour and decision making at potential investors.

Section 38 of the Environment Act 2021 sets out a new mechanism of environmental review, which will be distinct from judicial review, with amendments to the CPR being required to establish the mechanics of the process. Once this is up and running, it may well be that a rise in environmental reviews of governmental decisions follows.

In this regard, the judgment in *R (on the application of Friends of the Earth Limited v (1) The Secretary of State for International Trade / Export Credits Guarantee Department (UK Export Finance) (2) Chancellor of the Exchequer* reaffirms the notion that a significant margin of discretion should be afforded to public bodies in their decision-making, particularly where an exercise of judgment is required. However, it also reaffirms that the High Court will take an active role in reviewing whether a decision falls within that margin of discretion.

Permission to appeal has been granted.

Judges: Stuart-Smith LJ and Thornton J.



Entitlement to standby costs

In *Geoquip Marine Operations AG v (1) Tower Resources Cameroon SA and (2) Tower Resources plc* [2022] EWHC 531 (Comm) the Commercial Court decided that the provider of a vessel was not entitled to standby costs when it was unable to work due to the charterer not having the relevant licences and consents. As the contract was modelled on LOGIC terms, it will be of particular interest to those in the industry.

Facts

On 12 September 2019, Geoquip Marine Operations AG ('**Geoquip**') and Tower Resources Cameroon SA ('**Tower Cameroon**') entered into a Letter of Intent, whereby they agreed to work in good faith to prepare, mutually agree upon and execute a Contract for Services in the NJOM field, Offshore Cameroon, to be commenced upon Geoquip's service vessel (the '**Vessel**') completing its schedule of work in Nigeria (where the Vessel then was) not earlier than 1 October 2019 and not later than 1 January 2020.

On 30 October 2019, Geoquip (the '**Contractor**'), Tower Cameroon (the '**Company**'), and Tower plc (the '**Guarantor**') entered into the Contract. The Contract was for the provision of geotechnical survey services to be provided by Geoquip. The duration of the Contract was two months.

The Contract was structured into four sections: (1) Form of Agreement and Appendix 1; (2) (a) General Conditions of Contract - LOGIC Edition 2 - October 2003, and (b) Special Conditions of Contract; (3) Remuneration; and (4) Scope of Work.

The General Conditions, as amended by the Special Conditions, required:

'4.5 In order to ensure that performance and completion of the Work are not delayed or impeded the Contractor shall be responsible for the timely provision of all matters referred to in Clauses 4.1 and 4.4 and, where provided for elsewhere in the Contract, for the timely request of Company-provided materials, services and facilities. However, Contractor cannot be responsible for the timely delivery of Company-provided materials, services and facilities. If such are delivery late and cause delay in the performance and downtime of the Contractor's equipment, Company shall pay Standby time for such downtime …'

The Remuneration section provided (amongst other things):

'*The offer is subject to the Investigator arriving in Cameroon between 15th November and the 31st December 2019, and the contract is also contingent on the permits and license extension required for the site survey having been delivered prior to departure of the vessel to Cameroon.*'

Geoquip's service Vessel arrived in Cameroon and was ready to commence work in December 2019. There was a delay to the Vessel's mobilisation as a result of delays in renewing Tower Cameroon's drilling licence and permits from the authorities in Cameroon. During the delay, the Vessel incurred standby costs. During this period, invoices for standby costs were sent by Geoquip to Tower Cameroon, which were not objected to.

At the end of January 2020, an extension to the Contract was signed by Geoquip and Tower Cameroon (but not Tower plc) recording the parties' understanding of the standby hours to be incurred by the Vessel (the '**Extension Contract**'). Eventually, the work under the Contract commenced on 4 February 2020.

Geoquip sought to recover the standby costs for delays incurred by the Vessel.

Decision

Was Geoquip entitled to recovery of the standby costs?

The Contract, when it was agreed in October 2019, provided that it was '*contingent on the permits and license extension required for the site survey having been delivered prior to departure of the vessel to Cameroon*', meaning that there was no contract and therefore there were no contractual duties in place unless and until such licence extension and permits were obtained.

It would follow that any delay suffered by the Vessel after the Contract entered into force by reason of the unavailability of the relevant licence extension and permits would not have been within the parties' contemplation as falling within the scope of standby costs referenced in Clause 4.5. This was because the Contract contemplated that it came into force only after the licence extension and permits were obtained.

It is therefore unlikely that the parties objectively intended Clause 4.5 to apply to any delay in obtaining the relevant permits or licence extension.

Of course, in the event, the Vessel proceeded to Cameroon before the permits were obtained and indeed it is accepted by the parties that the Contract was nevertheless in force by January 2020. However, that of itself – absent an estoppel – does not alter the meaning accorded to Clause 4.5 or indeed any other provision at the time of the agreement of the Contract.

Was Geoquip entitled to recovery of the standby costs on the basis of an estoppel by convention?

The Commercial Court, having held that the terms of the Contract did not support Geoquip's entitlement to standby costs, considered its alternative argument based upon an estoppel by convention that: (i) Tower Cameroon was prevented from disputing liability on the basis that the parties shared a common assumption that the Vessel was incurring standby costs; or (ii) Geoquip held that assumption and Tower Cameroon '*acquiesced*'.

The Commercial Court analysed the requirements for an estoppel by convention and noted that recent authorities had not expressly addressed the issue of '*whether there is a requirement that the relevant assumption must be clear and ambiguous*'. The Commercial Court clarified that it was important that the relevant assumption was clear and unambiguous '*in its meaning, in its scope and in its impact on the legal relationship between the parties*' and '*something… must have crossed the line between the parties which manifested an assent to the assumption*'. The Commercial Court reasoned that this was necessary to protect the parties' express contractual intention.

On the facts, the Commercial Court was not persuaded that the parties clearly shared a relevant assumption and found no clear evidence that Tower Cameroon assumed liability for standby costs. Thus, Geoquip's claim for these costs on the basis of an estoppel by convention failed.

Was Tower plc liable as guarantor?

The established principle in *Holme v Brunskill* (1978) QBD 495 is that the liability of the guarantor under certain types of guarantee can be discharged if the underlying contract is materially varied without its consent.

Both Tower Cameroon and Tower plc had the same CEO, who signed the Contract on their behalf. The CEO, however, did not mention his position as a Tower plc representative when he signed the Extension Contract. Therefore, the question arose as to whether Tower plc could be discharged as a guarantor under the Contract on the basis that it was not a named party in the Extension Contract.

The Commercial Court held that Tower plc's liability was not discharged as a guarantor for two reasons.

Firstly, the Commercial Court noted that the representative, as a CEO of both companies, was '*intimately familiar with the operations… and that the activities of both companies were closely connected*'. Therefore, it was likely that he approved the extension on behalf of Tower plc as well.

Secondly, there was a no-oral variation provision in the Contract requiring all amendments to be signed by the parties to the Contract. This meant that the CEO must have approved the extension on Tower plc's behalf for the Extension Contract to be deemed effective, and there was no suggestion that it was not valid.

Comment

There are a number of interesting aspects to this decision for drafters of contracts in the oil and gas sector, as well as operation of those contracts:

First, when incorporating remuneration provisions into a standard form, with amendments, it is important to ensure that the agreement as a whole reflects the parties' true intent. Remuneration provisions are often removed from a tender document without consideration of whether anything has changed between tender and contract; if something has changed it is important that the contract reflects that change.

Second, it should not be assumed that because one company has the responsibility for providing an item needed for the works that, absent its provision, standby rates will apply. If the contract contains a clear remuneration structure as to when standby rates apply, there is a risk that English law will refuse to depart from that structure.

Third, that said, each case will turn on its specific facts. If Tower Cameroon had given a specific agreement to move the Vessel to site, other claims may have been available. One issue in this case seems to be that Tower Cameroon had not undertaken to pay any such cost.

Fourth, relying on estoppel by convention to defend a right to be paid, in the absence of a contractual agreement is difficult. English law will require an unequivocal communication or representation between the parties. English law applies a high evidential standard in order to succeed on a claim based on estoppel by convention.

Finally, the Commercial Court's approach to the no-oral variation clause meant that both Tower entities must have been parties to the Extension Contract is unusual. However, it is another example of the potential consequences of MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2018] UKSC 24.

Judge: MacDonald Eggers QC.

Chapter 3

M&A

Although unrelated to oil and gas transactions, two recent decisions of the English Courts will be of relevance to those carrying out M&A activity:

— In *Butcher v Pike* [2021] EWCA Civ 1407 the Court of Appeal decided that a purchaser could not rely on a provision relating to negligent non-disclosure in circumstances where the seller had in fact disclosed the information complained about, albeit outside the contractual disclosure letter.

— In *Thurcroft Power Limited v Volta Energy Group Limited* [2022] EWHC 338 (Comm) the Commercial Court decided that an option agreement concerning the early stages of a battery storage development did not prevent the claimant from using assets as party to the project, when the option to call for the transfer of the assets was not exercised.

Disclosure outside the Disclosure Letter can still be relevant in warranty claims

In *Butcher v Pike* [2021] EWCA Civ 1407 the Court of Appeal held that a purchaser could not rely on a provision relating to negligent non-disclosure in circumstances where the seller had in fact disclosed the information complained of, albeit outside the formal... outside the formal disclosure letter (the **'Disclosure Letter'**). Although the case is not an oil and gas transaction, it has obvious relevance.

Facts

The target company, BPG (UK) Ltd ('**BPG'**), operated an online lettings agency under the name 'my-let.com' (the '**Target**' or '**Company**'). The services provided by BPG included a facility which enables private residential landlords to advertise their properties for let on various online platforms, including Rightmove and Zoopla (the '**Platforms**').

Pursuant to an agreement dated 20 February 2017 (the '**SPA**') between Butcher and another ('**Butcher**'), as sellers, and Pike and others ('**Pike**'), as purchasers, Butcher agreed to sell and Pike agreed to buy the Target.

Clause 1.1 of the SPA defined 'Warranties' to mean the representations and warranties contained in Schedule 3.

Clause 5 of the SPA provided, so far as relevant:

'5.1 The Warrantors warrant and represent to the Purchasers that (subject to clause 5.2) each Warranty is true, complete and accurate and not misleading at the date of this Agreement.

5.2 The Warranties are subject only to:

5.2.1 any matter which is fully, fairly and specifically disclosed in the Disclosure Letter; and

5.2.2 the provisions of clause 6.

5.3 The Warrantors acknowledge that the Purchasers have been induced to enter into this Agreement by, and are entering into this Agreement in reliance upon, the Warranties which have also been given as representations with the intention of inducing the Purchasers to enter into this Agreement.

…'

Clause 6 of the SPA provided, so far as relevant:

'6.1 The Warrantors' liability under the Warranties shall be limited as follows:

6.1.1 no claim for breach of any Warranty shall be made by the Purchasers until the aggregate liability for all claims under this Agreement (including all previous claims whether or not satisfied and including costs) shall equal or exceed GBP 1,000 in which case the whole amount shall be capable of being claimed and not merely the excess;

6.1.2 the Warrantors' maximum aggregate liability in respect of all the Warranties (excluding interest, costs, fines, penalties and surcharges) is limited to the Purchase Price;

6.1.3 no claim for breach of the Warranties:

6.1.3.1 otherwise than in relation to Taxation shall be made unless the claim has been notified in writing to the Warrantors within 6 months of the Completion Date; and

…

6.2 None of the limitations contained in clause 6.1 apply to any claim under the Warranties where there has been fraud or negligent non-disclosure, or, in relation to the Warranties on Taxation, where any Taxation Authority alleges fraud, default, negligent conduct or conduct involving dishonesty on the part of the Company or any person acting on its behalf in relation to the matter giving rise to the claim.'

Pike claimed to be entitled to set off the deferred consideration of GBP 100,000 provided for under the SPA against damages allegedly due to them for a breach of warranty. The warranty in question stated that the target company had not defaulted under any agreement to which it was a party.

Pike accepted that they had not given notice of their claim within the six-month period but argued that they did not need to do so because the claim related to a negligent non-disclosure.

Butcher sought summary judgment on the question of whether or not there had been such non-disclosure, on the basis that the target company's activities on behalf of other agencies were not mentioned in the Disclosure Letter.

High Court Decision

The High Court decided:

1. The purpose of the Disclosure Letter is to carry into effect an agreement between the parties in respect of any warranty given, no claims can be made in respect of it by Pike on the basis that it is untrue, to the extent of the facts and matters fully, fairly and specifically disclosed in the Disclosure Letter. In essence the seller is showing that the warranty is not true, and the purchaser is agreeing that it knows this to be the case.

2. As to the proviso in Clause 6.2 of the SPA, the parties were trying to say that the purchaser would not be prevented from bringing a late claim if the reason it was brought late was the concealment by the sellers of facts and matters essential to the decision or knowledge necessary to be able to bring such a claim; or to put it another way, because those facts and matters ought properly to have been, but were not disclosed to them.

3. If the purchasers did in fact know, because the sellers did disclose information about the matter, then the bar would still apply. Whether enough had been disclosed would be a matter for argument.

For the reasons set out above, the High Court was satisfied that non-disclosure, as it is used in Clause 6 of the SPA, did not mean only the facts and matters disclosed in the Disclosure Letter.

Given the High Court's reasoning, summary judgment was refused. Pike appealed.

Court of Appeal Decision

The Court of Appeal upheld the High Court's decision. It agreed with the reasons given by the High Court, adding three observations of its own:

1. First, it is common ground that Butcher was under no duty of disclosure. This gives rise to a difficult question as to what is meant by '*non-negligent*' in Clause 6.2 of the SPA. It was neither necessary nor appropriate to venture any view on that question on this appeal. However, given that the Disclosure Letter is referred to elsewhere in the SPA, it is to be inferred that the absence of reference to it in Clause 6.2 of the SPA was intentional.

2. Second, it would make little sense to ask whether there was negligent non-disclosure by reference to the Disclosure Letter if in fact there was disclosure in another communication. That would seem to involve an enquiry as to whether it was negligent for Butcher not to include the information in the Disclosure Letter even though they had disclosed it elsewhere. But what would be the point of that enquiry given that the purpose of the Disclosure Letter is to limit the scope of the Warranties for the benefit of Butcher, whereas the purpose of Clause 6.2 of the SPA is to provide an exception to the limitations in Clause 6.1 of the SPA for the benefit of Pike?

3. Third, the Court of Appeal did not accept Pike's argument that Clause 6.2 of the SPA should be narrowly construed because it is part of a limitation provision which is a form of exclusion clause. Clause 6.2 of the SPA provides an exception to the limitations in Clause 6.1. of the SPA.

Comment

Although this is a preliminary decision on a summary judgment application, it sets out interesting guidance for drafters on the relationship between warranties, disclosure letters and limitations on warranty claims.

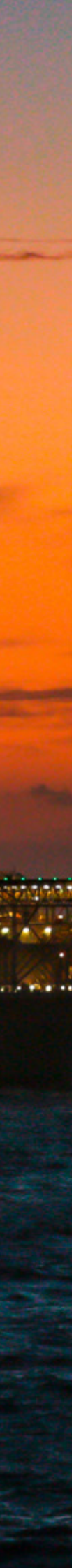
Each SPA will turn on its own words. In most cases there will be a 'tug-of-war' in negotiations over the scope of the warranties. In this case, in the context of there being no duty to make any disclosure in the Disclosure Letter, it is not entirely apparent what the SPA meant by '*fraud or negligent non-disclosure*'. On the face of it, there can be no negligent non-disclosure where a duty to disclosure does not exist. Negligence requires a duty. As a result, the High Court and Court of Appeal were left grappling to find a duty upon which the negligence could 'bite'.

If Clause 6.2 of the SPA sought to protect the purchaser from a case of concealment, words similar to section 32(1) of the Limitation Act 1980 might have assisted in providing clearer drafting. However, the word '*negligent*' might suggest something different to concealment. In this respect, it may be that the words '*on the part of the Company or any person acting on its behalf in relation to the matter giving rise to the claim*', may be of assistance. It may suggest that the words point to the non-disclosure being one by the Target rather than by the seller. Further, such non-disclosure may not need to be a concealment in a deliberate sense – but require some form of negligence on the part of the Target that meant the purchaser could not have discovered the facts and matters underlying the claim in the time available to claim under the warranties within the time provided. That is something that may ultimately need to be decided at trial.

In the interim, whilst the 'tug-of-war' of negotiations will doubtless lead to compromises over the scope of warranties, it will be important for purchasers to remember that any reference to a negligent non-disclosure will need to 'bite' on a duty to disclose.

High Court Judge: Charles Morrison.

Court of Appeal Judges: Arnold LJ, Coulson LJ and Popplewell LJ.



Consequences of not exercising an option

In *Thurcroft Power Limited v Volta Energy Group Limited* [2022] EWHC 338 (Comm), the Commercial Court decided that an option agreement concerning the early stages of a battery storage development did not prevent the claimant from using assets as party to the project, when the option to call for the transfer of the assets was not exercised.

The dispute between the parties highlights the need for clarity in approaching option agreements in the energy sector (and perhaps even more so in a volatile market).

Facts

The claimant, Thurcroft Power Limited ('**TPL**'), was a special purpose vehicle incorporated to pursue the initial stages of the development of a battery storage project in Thurcroft, Yorkshire (the '**Project**'). The defendant, Volta Energy Group Limited ('**Volta**'), was a company delivering battery storage projects. Battery storage facilities are a collection of high-power batteries used to store electrical energy taken from the National Grid for later release.

TPL leased the proposed site and had planning documents prepared. Volta funded the payments to the local grid company, Northern Powergrid (the '**Grid**'), payable upon acceptance of its '*Connection Offers*'. The initial intention of the parties was that Volta would develop the battery storage facility itself and it was agreed that the legal interest in an initial Connection Offer should be transferred to Volta.

Later on, TPL and Volta entered into an option agreement relating to the transfer of the '*Assets*' of TPL (the '**Assets'**) to Volta (the '**Option Agreement**'). It provided for a '*price*' payable to TPL of GBP 800,000 on the exercise of the option. In a side letter to the Option Agreement, TPL allowed Volta to enter the site to perform surveys.

The following provisions of the Option Agreement were relevant:

1. Clause 1.1 of the Option Agreement included the following definitions:

   a. '*Assets*' as meaning: '*assets of* [TPL] *relating to the Storage Project which are at the date of this Agreement or subsequently, owned by* [TPL] *and which include all assets in relation to the Storage Project made or submitted in the name of Thurcroft Energy Limited.*'

   b. '*Asset Transfer Agreement*' as meaning: '*the agreement for the sale of the Assets by* [TPL] to *[Volta] substantially in the form annexed in Appendix 1 and which is subject to such amendments as are agreed between the parties prior to the exercise of the Option, each party acting reasonably.*' In fact, Appendix 1 to the Option Agreement was blank, and no asset transfer agreement was annexed to it.

   c. '*Option*' as meaning: '*the option to require* [TPL] *to transfer the Assets to* [Volta] *or any Group Company of* [Volta] *that* [Volta] *shall direct the Assets to be transferred to, in consideration of the Price on the terms set out in the Asset Transfer Agreement*' (the '**Option**').

   d. '*Option Notice*' as meaning: '*notice exercising the Option signed by or on behalf of* [Volta] *substantially in the form set out in Schedule 1.*' Schedule 1 to the Option Agreement set out a specific form of Option Notice to be signed on behalf of Volta.

   e. '*Option Period*' as meaning: '*the period commencing on the date hereof and expiring 6 months from and including the date upon which* [Volta] *confirms its acceptance of the Planning Permission in accordance with clause 3.*'

   f. '*Planning Permission*' as meaning: '*the planning permission for the installation and operation of a Storage Project at the Property.*'

   g. '*Storage Project*' as meaning: '*the electricity storage and discharge scheme under which* [Volta] *intends to design, procure funding for, construct, operate and maintain the Equipment on the Property.*'

2. By Clause 2 of the Option Agreement, TPL granted '*the Option*' to Volta upon payment of an '*Option Fee*' of GBP 1, on terms that provided that the Option should be exercised by Volta sending '*the Option Notice*' to TPL's solicitors at any time during '*the Option Period*'.

3. Clause 2.3 of the Option Agreement specifically provided that on exercise of '*the Option*', TPL should sell and Volta or any Group Company of Volta that Volta should direct the Assets to be transferred to, should buy the Assets on the terms set out in '*the Asset Transfer Agreement*.'

4. Clause 3 of the Option Agreement dealt with '*Planning Permission*'. Clause 3.1 provided for TPL or its agent to promptly make an application to the relevant local planning authority for '*Planning Permission*' for a '*Storage Project of not less than the Minimum Capacity Requirement*', and then diligently pursue the application. Clause 3.2 of the Option Agreement then provided as follows:

   'As soon as possible after the date hereof, '[TPL]' *shall procure that there is provided to* '[Volta]' *copies of the Planning Permission, together with all related documentation and shall thereafter reply to such reasonable enquiries as* '[Volta]' *may raise in relation to the planning status of the Property.'*

The Option granted by the Option Agreement expired (Volta did not exercise the Option). Volta did not develop the battery storage facility and instead proceeded to sell certain rights to a third party. Those rights included an application for planning permission made by Volta and the benefit of the initial and later Connection Offers (to the Grid).

TPL claimed that Volta should have accounted to it for the sale proceeds to the third party and/or that Volta had breached an implied term of the Option Agreement to cease to use the Assets when the Option term expired.

There was also a question whether Assets under the Option Agreement covered the Connection Offers in the first place. The front sheet of the Option Agreement described the Option as '*relating to planning documents relating to land [description of land/location]*'. The Option Agreement itself defined '*Assets*' as '*assets of* [TPL] *relating to the Storage Project, which are at the date of this Agreement or subsequently, owned by* [TPL] *and which include all assets in relation to the Storage Project*'. Both parties accepted that the initial planning documents were the subject of the Option Agreement, but Volta disputed that the Connection Offers were also included.

The Issues

The issues to be determined were:

1. Whether the definition of '*Assets*' in the Option Agreement extended to anything more than TPL's rights in respect of the planning documents or whether the definition also extended to TPL's rights in respect of the Connection Offers;

2. whether Volta had been unjustly enriched as a result of the transfer of TPL's rights to Volta in respect of the Connection Offers and the use of drawings underlying planning permission for the Project; and

3. whether the Option Agreement was subject to an implied term that after the expiry of the Option Period Volta would cease using any assets which it had been using for the Project with the result that, being in breach of that requirement, Volta would be liable to pay to TPL the GBP 800,000 price.

Decision

Definition of Assets

The meaning of '*Assets*' was a matter of contractual interpretation.

The following factors were of relevance:

1. The background to the Option Agreement was an important consideration. Prior to the entry into the Option Agreement the parties had agreed that the legal interest in the first Connection Offer should be transferred to, or at least treated between themselves as having been transferred to, Volta.

2. The Option Agreement is described on its front sheet as: '*relating to planning documents relating to land adjacent to the electricity Substation of Green Lane, Thurcroft*.' The front sheet of a document is to be treated as akin to a heading to a clause within it. Lewison, the *Interpretation of Contracts*, 7th ed., at 5.108 expresses the view that: '*A heading to a clause may be taken into account in construing the clause, but it cannot override the clear words in a clause or create an ambiguity where, but for the heading, none would otherwise exist. Where the contracts so provide, headings should not be taken into account.*' Headings have been taken into account in construing contractual provisions in cases determined at the highest level, including cases in the Court of Appeal and Supreme Court - see e.g., *Farstad Supply AS v Enviroco Ltd* [2011] 1 WLR 921.

In the context of the foregoing, the Commercial Court found that the definition of Assets in the Option Agreement did not extend to TPL's interests in respect of the Connection Offers.

Unjust Enrichment

The Commercial Court considered the four elements of an unjust enrichment claim identified in *Beneditti v Sawiris* [2013] UKSC 50: (i) has Volta been enriched; (ii) was the enrichment at TPL's expense; (iii) was that enrichment unjust; and (iv) is there a defence.

Taking the first two elements, the Commercial Court found that despite TPL's case that the benefit to use the planning drawings was by way of licence, no such benefit was in fact conferred by TPL on Volta. It was held that TPL did not give away its non-exclusive licence to the planning documents and so TPL did not suffer any loss.

The unjust factor in respect of the third element was argued by TPL to be '*a failure of basis*' (i.e., where a transfer of value had been made both voluntarily and conditionally, and the condition for its retention by the recipient had failed). In light of the above findings, the point did not arise but, if the Commercial Court was wrong, it considered that it could not be a '*basis*' of the Option Agreement that, if Volta proceeded with the project, the GBP 800,000 would be payable even where events transpired which were envisaged neither by the Option Agreement nor by the parties.

Even if the first three elements of unjust enrichment had been established, Volta would have been able to rely on the change of position defence, as it would be unequitable to require Volta to make restitution.

Therefore, TPL failed to establish its claim in unjust enrichment.

Breach of Implied Terms

The Commercial Court considered the principles set out in *Yoo Design Services Limited v Iliv Realty Pte Limited* [2021] EWCA Civ 560, which provided that a term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the 'obviousness' test.

The Commercial Court accepted Volta's position that the implied terms contended for were theoretical because the situations in which they could apply do not arise. If no rights were conferred on Volta in respect of the planning documents, then TPL granting permission to make use of the same in the Option Period and after its expiry was implausible.

In respect of the business efficacy test, it was held that the implication of the terms contended for was not necessary in order to give business efficacy to the Option Agreement and that the Option Agreement did not lack commercial or practical coherence if the terms were not implied.

As to the obviousness test, the Commercial Court considered that the term sought to be implied should be '*so obvious that it goes without saying*' and that this should be considered by reference to the time at which the Option Agreement was entered into. The question should not be considered with the benefit of hindsight.

The Commercial Court decided that it could not be said that the parties would obviously have come up with the solution provided by TFL's proposed implied terms, particularly given that Volta would have been subject to an GBP 800,000 liability for using any Assets after the expiry of the option period irrespective of the value of those assets. This was considered to be wholly unrealistic.

Having failed the business efficacy and obviousness test, it was not possible to imply the terms sought by TFL. Consequently, it was held that there was no breach of contract by Volta.

Comment

Drafting is Key

It is notable that, in entering the Option Agreement, the parties considered (at the time) that Volta would develop the site using the Assets of TPL, which was not, in the end, the case. Put simply, the Option Agreement gave Volta the right, but not the obligation, to call for the transfer of the Assets and that, as the option was never exercised, no option payment ever became due and any enrichment had not been at TPL's expense.

The Commercial Court's decision highlights the need for careful drafting to ensure the intention of the parties is accurately expressed, including taking the time to consider, and provide for, the big '*what ifs*?'.

Had the Option Agreement been drafted to include: (i) the relevant Connection Offers within the definition of Assets; and (ii) a clause requiring Volta to cease using the defined assets after the expiry of the option period or, in the alternative, pay TPL a success fee, then TPL would have had a much stronger case.

Significance of Option Agreements in the Energy Sector

Option agreements are valuable instruments that are used by energy companies to limit risk by providing a level of certainty (e.g., price and date of execution of the obligation that underpins the option agreement) and to provide financial flexibility over time. It is therefore imperative that the option agreements are drafted precisely.

There is increased activity in the battery storage market. Since 2017/18, the time in which the events in the present case commenced, the battery storage market has developed and now offers services such as Dynamic Containment, Balancing Mechanisms, Firm Frequency Response, and participation in the Capacity Market. The latest Capacity Market Auction achieved the highest price in T-4 auctions to date (i.e., GBP 30.59/kW/year) with circa 3GW of battery storage assets securing long term contracts for their capacity at this record price, which demonstrates the growth in this market.

Also, given the strength of oil prices, oil and gas M&A activity is expected to hit a multi-year high this year. Options can be incorporated into M&A deals and, whilst their use is always bespoke, there is often one of two 'drivers': (i) for tax reasons, particularly in the UK.; or (ii) commercially where the parties want to create an option to buy or sell – e.g., only a put or only a call.

Despite the developments in these markets, there remains no '*standard form*' for option agreements for use in development projects or in the divestment of assets. The circumstances in which options arise tends to be very fact specific, again highlighting the need for the parties to be objectively clear in the drafting of their agreement.

Judge: HHJ Cawson QC.

CMS Expert Guide to Consequential Loss in the Energy Sector

Although not every jurisdiction recognises 'consequential loss' at law, clauses excluding 'consequential loss' can be encountered in energy contracts in almost every jurisdiction. However, the concept does not necessarily translate with ease across jurisdictions. In fact, the courts in common law jurisdictions are questioning whether the approach traditionally taken in the jurisdictions from where the contract originates is correct.

'One of Lexology's best read publications by in-house counsel'

Against this background, the clear message for all working in the sector is that care must be taken in the approach to the exclusion or inclusion of consequential loss as a part of the risk make-up of the contract in question. Further, when using the words 'consequential loss' it is critical to understand how this might be impacted by the choice of governing law.

To assist practitioners in this sector, the CMS Expert Guide to Consequential Loss provides a summary of the approach to consequential loss in 39 jurisdictions and outlines key trends in this area. The guide answers questions such as:

- Do the words 'consequential loss' have a given meaning in law?
- Are the words 'consequential loss' used in contractual exclusion of liability clauses?
- If so, what meaning is attributed to the words 'consequential loss' in contractual exclusion clauses?
- Where a clause includes other heads of loss alongside 'consequential loss', how will the law approach such clauses?
- Do consequential loss exclusion clauses have an impact on non-damages claims?

Access the guide here:

cms.law/en/int/expert-guides/cms-guide-to-consequential-loss-clauses-in-the-energy-sector

Chapter 4

Tax

Taxation continues to be a key issue in the oil and gas sector. In addition to the 25% windfall tax on oil and gas producers in the United Kingdom North Sea, the Courts have produced some interesting guidance on the interpretation of double tax treaties and whether cavities for gas storage are 'plant' for tax purposes:

— In *Royal Bank of Canada v HMRC* [2022] UKUT 45 (TCC) HMRC successfully resisted an appeal to the Upper Tribunal relating to the construction of Article 6 of the UK-Canada double tax treaty. The case dealt with the scope of the UK's ring fence corporation tax regime.

— In *Cheshire Cavity Storage 1 Ltd v Revenue and Customs Commissioners* [2022] EWCA Civ 305 the Court of Appeal considered whether expenditure on the creation of underground cavities for the storage of gas could be defined as expenditure on 'plant' for the purposes of capital allowances.

— In May 2022 the UK Government announced a 'windfall tax' on UK oil and gas profits. The Energy Profits Levy will be charged at 25% and apply to profits arising on or after 26 May 2022.

Upper Tribunal agrees with FTT on scope of UK tax charge on benefits relating to oil fields

In *Royal Bank of Canada v The Commissioners for HM Revenue and Customs* [2022] UKUT 45 (TCC), the Royal Bank of Canada ('**RBC**') appealed to the Upper Tribunal ('**UT**') against the FTT's ruling in favour of HMRC that UK corporation tax could be charged on payments made under a sale and purchase agreement (the '**SPA**') to the Canadian-resident RBC, on the basis that these payments related to oil won in the UK.

Facts

The facts of this case are set out in the *CMS Annual Review of developments in English oil and gas law (2020 Edition)* at page 27.

In summary, the Canadian branch of RBC had advanced loans of CAD 540m to Sulpetro Limited ('**Sulpetro**') to fund costs associated with oil fields on the UK continental shelf, largely relating to the Buchan field. Sulpetro sold its interest in the Buchan field and related assets in 1986 in exchange for various sums, including an entitlement to contingent royalty payments based on production from the field linked to the amount by which the market price of the oil exceeded a benchmark (the '**Payments**').

Sulpetro went into receivership while still owing RBC CAD 185m and the right to receive these payments (which had then started being paid) was assigned to RBC for nominal consideration. The original purchaser under the SPA also subsequently sold its interest in the Buchan field to Talisman Energy (UK) Limited ('**Talisman**'), which continued to make the Payments and claimed a corresponding deduction for the purposes of its ring fence trade.

RBC treated the Payments as income of its banking business in Canada and did not report it in a UK tax return (while the bank had a UK permanent establishment, it was not involved in this transaction). When reviewing Talisman's tax return, HMRC became aware of the Payments and claimed that RBC should have accounted for tax in relation

to these, on the basis that they were part of a ring fence activity carried on through a deemed UK permanent establishment.

The Issues on Appeal
The appeal raised three broad issues:

1. Under the UK-Canada double taxation treaty (the '**Treaty**'), were the rights to the Payments consideration for the right to work the Buchan field (such that the UK was permitted to tax the Payments)?

2. Under the relevant UK legislation, being s1313(2)(b) of the Corporation Tax Act 2009 ('**CTA 2009**'), were the rights to the Payments '*rights to … the benefit of*' the oil, and such that the payments were subject to corporation tax?

3. If the Payments were chargeable to corporation tax, was RBC entitled to a deduction for the loss it made on the original loan when Sulpetro went into receivership?

In this article we have concentrated on the first two, which together made up the main part of the UT decision (the third issue being heavily fact-dependent).

Decision

For the purposes of the Treaty, were the rights to the Payments consideration for the right to work the Buchan field?
The core argument reiterated by the appellant was that the rights to oil income did not amount to income from '*immovable property*' being '*rights to variable or fixed payments as consideration for the working of, or the right to work… natural resources*'. The Upper Tribunal assessed the interaction between Articles 6, 7 and 13 in considering this argument and found that if RBC's argument was correct, a substantial hole would exist in the scheme of taxation of income from oil in the Treaty. When entering into the Treaty, a core objective of the UK and Canada was to ensure each state could tax income received from their significant and valuable natural resources that existed at the time, and neither state could have intended such a hole to exist. This interpretation was therefore dismissed by the UT.

The appellant also put forward the argument that given the French version of the Treaty used the word '*la concession*' (meaning a '*grant*') as opposed to a '*droit*' (meaning a '*right*'), Article 6(2) should be interpreted in light of the distinction between these two concepts. This would restrict the relevant meaning of '*immovable property*' such that it applied where the income was derived from an original grant of the right to work an oil field and not where there had been a transfer, as there had been in RBC's case. While it considered the French version of the Treaty, the UT found that the effect was not to restrict the meaning in this way.

The grounds of appeal was dismissed, the UT finding that the UK was permitted to tax the Payments under the terms of the Treaty.

Under s1313(2)(b) CTA 2009, were the rights to the Payments 'rights to … the benefit of' the oil?
The appellant argued that the FTT had ignored the true contractual arrangement between the parties, which, if considered properly, was clear from Clause 5.4 of the SPA: a limited contractual right to payments calculated by reference to the value of oil (and only where the value of oil sold exceeded a set amount) was created. RBC was an assignee of this right to the Payments and did not have any right in the oil or its sale proceeds themselves, and such right was not intended to fall within the ambit of section 1313 CTA 2009.

While the UT noted that the rights to the Payments created under the SPA were not easily seen as rights to the oil itself, it was nonetheless satisfied that the rights to the Payments were rights to the benefit of the oil because, provided the oil was sold at a sufficiently high price to generate a Payment, Sulpetro would benefit from the oil; no proprietary interest in the oil was required for a party to benefit from it.

The relevant grounds for appeal were dismissed, and the Payments were found to be within the scope of UK corporation tax.

If the Payments were chargeable to corporation tax, was RBC entitled to a deduction for the loss it made on the original loan to Sulpetro?
While we have not concentrated on this issue here, the Tribunal found that RBC could not deduct the loan losses as the consideration given for the Payments on

Sulpetro going into receivership was explicitly nominal; the losses were incurred outside of any oil ring fence trade; and RBC had no UK permanent establishment to which it could attribute any deductible loss.

Comment

This case remains a reminder that any payments made in connection with UK oil rights need to be very carefully analysed in light of the specific legislation governing the taxation of oil and gas interests in the UK. The UK (in common with many other jurisdictions) has a broad ability to tax profits relating to such interests, both under double taxation treaties and domestic legislation. The upholding of this ability is not a surprising result in itself, but the concentration by the UT on the relevant facts and contractual position make clear that non-UK parties should ensure the position is clear, particularly in circumstances where a series of transactions or other complexity is involved.

Judges: Johnson J and Jones J.

Gas storage cavities – plant or premises?

In *Cheshire Cavity Storage 1 Ltd v Revenue and Customs Commissioners* [2022] EWCA Civ 305, the Court of Appeal upheld both the First-tier Tax Tribunal and the Upper Tribunal decisions on whether the companies in question were entitled to capital allowances in respect of costs incurred on gas storage cavities under section 11 of the Capital Allowances Act 2001. The question the Court of Appeal considered was whether a cavity formed to store gas satisfied the requirements of 'plant' or were instead 'premises', with the former qualifying for relief and the latter not.

Facts

The appellants were companies in the EDF Energy PLC group (the '**Companies**'). The Companies developed, constructed, and operated gas storage facilities on sites in Cheshire. The cavities were broadly used to allow gas from the national transmission system to be stored and returned to the system quickly, with the gas stored being the stock in trade of the Companies.

To create the cavities, water was pumped into the salt-bearing rock at the site, dissolving the rock and creating a cavity filled with brine (a process known as 'leaching'). The resulting saltwater was then exchanged for gas over a period of time (known as 'de-brining') to produce a cavity in which gas could be safely stored. The Companies claimed capital allowances on the expenditure incurred on the leaching and de-brining processes used to create the cavities.

Both the First-tier Tax Tribunal and the Upper Tribunal held that, while the cavities did have some function as plant, their main function was as premises, and accordingly they did not qualify for capital allowances.

In their appeal before the Court of Appeal, the Companies argued that case law showed that, if it is established that an item has any function as plant, that item should be treated as plant for the purposes of the capital allowances regime.

Decision

The Court of Appeal reviewed the various authorities and dismissed the appeal. In considering the case law (such as *IRC v Barclay, Curle & Co. Ltd* (1969) 1 All ER 732, in which a dry dock was held to be plant), consideration was given to the presence of additional equipment being implanted into an item that may otherwise have been viewed as premises, so as to allow the whole to be used in a plant-like manner.

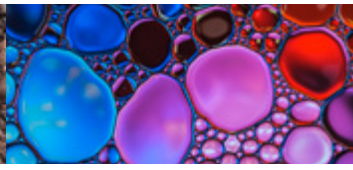
In this case, the Court of Appeal found that the cavities, having been part of the land before the leaching and de-brining, remained a part of the land after these processes (in the same way as a quarry or mine) and had no man-made structure or equipment introduced into them. To qualify as plant, there would need to be some indication of equipment or apparatus but, in this case, no alterations had been made to the land in order to receive or introduce plant: only to receive the Companies' stock in trade in the form of the stored gas.

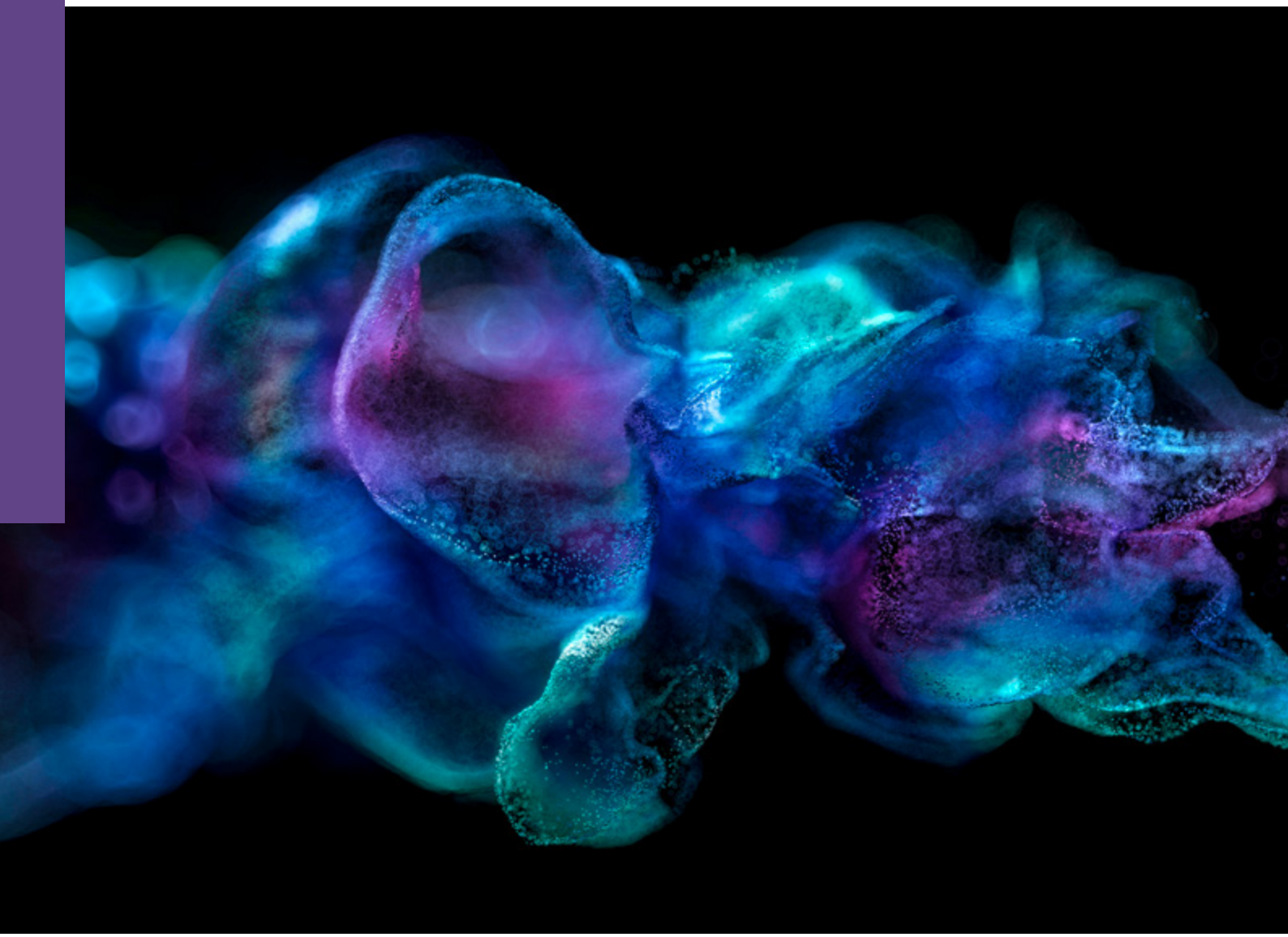
The Court of Appeal also noted that whether an item could be considered plant for the purposes of capital allowances was a question of fact and degree, and that the lower Courts had not erred in deciding that in these circumstances the cavities did not constitute plant. The fact that there was some plant-like function – found by the First-tier Tax Tribunal as being ancillary – did not mean that they fell to be treated as plant.

Comment

The judgment emphasises the fact-dependent nature of determining the extent to which a particular item qualifies as plant or premises, and that this is also a question of degree. It also suggests that in circumstances where the subject matter of a claim for allowances can be seen as being land, it is likely to be necessary to demonstrate a substantial degree of integration with other equipment to allow the whole to be treated as plant.

Judges: Lewison LJ, Baker LJ and Whipple LJ.





Introduction of the Energy Profits Levy

In May 2022 the UK government announced a new tax on profits from UK oil and gas activities. The standalone Energy (Oil and Gas) Profits Levy Act 2022 received Royal Assent on 14 July and introduced the energy profits levy (or '**EPL**') with effect from the date of the original announcement on 26 May 2022.

The EPL has been introduced as a standalone tax with a rate of 25%, charged on the same profits as ring fence corporation tax but with certain important differences. In addition to the combined 40% rate of ring fence corporation tax and the supplementary charge, it broadly results in an overall headline rate of 65% on profits from UK oil and gas activities.

Temporary Nature

In introducing the EPL, the Chancellor referred to it as a '*targeted, temporary energy profits levy*'. The temporary nature of the EPL is reflected in the 'sunset' provision included in the legislation, which provides that it applies in respect of accounting periods up to 31 December 2025. After this date it should cease to apply without further legislative action.

The EPL had also been described by the then Chancellor as being phased out once oil and gas prices return to '*historically more normal levels*'. This second concept is not reflected in the legislation – and identifying such levels may prove difficult in practice – so for the levy to fall away prior to 31 December 2025 as a result of oil and/or gas prices changing, would require further government intervention to actively remove it.

Calculation of EPL

The computation of profits for the purposes of the EPL has several crucial differences from ring fence corporation tax. Financing costs are not allowable, in the same manner as for the supplementary charge, but more significantly, neither losses incurred in previous periods nor decommissioning costs are allowable deductions against profits for EPL purposes.

The inability to use carried forward losses will mean that companies that have incurred significant capital expenditure in recent years will now be paying 25% tax on a basis that disregards that expenditure. Companies that have made losses as a result of lower oil prices in previous years may also being paying tax, despite the fact that they have not been profit-making even when viewed over a relatively short time period.

While previous losses cannot be used, it is possible to use losses arising during the period for which EPL is chargeable in a similar manner to ring fence corporation tax losses: for example, by surrendering them between entities, carrying them forward or (to a more limited extent) back to previous periods.

Similarly, companies that have fields that are at or near the end of their lifecycle will find themselves incurring decommissioning costs that will be disregarded for the purposes of the EPL. In some instances, this may mean companies find themselves paying tax while being in an overall loss-making position during the period in question.

The EPL therefore seems likely to have markedly different effects on taxpayers depending on where in the field lifecycle their assets currently sit, and the number of their assets. There may be limited scope for companies to alter this position in practice; for example, in the case of a company that has recently finished developing its only field, or whose assets are approaching decommissioning.

It had originally been suggested that repayments of petroleum revenue tax arising as a result of decommissioning and received while EPL were in force would have been subject to the levy, despite decommissioning costs not being allowable for EPL purposes and these repayments not arising from the profits that EPL was aimed at taxing. These repayments were removed from the charge to tax in the final legislation.

Prior to the introduction of the EPL there had been suggestions that where a windfall tax was brought in it may be possible for other costs (such as investments in renewable energy or carbon capture) to be allowable against it, in order to encourage investment in these areas. The EPL does not, however, deviate from the existing principle that non-ring fence costs cannot be used to reduce profits subject to ring fence corporation tax.

New Investment Allowance

The levy was accompanied by a new investment allowance, which is intended to operate in a similar manner to the 'super-deduction' introduced in relation to general corporation tax last year. Any expenditure that qualifies and falls within the period for which EPL is charged will benefit from an 80% uplift in deductibility against EPL. This is not subject to the activation requirements currently applicable to the investment allowances regime, but instead is available in the period it is incurred in the same way as first year capital allowances.

Previously, expenditure could be used against ring fence corporation tax and the supplementary charge (at a total rate of 46.25%, where investment allowances are utilised). Under the new regime, qualifying expenditure is also immediately allowable against the new levy (at 25%), with an additional uplift of 80% against that levy (so an effective deduction of up to 80% of 25%, or 20%). This gives rise to an additional tax relief of 45% such that in combination with the previous position, 91p of every GBP1.00 of qualifying expenditure is recovered in tax.

As with the generally applicable super-deduction, the intention of the new allowance can clearly be seen as encouraging new investment (which had previously been one of the main reasons given by the government for not introducing a windfall tax). Given the timelines involved, the extent to which investments that would not otherwise have been made will be prompted by the new allowance remains to be seen.

Chapter 5

Finance

The Commercial Court has continued to hand down critical decisions impacting financing of the oil and gas industry, including a case which serves as a useful reminder of good practice when working through a default scenario and the risks that can arise:

— In *Lombard North Central plc v European Skyjets Ltd (in liquidation)* [2022] EWHC 728 (QB) the Commercial Court considered whether a Loan Agreement had been validly terminated so as to permit enforcement of security.

— In *UniCredit Bank A.G. v Euronav N.V.* [2022] EWHC 957 (Comm) the Commercial Court decided that the bill of lading did not contain any contract of carriage at the time of discharge and that the bill of lading was a mere receipt.

— In *Africa Finance Corp and others v Aiteo Eastern E&P Company Ltd* [2022] EWHC 768 (Comm) the Commercial Court decided that a 13-month delay in the lender applying for an anti-suit injunction was reasonable in the circumstances and an anti-suit injunction should be granted to uphold the parties' arbitration agreement.

Declaring an event of default: termination tips

In *Lombard North Central plc v European Skyjets Ltd (in liquidation)* [2022] EWHC 728 (QB) involving the repossession of an aircraft by a secured lender, the Commercial Court considered whether a Loan Agreement had been validly terminated so as to permit enforcement of security. Although not an oil and gas case, the issues raised are a useful reminder of best practice when working through a default scenario and the risks that can arise.

Facts

Lombard North Central plc ('**Lombard**'), as lender, provided a secured loan of USD 8.8m to European Skyjets Ltd ('**Skyjets**'), as the aircraft owner, to be repaid in 120 monthly instalments (the'**Loan Agreement**'), with the Lombard being granted a mortgage over the aircraft.

Clause 9.1(a) of the Loan Agreement provided:

'*9. EVENTS OF DEFAULT*

9.1 Defaults

There shall be default if:

(a) the Borrower…defaults in the payment of principal or interest or any other sum payable under any Transaction Document …'

Clause 4.1.1 of the Loan Agreement (under the heading '*Repayment Terms*') provided:

'*The Borrower shall repay the Loan and shall pay interest on the Loan to the Lender in instalments in the amounts and on the Payment Dates specified in the Loan Details until the Loan has been repaid in full.*'

By Clause 14.1 of the Loan Agreement, all payments were required to be made in cleared funds by 10am on the due date. Clause 4.3 of the Loan Agreement provided:

'*Time shall be of the essence for all payments due from the Borrower hereunder.*'

Clause 22 also provided that:

'*Time shall be of the essence as regards the times and dates referred to in this Agreement…*'

Clause 9.2 provided:

'At any time after the occurrence of an Event of Default the Lender may by notice to the Borrower: (a) cancel the Facility and require the Borrower immediately to repay the loan together with accrued interest and all other sums payable under this Agreement…'

Skyjets subsequently defaulted on several payment instalments due under the Loan Agreement. While these defaults continued throughout 2010 and 2011, payments were made on occasion throughout this period, such that Skyjets was not continuously in arrears.

In 2012, Skyjets was said to be insolvent on a cashflow basis. Lombard terminated the Loan Agreement, exercised its power of sale as mortgagee under the aircraft mortgage, and demanded that Skyjets pay the outstanding sum of USD 5.9m.

The only event of default specified in the termination notice was the failure to make payments due. However, evidence adduced at trial suggested that other events of default had occurred, including a breach of the warranty regarding the maintenance arrangements for the aircraft; a material adverse change in the financial health of the owner; and a failure to make a payment as requested by the lender to maintain the loan to value ratio (being the value of the aircraft divided by the outstanding balance of the loan expressed as a percentage from time to time).

Skyjets brought a counterclaim for GBP 26m in damages, contending that the lender was not entitled to terminate the Loan Agreement and that, in selling the aircraft, Lombard had breached its duties as a mortgagee.

Decision

The Commercial Court decided that Lombard had been entitled to terminate the Loan Agreement, and that it was justified in selling the aircraft. The following issues were relevant to the decision:

Must any default be continuing as at the date of termination?

Clause 9.1(a) of the Loan Agreement provided that an event of default would occur if Skyjets defaulted in the payment of principal, interest or any other sum payable under any transaction document.

Clause 9.2 of the Loan Agreement provided that at any time after the occurrence of an event of default, Lombard, as lender, could by notice to Skyjets cancel the facility and require the immediate repayment of the outstanding loan together with accrued interest and all other sums payable under the Loan Agreement.

There was no doubt that Skyjets had repeatedly failed to pay the monthly instalments when due, but the question arose as to whether there had to be an amount outstanding as at the date of termination, i.e. notwithstanding that interim (late) payments had been made. As a matter of proper construction and interpretation of the words of the Loan Agreement, the Commercial Court concluded that: (i) there was a breach of Clause 9.1(a) whenever an amount was not paid when it was due to be paid; and (ii) Clause 9.2 did not require the event of default to be continuing at the date the notice of cancellation is served, but rather entitled Lombard to declare an event of default '*at any time*' after the occurrence of the event of default in question.

Has the right to declare an event of default been waived?

Skyjets then argued that Lombard had waived its right to treat late payments as events of default, and therefore lost its right to terminate the Loan Agreement. This argument was made on the basis that Lombard had accepted late payment and had given the owner additional time to clear outstanding arrears.

Lombard sought to rely on a '*no waiver*' clause in the Loan Agreement, which prevented any failure or delay on the part of the lender in exercising any right, power or privilege under the Loan Agreement from operating as a waiver. Lombard also relied on a general reservation of rights statement made repeatedly in e-mail correspondence to Skyjets. However, the Commercial Court found that neither the clause nor the statement

was sufficient to override an explicit communication sent from Lombard to Skyjets giving it the opportunity to regularise the position by a specific date. In this case, the waiver did not result solely from a failure to exercise or a delay in exercising a right (as provided in the relevant clause), but rather from positive statements made, which implicitly accepted that if payment were made, Lombard would not seek to claim an event of default for past delays in payment.

What if the breach is de minimis?

Skyjets sought to argue in the alternative that any breach was too small to be meaningful, such that the exercise of Lombard's contractual rights was inequitable. The Commercial Court rejected this argument on the basis that it is well-established in English law that where parties have made a breach of a particular obligation a condition of the contract, giving the right to terminate, that right is available without regard to the magnitude of the breach (Mustill LJ in *Lombard North Central v Butterworth* [1987] QB 527). The Commercial Court confirmed there was no scope for a de minimis obligation so far as the failure to pay instalments under a loan is concerned.

What does the termination notice have to say?

The Commercial Court also considered whether Lombard's termination notice was compliant with the relevant contractual provisions. Specifically, it considered whether it had to identify the events of default being relied upon, and whether it needed to accurately specify the sums due. In this case, Lombard, as lender, had mentioned only one ground of default (which had not, in fact, arisen) and had inaccurately included claims for accrued late payment charges which it subsequently accepted were not due.

On the precise wording of the relevant clauses in the Loan Agreement and the mortgage, the Commercial Court found that there was no provision requiring the event of default to be identified, or for the amount due to be accurately stated.

Neither provision required the event of default to be identified, and the Commercial Court was not persuaded that this is a necessary implication. There is no 'cure period' provided for, such that it might be said that the borrower needs to know what default is being contended for in order to address it. As a result, the Commercial Court decided that Skyjets was '*no worse off by reason of the inclusion of an invalid ground than if nothing had been said at all*'. Provided Lombard could establish an event of default had occurred, its notice was effective.

This finding was critical, as other events of default were found to have occurred that were not mentioned in the notice.

Is the relevant Clause a penalty?

Skyjet also argued that Clause 9.2 of the Loan Agreement was void as a penalty, because it entitled Lombard to render the full amount of the outstanding balance immediately payable and to take possession of the aircraft following an event of default which might, of itself, have little or no significant consequences. The Commercial Court rejected this argument as '*hopeless*'. There was nothing inherently penal in requiring repayment of the full outstanding balance following a failure to make an instalment payment on the due date, or in a mortgagee being able to enforce its security when there is a default under a secured loan.

Is there an obligation to act in good faith when terminating?

The Commercial Court decided that Lombard's decision to terminate is what is sometimes described as an '*absolute contractual right*' for it to exercise for its own purposes, as it sees fit. The issue of whether rights to terminate and analogous rights could be subject to Braganza-duties was the subject of careful consideration by HHJ found that reasoning compelling Pelling QC in *TAQA Bratani Limited v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm), [44]-[53], who rejected the argument that rights of termination were to be analysed as contractual discretions. The Commercial Court found that reasoning compelling and adopted it.

Comment

The decision of the Commercial Court has some interesting facets that are relevant to a variety of contractual and notice related issues:

First, a no-waiver clause will not necessarily protect a party from waiving a default or breach, where a clear and specific waiver has been given in writing. Ultimately, much may depend upon the specific wording of the waiver clause.

Second, a '*ritual incantation*' of reservation of rights language cannot prevent anything said or done in previous communications from having its objective effect. In other words, reserving your rights cannot save you if you have already waived such rights.

Third, a party that wishes to exercise a contractual right of termination by notice must strictly comply with any conditions set out in the contract for the exercise of that right. Working out what those conditions are is an exercise in the construction and interpretation of the relevant contract, and so, will differ from case to case.

Fourth, in addition to the express words of the termination clause, English law will look to the consequences of the notice in determining whether a specific breach or default needs to be identified in the notice. If information is needed by the receiving party to allow it to action a notice (for example, a cure period for a breach), it is more likely that English law will imply that the notice must set out the default or breach.

Fifth, although each termination right will be construed on its own merits, the current state of the law suggests that a termination clause expressed in the terms of an actual contractual right will not be subject to an implied term as to how it should be operated. As a side note, it is perhaps unsurprising that the Commercial Court adopted the reasoning in *TAQA Bratani Limited v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm), as the judge in this case (Foxton J) was leading counsel in *TAQA* where Pelling HHJ effectively adopted the leading counsel's reasoning.

Judge: Foxton J.

When is a bill of lading a contract?

In *UniCredit Bank A.G. v Euronav N.V.* [2022] EWHC 957 (Comm), UniCredit Bank A.G. ('**UniCredit**') brought a claim for damages against shipowners, Euronav N.V. ('**Euronav**'), the registered owner of tanker MT Sienna (the '**Vessel**'), for delivering cargo without production of the bill of lading (the '**Bill of Lading**'). In a decision with potentially significant repercussions for financing entities, the claim was dismissed by the Commercial Court which decided that the Bill of Lading did not contain any contract of carriage at the time of discharge and that the Bill of Lading was a mere receipt.

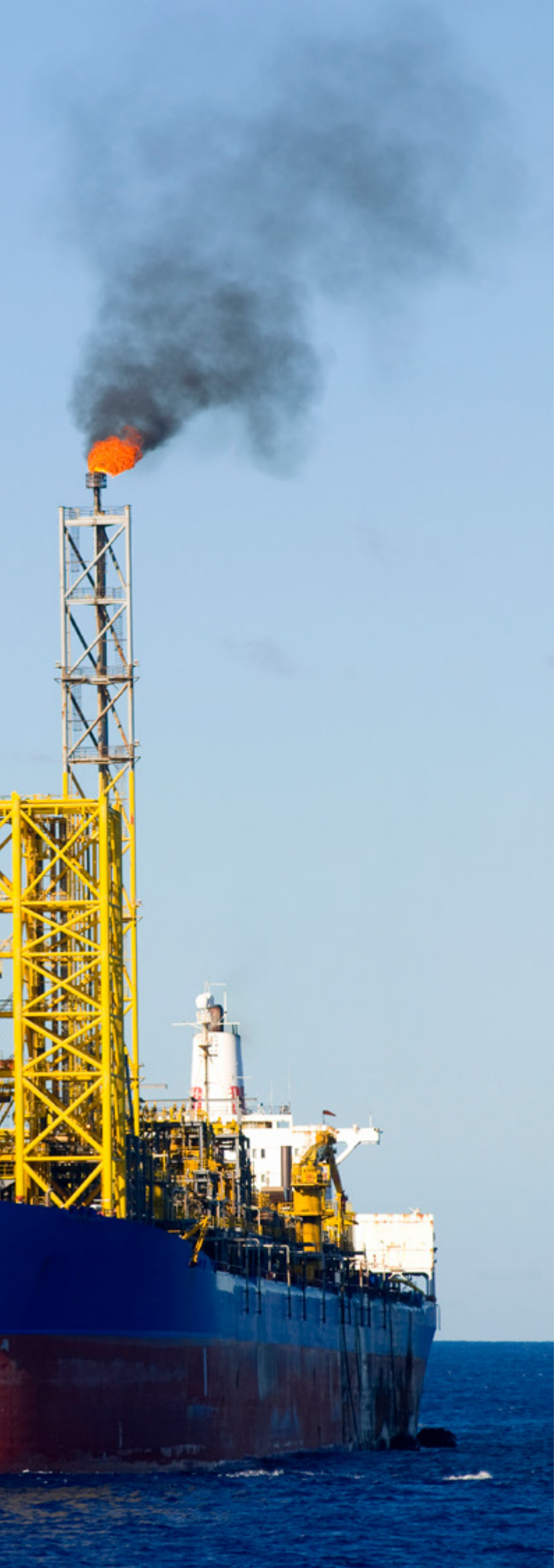
Facts

UniCredit is a bank with its headquarters in Munich, Germany, which is involved in commodities trade finance. Euronav was at all material times the owner of the Vessel. BP Oil International Ltd ('**BP**') were the sellers of a cargo of 80,000 mt of Low Sulphur Fuel Oil ('**LSFO**') (the '**Cargo**') and the original charterers of the Vessel in relation to the carriage of the Cargo. Gulf Petrochem FZC ('**Gulf Petrochem**') were the buyers of the Cargo from BP and became the charterers of the Vessel by a novation dated 6 April 2020 (the '**Novation Agreement**').

UniCredit had financed the purchase by Gulf Petrochem of the Cargo from BP.

The Novation Agreement was entered into by UniCredit, Euronav, BP and Gulf Petrochem. The arrangement then put in place between UniCredit and Gulf Petrochem was that the Cargo would be resold to sub-buyers, approved by UniCredit, but on terms that required the sub-buyers to pay UniCredit directly within 90 days from the date of invoice.

The claim arose out of the carriage of the Cargo from Rotterdam, Netherlands, where the Bill of Lading was issued, to Fujairah, UAE. In signing the Bill of Lading, Euronav acknowledged that the shipment of the Cargo was in good order and condition for carriage to and delivery at Fujairah.



The Bill of Lading was made out to the order of BP or their assigns. The LSFO was then discharged by ship-to-ship transfer without production of the Bill of Lading between 26 April 2020 and 2 May 2020 at Sohar, Oman. The sums financed by UniCredit, which were due between 26 July 2020 and 9 August 2020, were not repaid by Gulf Petrochem or any sub-buyers at which point UniCredit became aware that Gulf Petrochem were in financial trouble. UniCredit also suspected that there may have been fraudulent behaviour on the part of Gulf Petrochem. Nevertheless, BP endorsed the Bill of Lading to UniCredit on 7 August 2020.

UniCredit brought a claim for damages for breach of contract of carriage against Euronav for delivering the Cargo without production of the Bill of Lading.

The question for the Commercial Court was whether UniCredit was entitled to bring the misdelivery claim and this depended on whether the Bill of Lading contained and/or evidenced the contract of carriage in respect of the Cargo at the time the charterparty was novated.

Decision

The crux of the issue is whether when BP ceased to be the charterer on 6 April 2020, by reason of the Novation Agreement, the contract of carriage at the time of delivery was contained in the Bill of Lading.

The Commercial Court dismissed the claim and held that UniCredit's assertion that when the charterparty was novated to Gulf Petrochem, the Bill of Lading was no longer in the hands of the charterer of the vessel and thus was no longer a mere receipt and gained contractual status had not been made out. It did so after an extensive review of the authorities, which might have suggested otherwise.

It was submitted for UniCredit that:

'*… where a bill of lading is in the hands of a charterer of the carrying vessel, the bill of lading, for that period of time, is not a contractual document in the full sense; as between charterer and shipowner, the bill is merely a receipt in a charterer's hands. The contractual relationship between the charterer and shipowner is governed by the charterparty itself.*' [Emphasis added]

For that proposition, UniCredit relied on *Aikens Bills of Lading* (3rd Edition, 2020) (at paragraph 7.23), as follows:

'An important exception to the rule that a bill of lading contains or evidences the contract of carriage is where the bill of lading is issued to (or indorsed to) the charterer, in respect of goods carried on board the chartered ship. At least where the carrier under the bill of lading is the same party as the 'owner' for the purposes of the charterparty, a bill of lading has no contractual force, and constitutes a receipt only in the hands of the charterer, the relevant contract of carriage being contained in the charterparty.' [Emphasis added]

The authorities did support UniCredit's submission that a new bill of lading contract '*springs up*' when the bill is transferred by the shipper to a new lawful holder. *Aitkens* at paragraph 7.27 states:

'*Where a bill of lading is issued to a charterer and then indorsed to a third party, it attains contractual status upon indorsement on the basis that 'a new contract appears to spring up between the ship and the consignee on the terms of the bill of lading'.*'

However, the footnote to that paragraph of *Aikens* states:

'*Tate & Lyle Ltd. v Hain Steamship Co. (1936) 55 Ll. L. Rep. 159, 174. The theoretical difficulty with this is that it involves not just a 'new' contract but a contract springing up from a mere receipt.*'

Further, in *Scrutton on Charterparties and Bills of Lading* (24th Edition, 2021) the author considered the principles which may underlie the proposition that a new contract springs up when the bill of lading is endorsed (at paragraphs 6-014 and 6-015):

'*This view is so long established that it is scarcely open to question. It is, however, not easy to explain. The lawful holder has by statute transferred to him all rights of suit under the contract of carriage, i.e. ''the contract contained in or evidenced by'' the bill of lading and may in certain circumstances become subject to liabilities under that contract. But in the case of the indorsement from the charterer-shipper of a bill of lading differing from the charter, there is, per Lord Esher in Rodocanachi v Milburn, no ''contract contained in the bill of lading'', but only a ''mere receipt''. How, then, can the indorsement pass what does not exist? Does a contract spring into existence on the transfer to the lawful holder, which had no existence before? And, if so, what statutory authority is there for such a ''creation'', as opposed to the ''transference'' ordained by statute? It may be said, as in Leduc v Ward, that between*

shipowner and indorsee the bill of lading must be considered to contain the contract, ''because the shipowner has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods''. But this view, which appears to rest on some sort of estoppel against the shipowner, fails in the numerous cases where the variation from the charter is in favour of the shipowner and against the shipper and is also difficult to reconcile with the admitted law that a shipowner may repudiate against an indorsee for value a bill of lading, which his agent had no authority to give.

Possibly the difficulty may be resolved by a consideration of the wording of the Carriage of Goods by Sea Act 1992 itself. Section 2(1) transfers to the lawful holder of the bill of lading all rights of suit ''under the contract of carriage as if he had been a party to that contract''. The definition of ''contract of carriage'' in s.5(1)(a) presupposes that the bill of lading does contain or evidence a contract: but if it is a mere receipt and the governing document is the charterparty it does not do so. As, however, the words of the statute must be given a sensible meaning, it is submitted that the true meaning is that the lawful holder has vested in him all rights of suit ''as if there had been a contract in the terms contained in the bill of lading and he had been a party to that contract.'

However, it was submitted for Euronav that it was difficult to see why a new contract should arise on the facts of this case. In particular, the textbooks make clear that the reason why the transfer is said to give rise to the creation of a contract is because the shipowner is taken to have issued the bill of lading to the charterer intending to pass it on to a third party as the contract of carriage. In this case, at the time the Bill of Lading was issued, BP and Euronav plainly did not intend their contractual relationships to be contained in the Bill of Lading. Rather the charterparty regulated those relationships.

Whilst BP and Euronav should be taken to have intended at the time the Bill of Lading was issued that it would regulate the legal relationship between Euronav and a third party if BP transferred or indorsed the Bill of Lading to a third party, there is no reason to conclude that they intended that their relationship would be governed by the terms of the Bill of Lading in the event their contractual relationship was dissolved, as it was, by the Novation Agreement.

The Commercial Court accepted Euronav's submissions and concluded that there was there was nothing to indicate that the parties intended a new contract to be created between BP and Euronav and also that, where the charterer and Bill of Lading holder were the same, there would be no contractual relationship under the Bill of Lading.

In addition to this, the Commercial Court further held that, even if the Bill of Lading had contained a contract of carriage at the time of discharge, the discharge of Cargo without production of the Bill of Lading did not cause the loss of USD 24.7m that had been claimed.

Comment

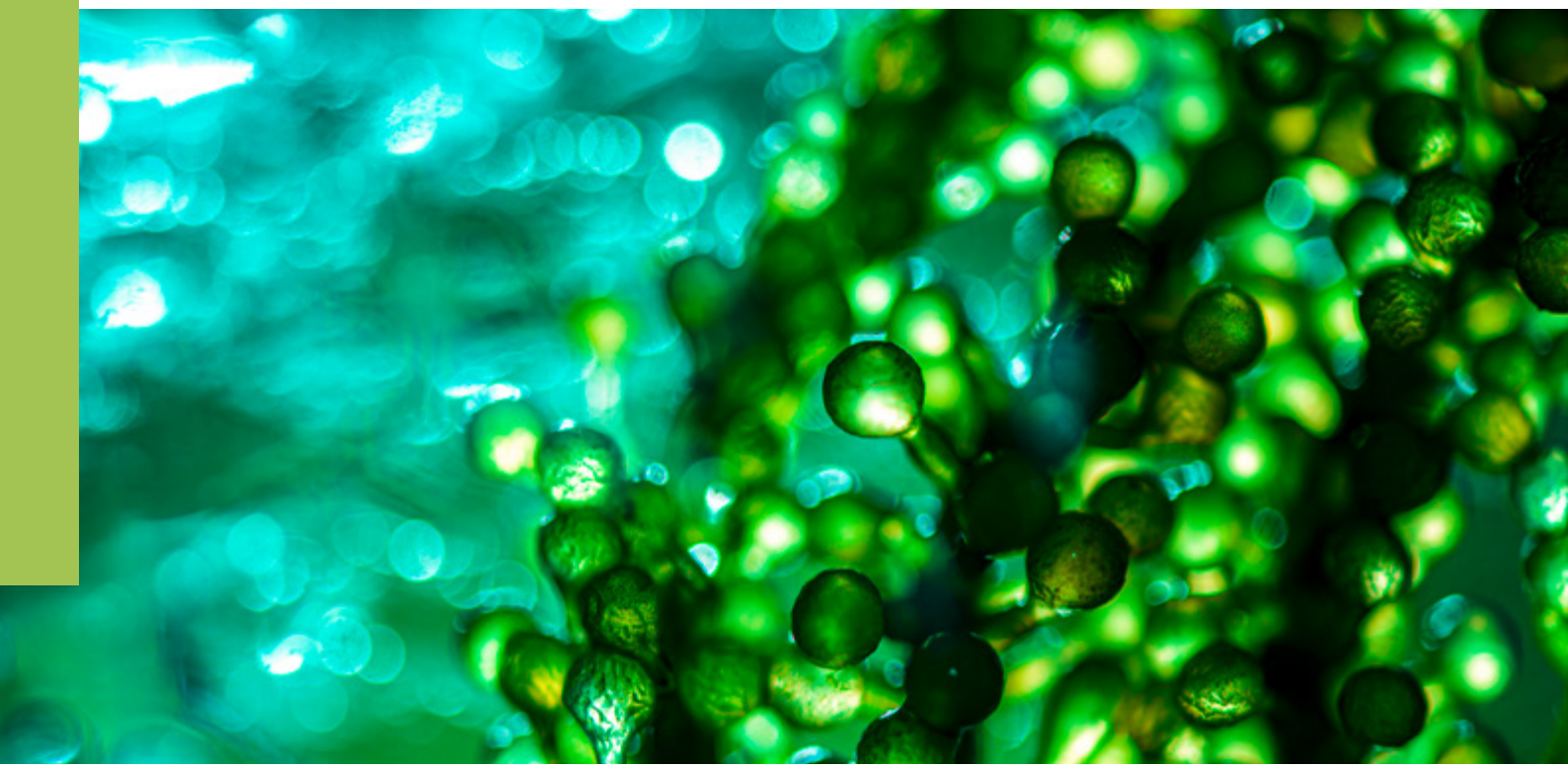
The issues addressed in this case are of importance to the industry and permission to appeal has been granted.

Aspects of the existing case law on the contractual status of bills of lading are ripe for review. The authors of *Aikens* and *Scrutton* seem unconvinced by the current position that the endorsement or transfer of a Bill of Lading to a third party will result in it being given contractual force, where it previously had none. The reason appears to be that the vessel owner is taken to have issued the bill of lading to the charterer intending to pass it on to a third party as the contract of carriage.

However, if the above is correct, it leaves open the issue in this case, i.e. whether a novation of the charterparty prior to the transfer or indorsement of a bill of lading will prevent the bill of lading ever gaining contractual force where the ownership of the cargo is transferred.

Pending the resolution of this issue by the Court of Appeal, this case highlights that, where financing arrangements that provide for bills of lading to be assigned to the financing party as part of the security for the financing, the financing party must ensure those bills contain the relevant contracts of carriage giving them title to sue in respect of misdelivery or other claims against the carrier.

Judge: Moulder J.



When delay is okay - English Commercial Court and anti-suit relief

In *Africa Finance Corp and others v Aiteo Eastern E&P Company Ltd* [2022] EWHC 768 (Comm), the Commercial Court decided that a 13-month delay in applying for an anti-suit injunction was reasonable in the circumstances and an anti-suit injunction should be granted to uphold the parties' arbitration agreement.

Facts

Aiteo Eastern E&P Company Ltd ('**Aiteo**') borrowed a total of USD 2bn from Africa Finance Corp and eight other lenders (together the '**Lenders**') in order to purchase an interest in Nigerian oil fields and facilities. The loan arrangement was documented in two facility agreements (together, the '**Facility Agreements**'), one governed by Nigerian law and the other by English law. The Facility Agreements provided for arbitration seated in London under the ICC Rules.

The Lenders alleged that Aiteo had failed to remedy certain breaches of the Facility Agreements and demanded repayment of the loan. Aiteo disagreed that there had been an event of default. In October 2019, Aiteo sought declaratory relief from the Nigerian Court that it was not liable for the sums due in the Lenders' letter of demand. Aiteo claimed that the Lenders had refused to restructure the Facility Agreements despite the occurrence of a *force majeure* event. Aiteo also applied for an interim injunction order that restrained the Lenders from acting on the letter of demand and from interfering in Aiteo's business, which was granted by the Nigerian Court. In response, the Lenders filed a notice of appeal with the Nigerian Court in November 2019, seeking to set aside the interim injunction order and to dismiss Aiteo's claim (together, the '**Nigerian Proceedings**').

Between November 2019 and November 2020, Aiteo and the Lenders engaged in commercial negotiations on a without prejudice basis. In December 2020, the Lenders commenced two arbitrations pursuant to the Facility Agreements, after the parties failed to make progress in the negotiations.

The Lenders also applied for an urgent interim anti-suit injunction in the English Court in respect of the Nigerian Proceedings. The Commercial Court granted the Lenders an interim order restraining Aiteo from continuing the Nigerian Proceedings and from bringing claims arising out of the Facility Agreements in any forum other than London-seated ICC arbitration (the '**Interim Order**').

In March 2022, the arbitral tribunal determined that it had jurisdiction over the dispute. The present case concerned the Lenders' application for a final anti-suit injunction and Aiteo's application to set aside the Interim Order.

Aiteo argued that the Lenders had waived their right to arbitration by filing a notice of appeal in the Nigerian Proceedings, thereby submitting to the jurisdiction of the Nigerian Court. In addition, Aiteo maintained that the Lenders should not be granted injunctive relief in view of their significant delay in making the application.

Decision

The Commercial Court upheld the arbitral tribunal's finding that the Lenders had not submitted to the jurisdiction of the Nigerian Court. Aiteo was in breach of the arbitration agreements in the Facility Agreements. As a result, the Commercial Court should grant an anti-suit injunction unless there were strong reasons against doing so.

Substantial delay can be such a strong reason. It is established law that an anti-suit injunction must be sought promptly and before foreign proceedings are too far advanced (*The Angelic Grace* [1995] 1 Lloyd's Reports 87). Reasons for the need to avoid delay include the avoidance of prejudice, detriment and the waste of resources, the need for finality, as well as considerations of comity and public policy (*Ecobank Transnational Inc v Tanoh* [2016] 1 WLR 2231).

The Commercial Court acknowledged that the Lenders did not promptly seek an anti-suit injunction in the English Court upon Aiteo's breach of the arbitration agreements in November 2019. However, there was a reasonable explanation for the delay. The primary reason was that the parties were engaged in negotiations to restructure the Facility Agreements, which was envisaged to bring an end to the Nigerian Proceedings.

Moreover, given that the Nigerian Proceedings had been effectively paused since November 2019 due to the Covid-19 pandemic, there was no issue of wasted time and costs. Even if Aiteo was correct that the Lenders should have applied for a stay of proceedings instead of filing a notice of appeal, this had no bearing on cost as there had been no progress on the merits. The grant of anti-suit relief by the English Court in this instance would not waste money and scarce judicial resources in Nigeria. As a result, the Interim Order should be made final.

Aiteo's application to set aside the Interim Order was also dismissed in its entirety. The Commercial Court held that there was a good reason for the Lenders to proceed with their *ex parte* application for the Interim Order.

Comment

The Commercial Court's consideration of the reasons behind the delay in an application for injunctive relief demonstrates its pragmatic, flexible and pro-arbitration approach. This was not an attempt by an applicant to derail foreign proceedings that were already far progressed, which would have resulted in wasted resources and upset the foreign Court.

Nonetheless, the Commercial Court was careful to highlight that every case will turn on its facts. Given that no steps were taken in the Nigerian Proceedings due to the pandemic, the parties did not incur legal costs and the Nigerian Court had not wasted any resources. The Commercial Court also noted that the Lender's decision not to initiate arbitration proceedings in November 2019 came with the risk that injunctive relief would be denied when later requested. In this instance, the circumstances worked in the Lenders' favour. However, this will not always be the case.

As such, the progress of foreign Court proceedings during any period of delay, as well as the length of the delay itself, will remain important factors in the Court's analysis. Even if there is a reason for delay, parties are advised to apply for injunctive relief as soon as practicable.

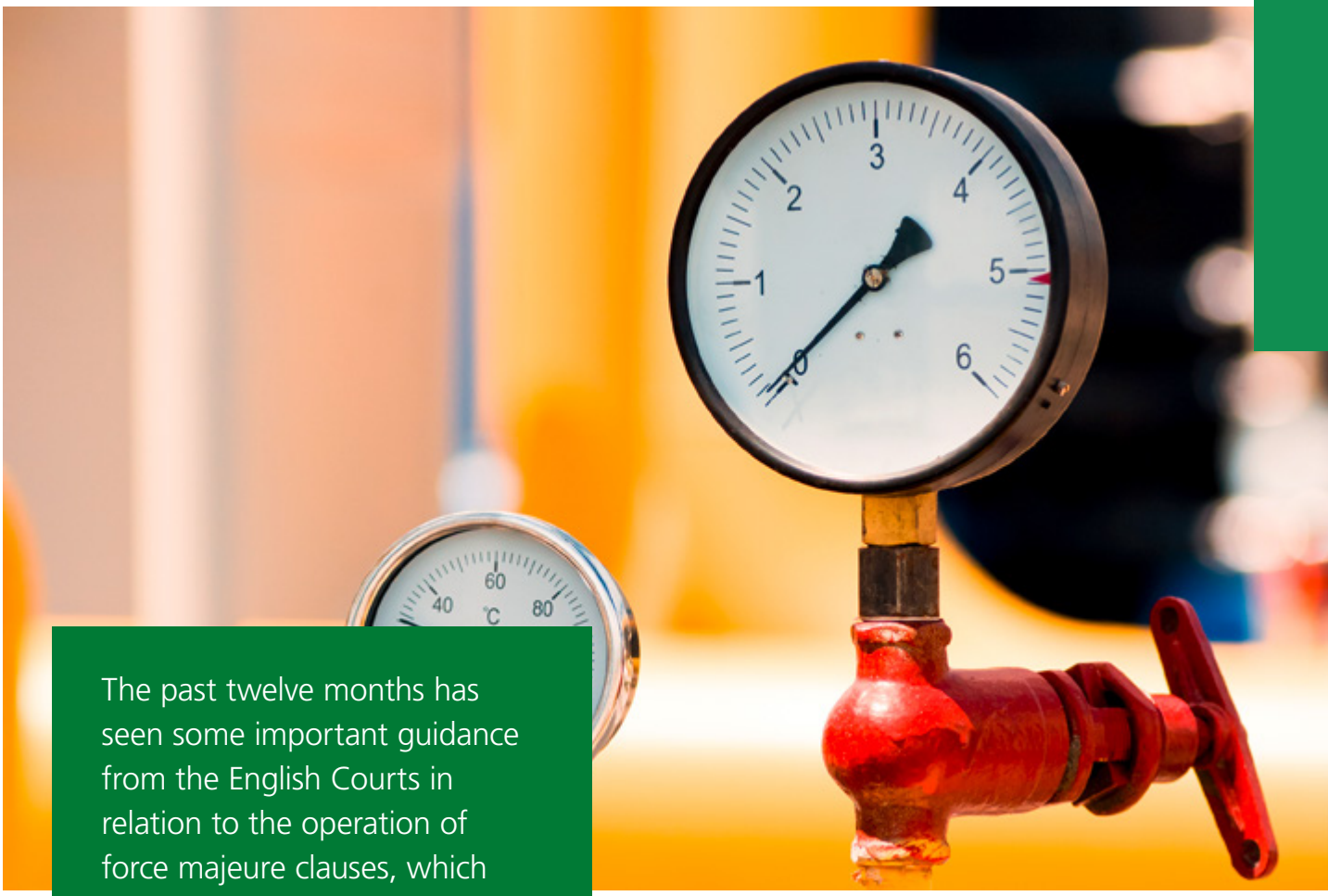
Where a facility agreement, or other agreement, contains an arbitration clause/agreement, and the borrower (or counterparty) commences proceedings in the domestic courts, lenders remain well advised to consider (i) seeking to immediately commence arbitration, and (ii) seeking an anti-suit injunction to protect the agreement to arbitrate. Absent such steps, there remains the risk of the local courts being ceased of jurisdiction – contrary to the intention of the parties' original agreement to arbitrate.

Permission to appeal the judgment has been granted.

Judge: Teare J.

Chapter 6

Force Majeure



The past twelve months has seen some important guidance from the English Courts in relation to the operation of force majeure clauses, which have become increasingly important in the context of the COVID-19 pandemic and Russia's invasion of Ukraine and ensuing sanctions:

— In *MUR Shipping BV v RTI Ltd* [2022] EWHC 467 (Comm) the Commercial Court found that a 'reasonable endeavours' obligation to overcome force majeure did not prevent a party from relying on a force majeure clause where alternative performance would require departure from its contractual rights.

— In *Laysun Service Co Limited Claimant v Del Monte International GMBH* [2022] EWHC 699 (Comm) the Commercial Court upheld a previous arbitration award which found that the inability to make payments or obtain valid import permits as a result of international sanctions constituted valid force majeure events.

Reasonable Endeavours to mitigate

In *MUR Shipping BV v RTI Ltd* [2022] EWHC 467 (Comm), the English Commercial Court found that a 'reasonable endeavours' obligation to overcome force majeure did not prevent a party from relying on a force majeure clause where alternative performance would require departure from its contractual rights.

Facts

The dispute concerned a contract of affreightment (the '**COA**') between MUR Shipping BV ('**MUR**') (as the '**Owner**') and RTI Ltd ('**RTI**') (as the '**Charterer'**), for the shipment of around 280,000 metric tons of bauxite from Guinea to Ukraine per month.

The COA was based on an amended Gencon form charterparty dated 9 June 2016. It contained a force majeure clause that stated:

'36.1. Subject to the terms of this Clause 36, neither Owners nor Charterers shall be liable to the other for loss, damage, delay or failure in performance caused by a Force Majeure Event as hereinafter defined. While such Force Majeure Event is in operation the obligation of each Party to perform this Charter Party (other than an accrued obligation to pay monies in respect of a previous voyage) shall be suspended.

36.2. Following the end of the Force Majeure Event, the Parties shall consult in good faith to make such adjustments as may be appropriate to the shipment schedule under this Charter Party.

36.3. A Force Majeure Event is an event or state of affairs which meets all of the following criteria:

a) It is outside the immediate control of the Party giving the Force Majeure Notice;

b) It prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port;

c) It is caused by one or more of acts of God, extreme weather conditions, war, lockout, strikes or other labour disturbances, explosions, fire, invasion, insurrection, blockade, embargo, riot, flood, earthquake, including all accidents to piers, shiploaders, and/or mills, factories, barges, or machinery, railway and canal stoppage by ice or frost, any rules or regulations of governments or any interference or acts or directions of governments, the restraint of princes, restrictions on monetary transfers and exchanges;

d) It cannot be overcome by reasonable endeavors from the Party affected.'

[Emphasis added]

In relation to payment, Clause 4 of the standard form, which was heavily deleted, provided:

'*The freight at the rate agreed in Box 13 shall be paid in cash calculated on the intaken quantity of cargo. See Rider Clause 20.*'

Rider Clause 20 in the fixture recap was as follows:

'*Clause 20. Freight payment*

Freight rate USD 12.00 per metric ton FIOT 1/1 basis USD 200 PMT IFO 380 CST in Gibraltar on Bill of Lading date and for each USD +/- 1.00 PMT change in the bunker prices as per Platt's Oilgram on the aforementioned date the freight to be adjusted by a Bunker Adjustment Factor (BAF) of USD 0.013 OMT.

95 per cent of freight to be paid within 5 (five) banking days after completion of loading and signing/releasing Congen Bills of Lading edition 1994 marked 'Freight payable as per C/P dated 09th June 2016 to Owners' nominated bank account. Freight to be discountless, non-returnable vessel and/or cargo lost or not lost. Owners to pay disbursements both at loading and discharging ports. Balance of freight to be settled within 20 days upon receipt of all supporting documents together with settlement of demurrage/dispatch'.

Please find following banking details for freight payment:

ABM AMRO Bank N.V.

Gustav Mahlerlaan 10, 1082 PP Amsterdam

The Netherlands

Account no: [removed]

IBAN no: [removed]

SWIFT code: [removed]

Correspondent bank: Wells Fargo Bank, New York
SWIFT code: PNBPUS3N

Beneficiary: MUR Shipping B.V.'

In April 2018, RTI's Russian parent company was sanctioned by the US Department of the Treasury's Office of Foreign Assets Control. This led MUR to state that it would be a breach of the sanctions to continue with the performance of the COA, noting that the

'*sanctions will prevent dollar payments, which are required under the COA*'. MUR therefore invoked the force majeure clause in the COA.

RTI argued that there was no force majeure event and that the sanctions were not relevant as (i) MUR was a Dutch company and so it would not be caught by US sanctions as it was not a US entity, and (ii) payments could be made in Euros instead (with RTI covering any associated currency charges).

MUR would not nominate ships under the COA, arguing that it was an express term of the COA that payments were to be made in US Dollars and so the COA could not be performed.

Arbitral Award

RTI succeeded in an arbitration action against MUR for the costs incurred in obtaining alternative tonnage on the basis that terms of the force majeure clause could have been '*overcome by reasonable endeavours from the Party affected*'.

The arbitral tribunal considered that making payment in Euros was a '*completely realistic alternative*', particularly as RTI had offered to bear any additional costs incurred by exchange rate charges, and so MUR should have accepted this proposal rather than claiming force majeure.

MUR appealed the decision to the Commercial Court, on a question of law, as to whether 'reasonable endeavours' would require a party claiming force majeure to accept non-contractual performance (i.e., payment in Euros rather than US dollars).

Commercial Court Decision

The Payment Obligation

In relation to the payment obligation, the Commercial Court considered that the arbitral tribunal was correct to say that the Charterers '*could not insist as of right on making payments in euros because their payment obligations in the COA were to pay US dollars*'.

In this respect:

1. The Commercial Court did not accept the submission that there was nothing in the COA which obliged Charterers to tender in USD to the Owners', bank, or excluded any right to tender Euro.

2. Box 14 of the Gencon form set out the parties' agreement, in relation to the freight payment, as to '*currency and method of payment; also beneficiary and bank account*'. There was a cross reference to Clause 4 of the Gencon form.

3. Both the entry in Box 14, and Clause 4 of the Gencon form, referred to Rider Clause 20. This provided, in the form ultimately agreed by the parties, for a basic USD freight rate (USD 12 per metric ton), together with a Bunker Adjustment Factor also calculated in USD.

4. The banking details identified the beneficiary and bank account in The Netherlands, but also a correspondent bank in New York. Accordingly, both the currency of payment and method of payment were contractually agreed: a payment in USD to a specified bank in the Netherlands.

5. In addition, the Commercial Court rejected the argument that the COA contained no provision relating to the currency of payment, but only a provision relating to the currency of account. Box 14 makes it clear that it requires a currency of payment to be specified.

In relation to payments, *Dicey Morris & Collins: The Conflict of Laws* 15th edition, paragraphs 37R-051 – 37-060 provides:

'*(1) Irrespective of the currency in which a debt is expressed or damages are calculated (money of account), regard shall be had to the law of the country in which the debt or liability is payable in order to determine the currency in which it may, or must, be*

discharged (money of payment), but (semble) the rate of exchange at which the money of account must be converted into the money of payment is determined by the law applicable to the contract or other law governing the liability.

(2) If a sum of money expressed in a foreign currency is payable in England, it may be paid either in units of the money of account or in sterling at the rate of exchange at which units of the foreign legal tender can, on the day when the money is paid, be bought in London in a recognised and accessible market, irrespective of any official rate of exchange between that currency and sterling. Quaere, whether this rate of exchange also applies if English law is not the law applicable to the contract.'

Dicey & Morris indicates that where a contract is governed by English law, and there is an obligation to pay in a foreign currency in England, the debtor can tender either the foreign currency or sterling. However, in this respect:

1. The present case is not concerned with an obligation under an English law contract to pay foreign currency in England. It is an English law contract to pay foreign currency in the Netherlands. *Dicey & Morris* suggests (in paragraph 37-056) that the position is as follows, whilst making it clear that there is no English authority on this (and related) points, and that the solution is that:

   '*If a debt, expressed in whatever currency, pounds, dollars or francs, is governed by English law and payable in Switzerland, Swiss law should determine whether it can be discharged by tendering Swiss francs*'.

2. The Commercial Court did not feel that it needed to consider whether the above was correct, or whether it was an issue of proper construction and interpretation of the contract.

3. The passage from *Dicey & Morris* indicates that there is no rule of English law, and no authority to support the proposition, that it is always permissible for a party, under a contract governed by English law, to make a payment in the 'local' currency where that differs from the contractual currency of payment.

4. As issues of foreign law are questions of fact, which were not put before the arbitral tribunal, or raised in the notice of appeal, it would be unfair to consider the point now.

As such, the Commercial Court found that the requirement to make payments in US Dollars was an express term of the COA.

Reasonable Endeavours

Having considered the case-law in this area, the Commercial Court decided that the exercise of reasonable endeavours did not require the Owners to sacrifice their contractual right to payment in US Dollars.

The Commercial Court found that parties' contractual obligations were '*paramount and determinative,*' determining that:

'a party is not required, by the exercise of reasonable endeavours, to accept non-contractual performance in order to circumvent the effect of a force majeure or similar clause. It also shows that a relevant contractual obligation is not simply a factor to be weighed in the balance when coming to an overall assessment of reasonableness'.

Relevant to the Commercial Court's conclusions were, amongst other things, the following factors:

First, case law in relation to mitigation of loss is not analogous and not of assistance. The issue does not concern remedies for breach of contract. The question here is the operation of the force majeure clause, which is designed to regulate how the contract is to be performed if there is a force majeure event.

Second, the law in relation to frustration was also of no assistance. *Peel: Frustration and Force Majeure* paragraph 4-111 says, in respect of the Suez Canal cases, *'Thus even the failure of an expressly or impliedly stipulated method of performance will not discharge a contract if that method is not of fundamental importance, unless the parties make it clear that they intend the stipulated method to be exclusive.*' However, one purpose of force majeure clauses was to avoid the difficulties and uncertainty of the doctrine of frustration, and it would be undesirable to introduce the principles relevant to that doctrine into the area of force majeure. Frustration is essentially concerned with the discharge of contracts, and the Suez cases discussed by Professor Peel illustrate the reluctance of the courts to hold that contracts have been discharged.

Third, in the present case there can be no doubt as to the significance of the Charterers' obligation to make payments to the Owners, in particular the payment of freight.

Comment

Two issues of importance arise from this decision of the arbitral tribunal and the Commercial Court for the drafting of oil and gas contracts:

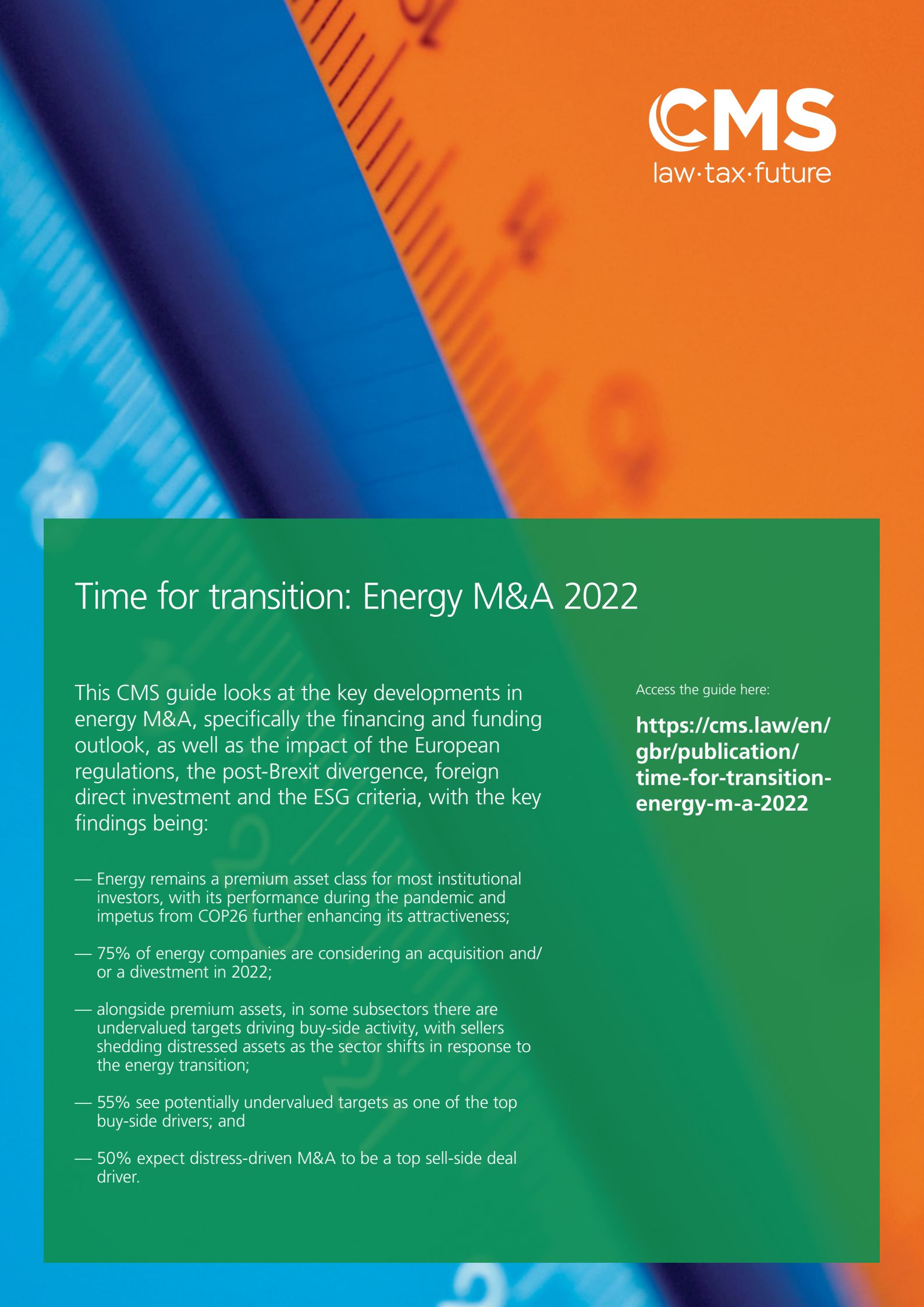
This decision leaves open one point and confirms another.

The point left open is whether a contractual obligation creating a debt, expressed in whatever currency, pounds, dollars or francs, contractually governed by English law and payable in a foreign country, is subject to the law of that foreign country to determine whether it can be validly discharged by tendering an alternative currency. Whilst *Dicey & Morris* suggests that this may be the case, as a matter of conflict of laws, it may alternatively be argued to be an issue of contractual construction and interpretation in English law rather than an issue of conflict of laws. There does not seem to be clear authority on the point. In addition, as the issue was not addressed fully in the judgment, issues such as (i) the impact of section 46 of the Arbitration Act 1996 and (ii) the express terms of the governing law clause and/or arbitration clause were not considered by the Commercial Court. As such, this issue has the potential to raise further debate.

In relation to the point confirmed, the Commercial Court decided that '*reasonable endeavours*' to overcome a force majeure event does not include a party being required to tender non-contractual performance, even where there may be an alternative non-contractual course of action which may avoid the effect of the event said to give rise to force majeure.

Permission to appeal before the Court of Appeal was applied for and the appeal is now outstanding.

Judge: Jacobs J.



Time for transition: Energy M&A 2022

This CMS guide looks at the key developments in energy M&A, specifically the financing and funding outlook, as well as the impact of the European regulations, the post-Brexit divergence, foreign direct investment and the ESG criteria, with the key findings being:

— Energy remains a premium asset class for most institutional investors, with its performance during the pandemic and impetus from COP26 further enhancing its attractiveness;

— 75% of energy companies are considering an acquisition and/or a divestment in 2022;

— alongside premium assets, in some subsectors there are undervalued targets driving buy-side activity, with sellers shedding distressed assets as the sector shifts in response to the energy transition;

— 55% see potentially undervalued targets as one of the top buy-side drivers; and

— 50% expect distress-driven M&A to be a top sell-side deal driver.

Access the guide here:

https://cms.law/en/gbr/publication/time-for-transition-energy-m-a-2022

Payment and import restrictions as force majeure events

In *Laysun Service Co Limited v Del Monte International GMBH* [2022] EWHC 699 (Comm), the Commercial Court upheld a previous arbitration award which found that the inability to make payments or obtain valid import permits as a result of international sanctions constituted valid force majeure events. Although it is not an oil and gas case, it is of particular relevance to the industry.

Facts

The appeal was brought under section 69 of the Arbitration Act 1996 and concerned a Contract of Affreightment between the Claimant, Laysun Service Co. Ltd ('**Laysun**' or 'the '**Owners**'), and the Defendant, Del Monte International GmbH ('**Del Monte**' or the '**Charterers**') for the transportation of bananas from the Philippines to Bandar Bushehr in Iran (the '**Contract**'). The Contract was for a total of 36 voyages between 1 January 2018 and 31 December 2018.

Clause 3.5 of the Agreement provided as follows:

'*The Charterer shall bear the cost and risks of loading and unloading at the Port of Shipment and the Port of Destination 1.*'

The contractual obligations of Del Monte were threefold:

1. The loading of the cargoes on vessels provided by the Owners (clause 3.5);

2. the payment of freight (clause 5); and

3. the discharging of the cargoes at Bandar Bushehr, Iran (clause 3.5).

The force majeure provisions in the Contract said (as far as relevant):

'*8.1. A force majeure event means, in relation to either party, any circumstances beyond the reasonable control of that party that prevents such party, practically or legally, from performing any or all of its obligations under this Agreement, including, without prejudice to the generality of the foregoing:-*

8.1.1. any act or change thereof, law, regulation, order or policy of any governmental or supranational authority, governmental interruptions of any applicable country including trade or import/export restrictions or the revocation or non-renewal of trading licenses;

…8.2 Neither party will be in breach of this Agreement due to a force majeure event provided that such event is not due to the fault or negligence of such party and the effect of which could not have been avoided by taking appropriate and reasonable measures and such party has promptly notify the other party of such event.

8.3 Party affected by a force majeure event will use all endeavours to mitigate the effect of the force majeure event to carry out its obligations under this Agreement in any way that is reasonably practicable and to resume the performance of its obligations as soon as reasonably possible.

8.4 In the event of force majeure affecting either the Owner or the Charterer the Owner has the right to reduce the committed volume set forth in Clause 3 and/ or the Charterer has the right to request a reduction in volume in proportion to the quantity of Fruit affected by the force majeure event.'

The Charterers' bananas were sold by its sister company, Del Monte UAE to two customers located in the UAE: Prime International Fruit LLC ('**Prime**') and Marhaba MTA General Trading LLC ('**Marhaba**').

After 17 shipments, Del Monte stopped providing cargoes. Laysun brought a claim for their losses arising out of Del Monte's alleged wrongful failure to perform the remaining 19 shipments. Del Monte denied liability. Their defence rested on two declarations of force majeure. They contended that:

1. It was impossible to make payments from Iran to a bank in another country and/or for international banks to facilitate or finance any transaction with an Iranian link. This was due to the US hardening its stance against Iran, culminating in May 2018 in the US leaving the international agreement with Iran in relation to its nuclear programme and ultimately imposing sanctions against Iran (the '**Payments Issue**').

2. It was impossible to import bananas into Iran due to the imposition by the Iranian Government, between April and at least June 2018 and possibly for longer, of various restrictions on import permits (the '**Import Permits Issue**').

Arbitral Award

The Payments Issue

The arbitral tribunal found that from February 2018, Del Monte UAE started experiencing problems with receiving payments from its UAE customers. The arbitral tribunal found as facts that Prime and Marhaba were unable to make payments to Del Monte UAE, because no bank in the UAE would accept an Iranian payment; and Del Monte UAE was in turn unable to receive payments from Prime or Marhaba from April or May 2018.

The arbitral tribunal found the following facts concerning the Payments Issues:

1. In early 2018 the Trump Administration took a hardened stance against Iran and threatened to withdraw from the Joint Comprehensive Plan of Action ('**JCPOA**').

2. In consequence, Del Monte UAE were '*unable to receive payments*' from Prime or Marhaba from April or May 2018; and Prime and Marhaba were unable to make payments to Del Monte UAE, because no bank in the UAE would accept an Iranian payment.

3. It was impractical and entirely unrealistic to suppose that Del Monte UAE would be able to open an account with a new bank which might accept Iranian payments.

4. Without the Iranian receiver making payment for the goods, they would not receive the bill of lading. Yet the Iranian receiver required the bill of lading in order to clear the cargo through customs before it could discharge the cargo.

The arbitral tribunal concluded, based upon these findings of fact, that the inability of the Iranian receivers to make payments and the inability of Prime and Mahaba to pay by any bank at their disposal resulted in a qualifying event of force majeure under Clause 8.1 of the Contract.

The Imports Issue

The arbitral tribunal was clear that the payments issue in itself was sufficient for a force majeure event, and so the imports issue became purely academic.

It nonetheless went on to decide as a fact that the Iranian government stopped issuing new import permits '*towards the end of June 2018*' until 31 July 2018 and that '*it was not possible for [the Charterers] to perform their obligations under the Agreement from the end of June 2018 until, at the least, the end of July 2018 because they were unable to discharge bananas to their existing customers in the absence of either of them having import permits*'. In doing so it considered that:

1. With the US Government's threat of renewed sanctions against Iran, by a decree dated 11 April 2018 (the '**11 April Decree**'), the Iranian Government imposed new regulations aimed at controlling the outflow of foreign currency from Iran and restricting imports (which were a source of foreign exchange outflow). In particular, the 11 April Decree imposed import permit requirements throughout all of the ports of Iran before goods could legally be imported into Iran.

2. Discharge of the cargo could not take place until the cargo had been cleared through customs and it could not be cleared unless there was a valid import permit.

3. There was a de facto stop on the issuance of import permits towards the end of June 2018 until at least 31 July 2018 which meant that Del Monte UAE was unable to ship bananas to Marhaba and Prime.

4. The Owners failed to establish their argument that Prime or Marhaba refused to use (as a matter of choice) permits for Del Monte UAE's benefit, whether existing or traded permits.

5. It followed that it was not possible for the Charterers to perform their obligations under the Contract from the end of June 2018.

The arbitral tribunal then considered Clause 8.3 and found that it was not reasonably practicable for Del Monte UAE to resume shipping bananas to either Marhaba or Prime, both of whom had ended their contracts with Del Monte UAE. The former had used up their remaining allowance under their last valid permit in July 2018 and the latter did not have new import permits after the end of June. Moreover, locating substitute customers before the end of 2018 was unreasonable and impractical. Since there was nothing Del Monte could have done to mitigate the effect of the force majeure events or resume performance under Clause 8.3, they were excused from performing until the Contract expired.

Commercial Court Decision

Laysun appealed. It submitted that the question was and remains whether Del Monte can validly rely on Clause 8 of the Contract to exclude their liability for breach, that is to say whether they proved that they were prevented, practically or legally, from performing any or all of its obligations on the true construction of Clause 8 of the Contract.

However, in fact these suggested questions of law were either premised on supposed factual findings which the arbitral tribunal did not make, or are not questions of law at all but rather thinly veiled challenges to the arbitral tribunal's findings of fact. Once the true factual findings of the arbitral tribunal are appreciated, the so-called errors of law simply did not arise.

The appeal was dismissed, and the original arbitration award was upheld.

Comment

The decision of the arbitral tribunal offers an interesting insight into the operation of force majeure clauses within the context of global sanctions.

Three points arise:

— First, a force majeure clause will usually require an affected party to demonstrate that a specific performance obligation is impacted (e.g. prevented, impossible, hindered) by an event that is classified as force majeure. As such, it is important for a party claiming force majeure to be able to identify a contractual obligation impacted.

— Second, in this case, although Del Monte's obligations were limited, it was found that two events impacted its obligation to discharge the cargoes at Bandar Bushehr, Iran (Clause 3.5).

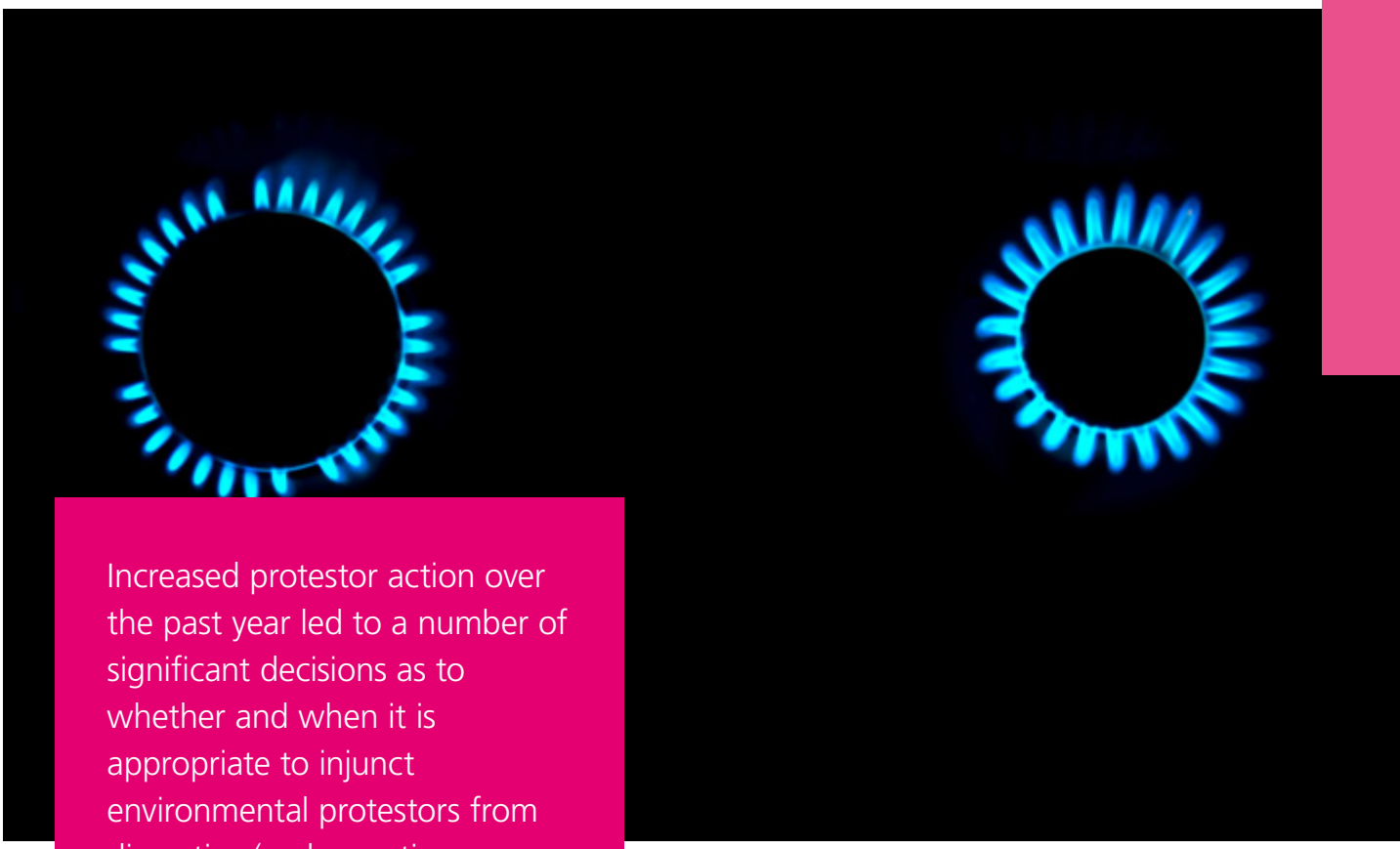
— Third, although one of the events is referred to as the '*Payments issue*', in fact, it was also an issue that impacted Del Monte's ability to discharge cargoes (because Del Monte UAE's buyers could not acquire bills of lading, and there was no alternative buyer that could).

The obligation of Del Monte to discharge the cargos was critical to its ability to claim force majeure. Although its buyer, Del Monte UAE, could not receive payment from its customers, that would not be sufficient to engage force majeure for an impossibility to pay for the freight by Del Monte (Clause 5). There was no inability upon Del Monte to pay Laysan. It just had an issue through its own payment chain. The impossibility was unloading the cargos, due to two separate events.

Judge: Calver J.

Chapter 7

Protestor Action



Increased protestor action over the past year led to a number of significant decisions as to whether and when it is appropriate to injunct environmental protestors from disruptive (and sometimes dangerous) protest activities:

— In *Thurrock Council and Another v Adams & Ors* [2022] EWHC 1324 (QB) the High Court renewed an interim injunction against 222 named defendants and seven categories of persons unknown concerning protests on highways. The case illustrates that councils and highway authorities have the ability to prevent protests on highways that cause a public nuisance and trespass, and provides guidance as to when the High Court will grant injunctions in such circumstances.

— In *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (QB) the High Court granted an interim injunction to prevent persons unknown from damaging and/or blocking the use of or access to any Shell petrol station, in connection with environmental protest campaigns with the intention of disrupting the sale or supply of fuel to or from the said Shell petrol station.

— In *(1) Esso Petroleum Co. Limited, (2) Exxon Mobil Chemical Limited v (1) Persons Unknown, (2) Persons Unknown,(3) Persons Unknown* [2022] EWHC 1477 (QB) the High Court granted injunctions to prevent trespass at eight of Esso Petroleum Co and Exxon Mobil Chemical Limited sites. The High Court held that there is no human right to carry out unlawful activity on property owned by others and that Articles 10 and 11 of the Human Rights Act 1998 do not protect against trespass.

— In *INEOS Upstream Ltd v Persons Unknown* [2022] EWHC 684 (Ch) the High Court granted an application to discharge injunctions, on the ground that there had been a material change in circumstances, reinforcing a duty to keep the Court informed following the grant of an injunction.

Protests by persons unknown on a highway

In *Thurrock Council v Persons Unknown* [2022] EWHC 1324 (QB) the High Court renewed an interim injunction against 222 named defendants and seven categories of persons unknown concerning protests on highways. The case illustrates that councils and highway authorities have the ability to prevent protests on highways that cause a public nuisance and trespass, and provides guidance as to when the High Court will grant injunctions in such circumstances.

Facts

The claimants were Thurrock Council and Essex County Council. The defendants were 222 named defendants and seven categories of persons unknown (the '**Defendants**').

In early April 2022, environmental activists (most of whom appeared to be connected with the group Just Stop Oil) carried out a series of protestor activities around Thurrock and wider Essex. Within these areas there are four fuel terminals some of which became the target of the activists. Due to the nature of the activities, which included blocking the highways and tunnelling under the highways, Thurrock Council and Essex County Council brought an action for injunctive relief against 222 named defendants (taken from information provided by the police detailing those who had been arrested) and seven categories of persons unknown (defined by the conduct to be prohibited). On 24 April 2022, the High Court granted an interim injunction without notice at an out of hours hearing.

Thurrock Council and Essex County Council's action was based on: (a) public nuisance under section 222 of the Local Governmnet Act 1972 and (b) trespass, in their capacity as a Highway Authority, under section 130 of the Highways Act 1980. The interim injunction that was sought contained several prohibitions restricting the ability of the Defendants to obstruct a set list of roads in the area. Thurrock Council and Essex County Council's concern was not only in relation to being able to use the highways, but also the significant dangers involved in some of the activities being carried out, particularly persons unknown gluing themselves to fuel tankers and tunnelling under the highways.

The return date for the without notice injunction was 10 May 2022.

Decision

At the return date hearing, the High Court renewed the interim injunction.

The High Court decided that, in addition to applying the usual test for an interim injunction, set down in *American Cyanamid Co (No 1) v Ethicon Ltd* [1975] UKHL 1, it was also necessary to take into account:

1. The requirements of the Articles 10 and 11 of the Human Rights Act 1998.

2. The Court of Appeal guidance on granting a *quia timet* injunction against persons unknown.

The Human Rights Act 1998 ('HRA') Articles 10 and 11

The Supreme Court in *Director of Public Prosecutions v Ziegler and others* [2021] UKSC 23, at paragraph 58, approved what the Divisional Court described as '*the usual enquiry*' under the HRA, which requires consideration of five questions:

1. Is what the defendant did in exercise of one of the rights in Articles 10 or 11 of the HRA?

2. If so, is there an interference by a public authority with that right?

3. If there is an interference, is it prescribed by law?

4. If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of Article 10 of the HRA or Article 11 of the HRA, for example the protection of the rights of others?

5. If so, is the interference '*necessary in a democratic society*' to achieve the legitimate aim?

The Divisional Court in *Ziegler* had noted that question 5 above would, in turn, require consideration of the sub-questions which arise in order to assess whether an interference is proportionate. The sub-questions are:

a. Is the aim sufficiently important to justify interference with a fundamental right?

b. Is there a rational connection between the means chosen and the aim in view?

c. Are there less restrictive alternative means available to achieve that aim?

d. Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

The '*usual enquiry*' in this case yielded positive responses 1 to 4 above, the legitimate aim certainly encompassing the protection of the rights of others. As to the sub-questions considering the necessity in a democratic society of the interference, A and B are answered in the affirmative. There were no less restrictive alternative means of achieving the aim. There was a fair balance in the injunction sought.

Quia timet injunction against persons unknown

In *Boyd v Ineos Upstream Ltd* [2019] EWCA Civ 515, Longmore LJ tentatively framed the requirements for granting a *quia timet* injunction against persons unknown as follows:

1. There must be a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief.

2. It is impossible to name the persons who are likely to commit the tort unless restrained.

3. It is possible to give effective notice of the injunction and for the method of such notice to be set out in the order;

4. The terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct.

5. The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do.

6. The injunction should have clear geographical and temporal limits.

This '*checklist*' must now be considered with the additional gloss on the requirement for item 4 provided by Leggatt LJ (who was a member of the Court of Appeal in *Ineos*) in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9:

'50. In the light of precedents which were not cited in the Ineos case but which have been drawn to our attention on the present appeal, I would enter a caveat in relation to the fourth of these requirements. While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule…, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case…

… The Court of Appeal allowed an appeal brought by

two individuals who objected to the order made on the ground that the judge's approach – which simply accepted the claimants' evidence at face value – did not adequately justify granting a quia timet injunction which might affect the exercise of the right to freedom of expression, as it did not satisfy the requirement in section 12(3) of the Human Rights Act 1998 that the applicant is 'likely' to establish at trial that such an injunction should be granted. The Court of Appeal also held that the parts of the injunction seeking to restrain future acts which would amount to an actionable nuisance or a conspiracy to cause loss by unlawful means should be discharged in any event, as the relevant terms were too widely drafted and lacked the necessary degree of certainty…'.

The distinction to be drawn with *Ineos* and the present proceedings is that there is detailed and reliable evidence from Thurrock Council and Essex County Council to be drawn from past experience, the repetitive nature of the actions of a significant number of protestors already identified through arrests and the sufficiently real and immediate anticipated return to protest activity within *Thurrock* and *Essex* to justify granting interim injunctive relief.

Longmore LJ's requirements 2 and 3 were also satisfied.

In relation to the terms of the injunction, the High Court did not accept the Defendants' submission that it may not prohibit lawful conduct. That would be inconsistent with Leggatt's LJ view in *Cuadrilla*. However, the injunction must be '*necessary to afford effective protection to rights of the claimant in the particular case*'. The High Court concluded that the majority of the existing interim injunction satisfied this test. However, it deleted one element of the injunction as not justified.

Section 12 of the HRA

The drafting of section 12 of the HRA does appear to draw a distinction between relief affecting the exercise of Article 10 and the restraint of publication as a sub-set of that Convention right. Nothing in the instant proceedings affected any act that would appear to come within the broad definition of '*publication*'. The restrictions sought relate to where protestors are free to express themselves not what they are free to express. As a result, section 12(3) of the HRA was not directly applicable. Even if the High Court was wrong in this analysis, it was nonetheless satisfied that Thurrock Council and Essex County Council would likely succeed at final trial.

Service

Service on named Defendants was achieved in the usual way pursuant to the CPR.

For a period of time, and in some locations, full copies of the order were posted, including details about named Defendants. The High Court was concerned about this approach as:

First, it was suggested that some of those named were, in law, children, such that they should have had an opportunity to make representations to the Court as to whether they might be entitled to any order protecting release of their details.

Second, the actions of the protestors are not universally supported or welcomed. Some may fear reprisals from the publication of their details.

The High Court was given assurances that this state of affairs was unintended and short-lived.

There is a proper balance to be struck between achieving the required publicity of the injunction's existence for persons unknown and inadvertently representing the injunction as having wider reach than it does, such that there is a 'chilling effect' on permissible protest. The High Court invited submissions on the exact wording of the order in this respect. Beyond this, the various methods of alternative service are required to ensure that the existence of the injunction is made known to anyone whom it might affect and the exact terms of it are readily accessible to promote compliance.

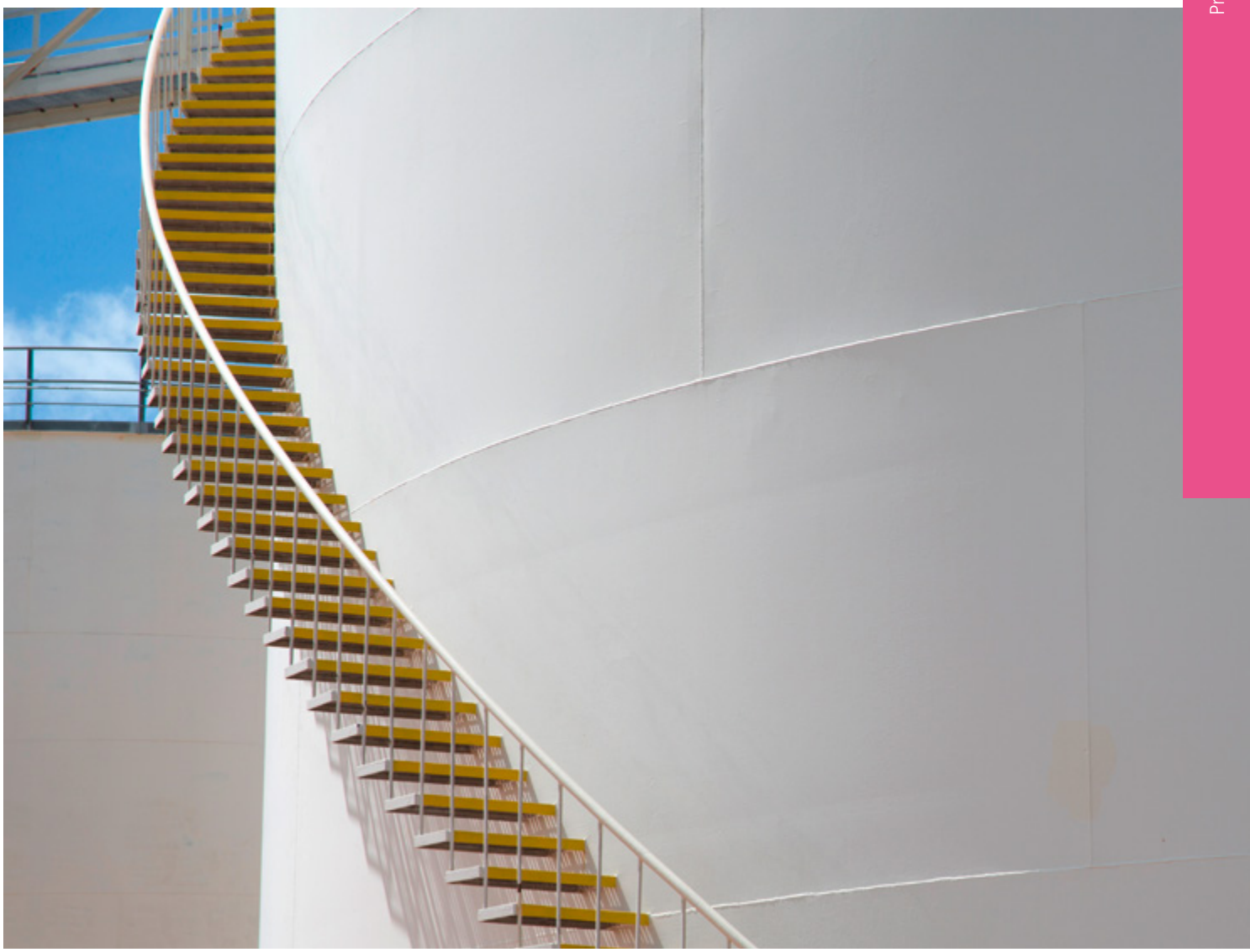
Comment

There are a number of important outcomes from this case that are relevant to energy companies:

1. Where a disruptive and/or dangerous protest is taking place on a highway, the highway authority and/or local authority will likely have power to act.

2. In such circumstances, as with other forms of interim injunction concerning protests, the rights afforded by Articles 10 and 11 of the HRA might be impacted, which will require the court to take account of factors beyond that required for usual interim injunctions.

3. Assuming the injunction is against 'persons unknown' the Court of Appeal has provided guidance on granting a *quia timet* injunctions against persons unknown, which must also be considered and applied before granting an injunction.



4. Further, section 12 of the HRA may, depending on the meaning and scope of the injunction sought, mean that the party seeking the injunction needs to show that it is likely to succeed at trial (which is a higher standard than that required for a standard interim injunction).

5. Finally, where an injunction is against named persons and persons unknown, careful consideration should be given to the issue of serving the relevant documents and the terms of the injunction. Proper service will need to be made against persons unknown (likely by, amongst other things, placing notices in the relevant public places), without identifying persons known in such a manner that they may become a target for persons of a different view that may wish to prevent or discourage them from protesting.

Judge: Simon J.

Interim injunctions – striking a balance between competing rights

In *Shell UK Oil Products Limited v Persons Unknown* [2022] EWHC 1215 (QB) an interim injunction was granted to prevent persons unknown from damaging, and/or blocking the use of or access to any Shell petrol station, or to any equipment or infrastructure upon it, by agreement with others, in connection with environmental protest campaigns with the intention of disrupting the sale or supply of fuel to or from the said Shell petrol station.

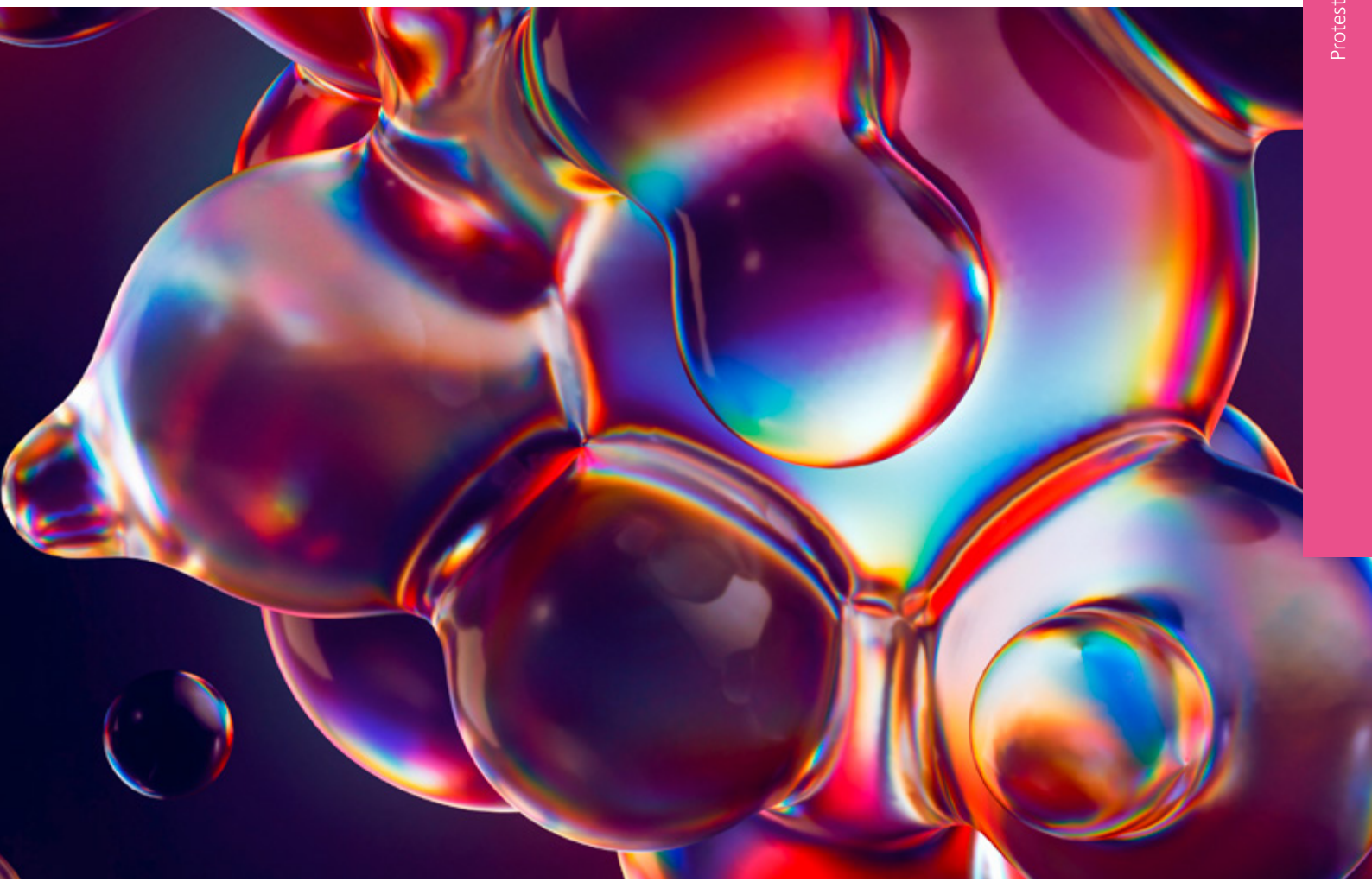
Facts

Shell UK Oil Products Limited ('**Shell**'), is part of the Shell group that is ultimately owned and controlled by Shell plc. It markets and sells fuels to retail customers in England and Wales through a network of 1,062 Shell-branded petrol stations ('**Shell Petrol Stations**'). The stations are operated by third party contractors, but the fuel is supplied by Shell. In some cases, Shell has an interest in the land where the Shell Petrol Station is located.

On 28 April 2022, at two petrol stations in England, persons unknown were alleged to have carried out the following activities:

1. Blocking the entrance to the forecourts;
2. smashing display screens of fuel pumps with hammers;
3. obscuring display screens of fuel pumps with spray paint;
4. sabotaging kiosks to '*stop the flow of petrol*'; and
5. gluing themselves to the floor, a fuel pump, the roof of a fuel tanker, or each other.

A total of 55 fuel pumps were damaged (including 35 out of 36 pumps at Cobham) to the extent that they were not safe for use, and the forecourt had to be closed. Five people were arrested and charged with



offences, including criminal damage. They were subject to bail conditions.

Shell expressed significant concern related to the health and safety risks to the public, protestors and staff that these actions posed.

Shell sought an interim injunction against persons unknown damaging, and/or blocking the use of or access to any Shell Petrol Station in England and Wales, or to any equipment or infrastructure upon it, by express or implied agreement with others, in connection with environmental protest campaigns with the intention of disrupting the sale or supply of fuel to or from the said Shell Petrol Station ('**Persons Unknown**'). The interim injunction was granted on a without notice, emergency, basis on 5 May 2022.

The return date was set for 13 May 2022, at which Persons Unknown would be afforded the opportunity to object to the continuation of the injunction and/or its terms.

Decision

The High Court noted that, aside from the physical damage that has been caused at the petrol stations, and the direct financial impact on Shell (from lost sales), these types of protest give rise to additional potential risks. Petrol is highly flammable. Ignition can occur not just where an ignition source is brought into contact with the fuel itself, but also where there is a spark (for example from static electricity or the use of a device powered by electricity) in the vicinity of invisible vapour in the surrounding atmosphere. Such vapour does not disperse easily and can travel long distances. There is therefore close regulation, including by the Dangerous Substances and Explosives Atmosphere Regulations 2002, the Highway Code, Health and Safety Executive guidance on 'Storing petrol safely' and 'Dispensing petrol as a fuel: health and safety guidance for employees', and non-statutory guidance, 'Petrol Filling Stations – Guidance on Managing the Risks of Fire and Explosions.'

For example, the use of mobile telephones on the forecourt (outside a vehicle) is prohibited for that reason

(see Annex 6 to the Highway Code: '*Never smoke, or use a mobile phone, on the forecourt of petrol stations as these are major fire risks and could cause an explosion*'). The evidence showed that at the protests on 28 April 2022 protestors used mobile phones on the forecourts to photograph and film their activities. Further, as regards the use of hammers to damage pumps, the severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell group has tragically lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations.

In order to be granted an interim injunction, Shell was required to demonstrate:

1. In relation to the usual test for interim injunctions (see *American Cyanamid v Ethicon* [1975] AC 396):
    a. There is a serious question to be tried.
    b. Damages would not be an adequate remedy for the claimant, but a cross-undertaking in damages would adequately protect the defendants.
    c. The balance of convenience lies in favour of the grant of the order.
2. As the interim injunction was against persons unknown (see *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303):
    a. There is a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction.
    b. The prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the claimant's rights.
    c. The terms of the injunction are sufficiently clear and precise.
    d. The injunction has clear geographical and temporal limits.
    e. The defendants have not been identified but are, in principle, capable of being identified and served with the order.
    f. The defendants are identified in the Claim Form (and the injunctions) by reference to their conduct.
3. As the interim injunction potentially engaged rights of the protestors under the Human Rights Act 1998 (see sections 6 and 12 of the Human Rights Act 1998):
    a. The interferences with the defendants' rights of free assembly and expression are necessary for and proportionate to the need to protect the claimant's rights.
    b. All practical steps have been taken to notify the defendants.
    c. The order does not restrain '*publication*', or, if it does, the claimant is likely to establish at trial that publication should not be allowed.

The High Court was satisfied that all of the elements of the test for such an injunction had been met by Shell and allowed the injunction to be continued for a period of 12 months.

In terms of service, most of Persons Unknown were not identifiable by name and/or location (although could, in principle, be identified or were identifiable by reference to their conduct). In this respect:

First, Shell was required to send a copy of the order to more than 50 email addresses of persons and/or groups that it was aware had connections to such activities

carried out by the Persons Unknown, such as Just Stop Oil and Extinction Rebellion.

Second, the order and all other relevant court papers were to be uploaded onto an easily accessible website for Persons Unknown and others to view and/or download.

Finally, all reasonable endeavours were required to display notices at the entrances of each Shell Petrol Station (and elsewhere in each Shell Petrol Station) that identified a point of contact from which the court order may be requested, as well as details of the website where the court order may be found.

When considering whether the injunction was necessary for and proportionate to protect Shell's rights, it was necessary for the Court to consider whether such interference with rights of Persons Unknown was justified. The High Court recognised that while the aim was to protect Shell's right to carry on its business, Persons Unknown were motivated by matters of the greatest importance. However, the High Court held that:

'*It is not for the court, on this application, to adjudicate on the important underlying political and policy issues raised by these protests. It is for Parliament to determine whether legal restrictions should be imposed on the trade in fossil fuels. That is why the defendants' actions are directed at securing a change in Government policy. The claimant is entitled to ask the court to uphold and enforce its legal rights, including its right to engage in a lawful business without tortious interference. Those rights are prescribed by law and their enforcement is necessary in a democratic society.*'

The High Court also held that the interim injunction sought did '*strike a fair balance*' between the parties' competing rights. The interim injunction was worded in such a way that afforded Shell the protections sought whilst not removing the rights of Persons Unknown to lawfully protest. All that the injunction prohibited, was a specific unlawful tortious activity carried out as part of an agreement between Persons Unknown and with the intention of harming Shell's lawful interests.

Comment

There are a number of important points in relation to the interim injunction granted by the High Court in this instance, which will be of guidance to those seeking similar measures:

First, in relation to the practicality of notifying Persons Unknown of the interim injunction, the High Court took a practical, multifaceted, approach that sought to ensure Persons Unknown were given proper notice of the terms of the injunction by requiring it to be displayed/notified in a variety of ways: (i) by sending to email addresses; (ii) by uploading onto a specific website; and (iii) by displaying at relevant locations. Adequately dealing with this issue is an important aspect of the High Court granting an interim injunction in cases of persons unknown.

Second, the health and safety implications of previous protestor action were considered relevant by the High Court on the issue of adequacy of damages should an injunction not be granted. Where health and safety is at issue, it will likely be rare for a court to consider damages to be an adequate remedy, such that the *American Cyanamid* element of the test is unlikely to be satisfied.

Finally, the court is likely to carefully analyse the scope of the interim injunction sought. In this case, the injunction sought by Shell did not have the impact of limiting otherwise lawful protest. The High Court emphasised that: *'All that is prohibited is specified deliberate tortious conduct (in one sense deliberate doubly tortious conduct, because of the nature of conspiracy to injure) that is carried out as part of an agreement and with the intention of harming the claimant's lawful business interests. It would not strike a fair balance between the competing rights simply to leave matters to the police to enforce the criminal law. Such enforcement could only, practicably, take place after the event, meaning that loss to the claimant is inevitable. Moreover, some of the activities that the injunction seeks to restrain are not breaches of the criminal law and could not be enforced by the exercise of conventional policing functions'*.

Judge: Johnson J.

Trespass vs freedom of expression, assembly and association

In *(1) Esso Petroleum Co. Limited, (2) Exxon Mobil Chemical Limited v (1) Persons Unknown, (2) Persons Unknown,(3) Persons Unknown* [2022] EWHC 1477 (QB), the claimants, Esso Petroleum Co and Exxon Mobil Chemical Limited were granted injunctions against persons unknown to prevent trespass at eight of their sites. Protests had already taken place at four of their sites and there was a strong possibility that protestors would act again and infringe Exxon's rights causing grave and irreparable harm.

Facts

Esso Petroleum Co. Limited and Exxon Mobil Chemical Limited (together '**Exxon**') are two companies that import and process oil.

In April 2022, four of Exxon's oil terminals had been subject to direct action by protestors who cut through fences, attached banners, and placed objects to block entrances.

The groups behind the protest were Just Stop Oil and Extinction Rebellion. There was also mention of a subgroup referred to as Youth Swarm. The groups publicised their planned action, they claimed such actions as their own when they had occurred, and made calls for other groups and individuals to join any such protests.

Exxon sought interim injunctions concerning protests on land owned by them (with one exception) against categories of persons unknown.

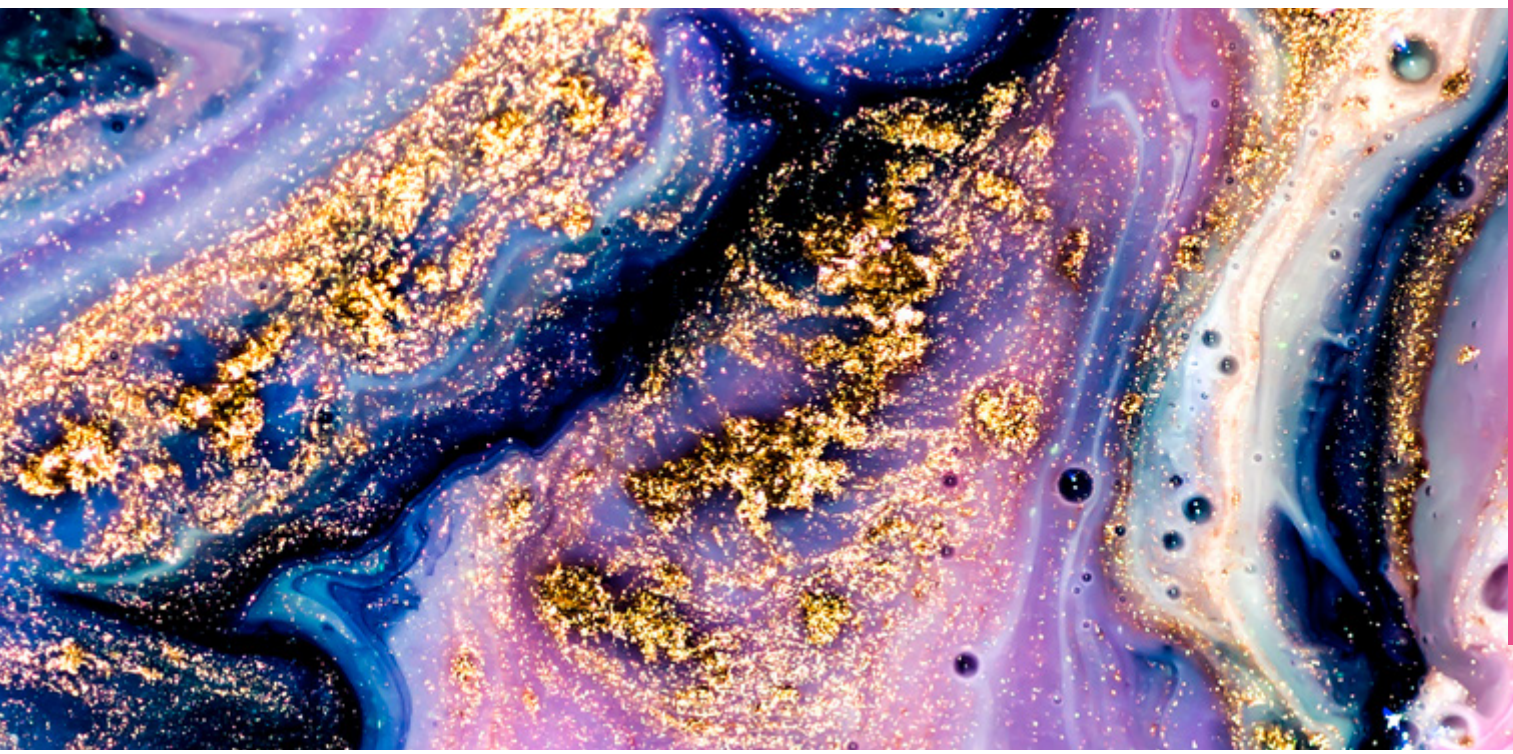
Procedure and Hearing

The defendants were neither represented nor present. Unusually, as well as hearing submissions on behalf of Exxon, the High Court agreed to hear submissions against the interim injunction, from a counsel instructed by an individual opposing the application, that was not party to proceedings. The High Court allowed this as it felt the broad order sought against the unnamed defendants would '*benefit from scrutiny*'. However, it made it clear that: '*In doing so I shall not be seen as setting any precedent that binds other judges, or indeed myself. I simply felt that the sort of very broad order sought against unnamed defendants would benefit from the scrutiny that could attach to other submissions*'.

Decision

In relation to the relevant legal hurdles, the High Court considered that:

First, section 12(2) of the Human Rights Act 1998 ('**HRA**') limited the Court's ability to grant an injunction



in cases where freedom of expression was involved and the respondent was not present or represented, unless the applicant had taken all practical steps to notify the respondent of the proceedings. The High Court was satisfied that the applicants had taken all practical steps.

Second, under section 12(3) of the HRA, the Court should not issue an injunction unless persuaded that the applicant was '*likely*' to succeed in the action. On one view of the law that provision is not really aimed at protest cases such as this, but there is a Court of Appeal authority indicating that it should be taken as applying, and the High Court followed that authority.

Third, the power of the Court to grant injunctions is set out in very broad terms in section 37 of the Senior Courts Act 1981.

Fourth, a well-established test for the grant of an interim injunction was described in *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396:

1. Whether there was a serious question to be tried.
2. Whether damages would be an adequate remedy.
3. The balance of convenience.

The High Court decided that the actions planned, carried out and publicised by the groups, Extinction Rebellion and Just Stop Oil, clearly amounted to a strong basis for an action for trespass and private and public uses. Further, given the sort of sums involved in the oil industry and the impracticality of obtaining damages on that scale from a diverse group of protestors, some of whom may have no assets, damages would obviously not be an adequate remedy.

Fifth, the High Court also applied *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch) in relation to anticipatory injunctions. *Vasint* set out a two-stage test which now had to be addressed by Bennathan J:

1. Whether there was a strong probability that unless restrained by injunction the defendant would act in breach of the claimant's rights.
2. Whether the resulting harm would be so grave and irreparable that damages would not be an adequate remedy.

Sixth, with regard to injunctions against persons unknown, the High Court considered two recent cases – *Ineos Upstream Limited v Persons Unknown* [2019] 4 WLR 100 and *Canada Goose Retail Limited v Persons Unknown* [2020] 1 WLR 2802. In *Ineos* the Court of Appeal suggested that the terms of the injunction must not be so wide that they prohibit lawful conduct and the terms must be sufficiently clear and precise to enable persons potentially affected to know what they must not do. However, in *Canada Goose,* the Court of Appeal clarified that*: 'The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is*

no other proportionate means of protecting the claimant's rights'.

In relation to protections under Articles 10 and 11 of the European Convention on Human Rights (the '**Convention**'), the High Court considered the Supreme Court's decision in the case of *The Director of Public Prosecutions v Ziegler & Ors* [2020] 2 AC 408. The limits to *Ziegler* are made clear in the *Director of Public Prosecutions v Cuciurean* [2022] EWHC 736 (Admin), in which the High Court held that *Ziegler* did not impose an extra test in a case of aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994, as: (a) Article 10 and Article 11 rights do not generally include the right to trespass; and (b) Parliament had set the balance between those rights and the lawful occupier's rights under Article 1 of Protocol 1 of the Convention, by the terms of the section 68 offence. The right to peaceful enjoyment of one's property has been honoured by the courts for centuries. Exxon have rights under Article 1 of Protocol 1 of the Convention and must be entitled, as are all companies and individuals, to seek the protection of the courts.

In making the order sought, the High Court considered the following and was satisfied that:

1. Were the underlying claims ever to reach trial, the claimants had a strong basis for an action of trespass and private and public nuisance, on the basis of a protest that had already occurred on some sites and were threatened on others.

2. Given the sort of sums involved in the oil industry and the impracticality of obtaining damages on that scale from a diverse group of protestors, some of whom may have no assets, damages would not be an adequate remedy.

3. There was a strong possibility that the defendants would imminently act to infringe Exxon's rights, given they had already done so and promised (if that is the right word) that similar actions will continue on other sites.

4. The harm caused by the activities would amount to grave and irreparable harm in that trespassing on the sites could lead to highly dangerous outcomes, given the highly flammable or even explosive nature of the materials being handled. Prolonged obstruction of entrances could also lead to a different type of very serious damage in that some of the sites at least are parts of the critical national infrastructure and numerous businesses, emergency services, hospitals and other key parts of society depend on oil-based fuels.

The High Court also held that Exxon must be entitled to seek the protection of the courts. The fact that others have strongly held views about fossil fuels and the environment cannot be a basis for the court refusing protection to a law-abiding business once the relevant criteria are met.

However, the High Court expressed scepticism over whether the same reasoning would apply to protests on a public highway. It queried whether the better course when dealing with actions by protestors that might be found lawful on a *Ziegler* assessment, is that taken by Exxon in this case, allowing this Court to leave those matters to the police to enforce and the Magistrates' Court to adjudicate.

Comment

The approach of the High Court sets out clearly the issues to be addressed when seeking an interim injunction against persons unknown.

An interesting question arises as to whether, or when, Article 10 and Article 11 of the HRA are engaged. As noted in *Director of Public Prosecutions v Cuciurean* there is no human right to carry out unlawful activity on property owned by others. As such, it is doubtful that Article 10 and Article 11 of the HRA have a proper role to play when an interim injunction is sought to prevent a trespass. Further, a property owner has a legitimate interest to be protected by the court - regardless of the strength of feeling of those wishing to trespass over an issue in debate.

Judge: Bennathan J.

Change of circumstances and interim injunctions

In *Ineos Upstream Ltd and others v Persons Unknown and others* [2022] EWHC 684 (Ch), the High Court refused an application by the Seventh Defendant to strike out of the claim for abuse of process. However, the High Court granted the claimants' application to discharge injunctions, on the ground that there had been a material change in circumstances. The High Court refused to stay the proceedings, instead imposing a sanction in costs on the claimants.

Facts

The claimants were a group of companies in the INEOS group and a number of individuals. The INEOS group is a global manufacturer of chemicals and oil products and has an interest in shale gas extraction through hydraulic fracturing.

The claim concerned a number of sites. Three of the sites were the group's business premises and the remaining five sites, some or all of which were owned by the individual claimants, had previously been identified as possible sites for fracking exploration by the INEOS group.

In 2017, the claimants were granted injunctions against persons unknown restraining unlawful activity at the sites intended for fracking. This interim injunctive relief restrained five categories of persons unknown from engaging in acts of trespass, public or private nuisance, harassment or unlawful means conspiracy with the intention of disrupting the claimants' lawful activities. At the time that this interim relief was granted by the High Court, no planning permission had been granted for any of the proposed sites.

The injunctions were varied by the Court of Appeal in 2019 and the High Court ordered that the injunctions, in relation to some of the persons unknown categories, be maintained pending remission to the High Court for reconsideration.

In the time since the Court of Appeal's decision, the claimants had done '*hardly anything*' to progress the claim and had continued benefiting from the continuation of the injunctions.

An application by the Seventh Defendant was made to the High Court to strike out the claim form and dismiss the claim. Once the application had been served, the claimants also applied to the High Court to stay the proceedings and discharge the injunction on the ground that there had been a material change in circumstances, i.e., the lapse in planning permission.

The High Court heard the above applications (the '**Applications**') simultaneously.

Decision

The High Court reviewed the relevant authorities, including the decision of Eder J in *Speedier Logistics v Aardvark Digital* [2012] EWHC 2776 (Comm) where the judge said at [25]:

'I cannot see any reason in principle, in circumstances where the claimant becomes aware of information which renders what that claimant told the court originally incorrect, not being under a duty to go back before the court to inform the court that there has been that relevant change, or, at the very least, to inform the defendant of those new circumstances… If that basis changes, it seems to me important, as a matter of principle, that the claimant does revert to the court to inform the court of the position. The main reason for that is that the exercise of the court's discretion was originally on a particular basis and, if that basis changes, it seems to me, as a matter of principle, that the court must be informed of that change in the ordinary circumstances'.

On this basis, the High Court considered that once the planning permissions for the fracking sites had lapsed, the claimants had a positive duty to promptly apply to the High Court to have the injunctions discharged. It was found that the claimants failed to act sufficiently quickly when they became aware of the material change in circumstance, such that their conduct had been improper.

Nevertheless, having regard to the overriding objective, which requires cases to be dealt with justly and proportionately, the High Court decided that:

1. The application of the Seventh Defendant to strike out the claim form be refused, as it would be disproportionate to the claimants' conduct;

2. the claimants' application to stay the claim shall also be refused, as the overriding objective requires cases '*to be determined, not left to languish in a court office … simply to save the claimant having to incur the issue fee payable if they have to begin a fresh claim*';

3. the claimants' application to discharge the injunction on the basis of material change in circumstance shall be granted, however, if the claimants were to apply for a further injunction in future, it would be for the judge hearing the case to determine whether the claimants' conduct to date would be considered;

4. a case management hearing shall be listed as soon as possible; and

5. the claimants shall be sanctioned in costs regarding the Applications.

Comment

The case provides guidance on claimants dealing with interim injunctions where the underlying circumstances change. An interim injunction is an exercise of discretion. Although prior to *Speedier Logistics v Aardvark Digital* [2012] EWHC 2776 (Comm) it might have been thought that a duty to keep the court informed only related to freezing injunctions, the decision of the High Court in that case suggested, and indeed found, a wider duty.

In the context of an injunction against persons unknown, the duty may well be more onerous. The reason being that it may not be possible '*at the very least, to inform the defendant of those new circumstances*'. As such, it may be that the claimant is required to update and inform the court.

That said, the decision in this case suggests that the sanction for failure to do so is likely to be discharge of the interim injunction and an adverse award on costs, rather than the more draconian sanction of striking the case out.

Judge: HHJ Klein.

Chapter 8

Licences and Regulation

Environmental campaigners are increasingly taking formal steps through court proceedings to challenge consents and approvals under oil and gas licenses, and to challenge regulatory strategy. The past year has specifically seen significant cases that deal with the relevance of Scope 3 emissions:

— In *Greenpeace Ltd v The Advocate General and Another* [2021] CSIH 53 the Inner House in Scotland refused Greenpeace's appeal against the decision by the Secretary of State for Business Energy and Industrial Strategy and the Oil & Gas Authority to grant consent to the exploitation of the Vorlich field in the North Sea.

— In *R (on the application of Cox and others) v Oil and Gas Authority and another* [2022] EWHC 75 (Admin) the High Court considered the United Kingdom's statutory objective of maximising the economic recovery ('**MER**' UK) and whether the strategy adopted by the Oil & Gas Authority (now the North Sea Transition Authority) was lawful.

— In *R (on the application of Finch) v Surrey CC* [2022] EWCA Civ 187 the decision of Surrey County Council to grant planning permission for the extension of the existing Horse Hill well site for the commercial extraction of crude oil was decided to be lawful by the Court of Appeal.

Greenpeace's appeal on the granting of consent in respect of the Vorlich field refused

In *Greenpeace Ltd against v The Advocate General* [2021] CSIH 53 the Inner House refused Greenpeace's appeal against the decision by the Secretary of State for Business Energy and Industrial Strategy ('**BEIS**') and the Oil & Gas Authority ('**OGA**') to grant consent to BP and Ithaca (the '**Interested Parties**') to exploit the Vorlich field in the North Sea.

Facts

As part of the process of obtaining the necessary regulatory approvals to develop the Vorlich Field, under the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 (the '**Regulations**'), BP was required to submit an Environmental Statement concerning the environmental effects of the proposed development to BEIS as a precondition to applying for development consent from the OGA. BP was also required to publish a notice to bring the Environmental Statement to the attention of the public, to inform them of their ability to make representations to BEIS, and to explain that any person aggrieved by a decision of BEIS could apply to the court for that decision to be quashed on the basis of a failure to consider relevant information or procedural failures. BP published such notices on its website and in two newspapers. Greenpeace did not make any representations in response to the notice.

In accordance with its powers under regulation 5(A1) of the Regulations, BEIS agreed that consent should be granted by the OGA. The OGA subsequently granted consent in respect of the Vorlich Field, in accordance with section 3(1) of the Petroleum Act 1998. After the consent had been published belatedly by the OGA, Greenpeace appealed to Court of Session (Inner House, First Division) using the process in the Regulations that permits aggrieved persons to apply to the Court to have consent reduced. A person is a '*person aggrieved*' under the Regulations if a consent is granted in contravention of regulation 5(4) or 5A(1)(a) of the Regulations or their interests have been '*substantially prejudiced*' by non-compliance with any other of the Regulations' requirements.

The Inner House considered a number of arguments. These included whether the Interested Parties, BEIS, and the OGA had satisfied the procedural requirements concerning publicity of applications and Environmental information under the Regulations, which Greenpeace contended had not been met.

Greenpeace also contended that the BEIS decision was invalid because BEIS was not fully informed of the Environmental effects of the licence before agreeing

that the OGA should consent. Greenpeace brought this argument on two grounds: that BP's Environmental Statement contained arithmetical errors regarding greenhouse gas emissions; and that the Environmental impact of the use of the oil after it had been extracted should have been considered.

Decision

Giving the unanimous decision of the Inner House, Lord President Carloway described Greenpeace's arguments based on a failure to comply with procedural requirements as '*overwhelmingly technical and unconvincing*' and concluded that the publicity requirements set out in the Regulations had been met.

Applying previous case law, the Inner House then accepted the argument made by the Interested Parties that Greenpeace was not an '*aggrieved party*' in terms of the Regulations. Greenpeace could have raised its substantive points during the initial process i.e., when the Environmental Statement was made public, but having failed to take that opportunity, it could not now be permitted to do so. The Inner House noted that, had Greenpeace been successful in its arguments on procedural failures, it would have been recognised as an aggrieved person under the Regulations, however, as set out above, these arguments were unsuccessful.

The issue regarding BP's arithmetical errors was dismissed as the overall figures were correct.

In terms of whether BEIS should have considered the Environmental effects of the use of the oil and gas after it had been extracted, the Inner House rejected an argument from the Interested Parties that this was '*res judicata*' i.e., that the point had already been decided as a result of an earlier judicial review application arising out of the same facts.

However, the Inner House then determined that these were not matters that BEIS ought to have considered. The Regulations required BEIS to consider the '*direct or indirect significant effects of the relevant project.*' The Inner House determined that the use of oil and gas once it has '*been extracted from the wells, transported, refined and sold to consumers, and then used by them*' is not such an effect.

The Inner House continued in its judgment that: *'It would not be practicable, in an assessment of the Environmental effects of a project for the extraction of fossil fuels, for the decision maker to conduct a wide ranging examination into the effects, local or global, of the use of that fuel by the final consumer.'*

Although Greenpeace was unsuccessful in this case, the Inner House did highlight that there is scope for future Environmental challenges to succeed, particularly in relation to the reduction of consents, for example, where there is a failure to substantially fulfil the notification and consultation requirements under the Regulations.

Comment

Environmental campaigners are increasingly taking formal steps through court proceedings to challenge oil and gas exploration and activity. The above case is an example. Greenpeace sought to curtail future exploration for oil in the Vorlich field in the North Sea, using both judicial review applications and challenges under the relevant Environmental regulations.

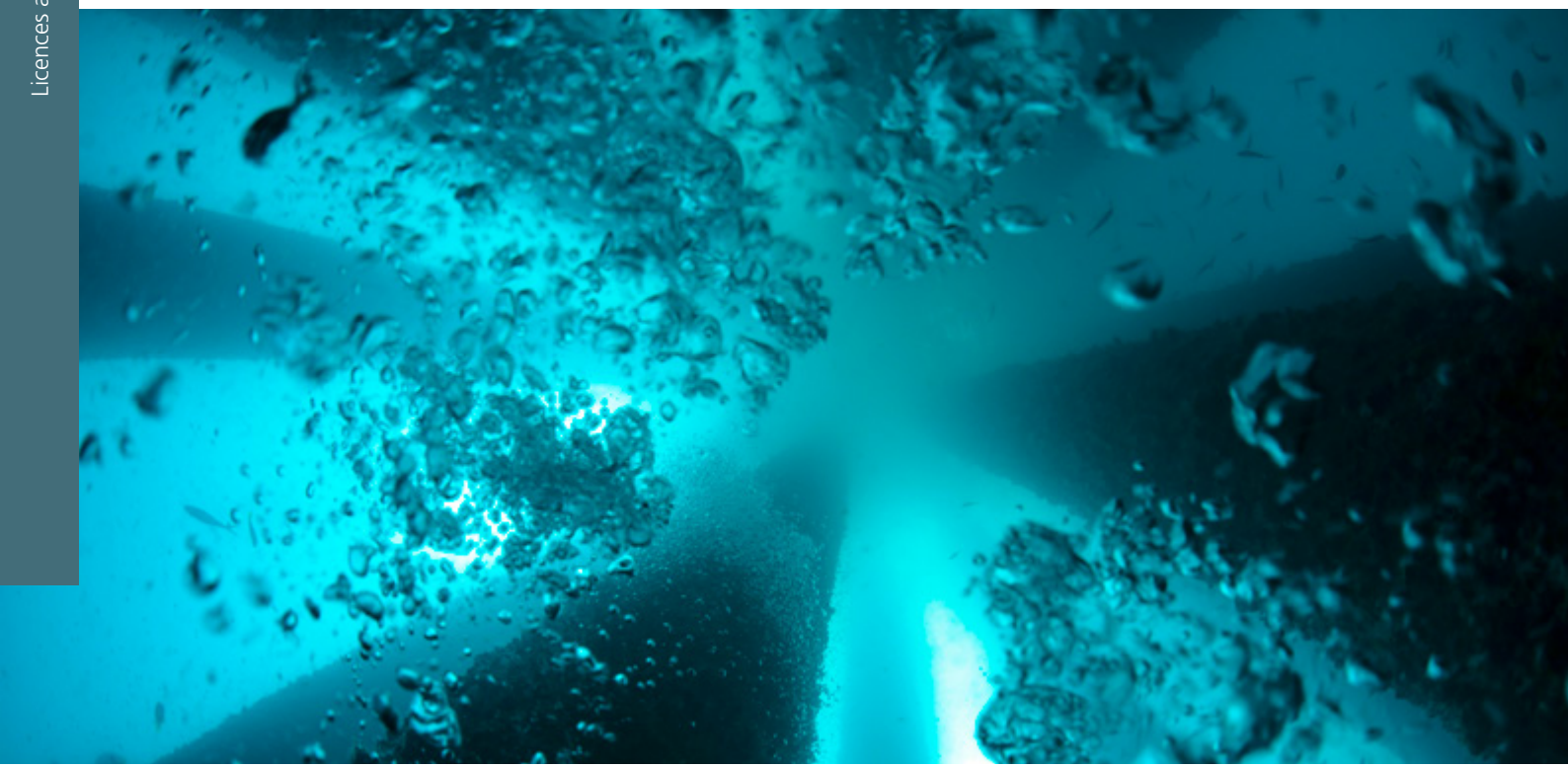
Although many of the arguments that were made in this case were of a technical nature as they related to the detail of compliance with the Regulations, there were some broader issues in play, in particular as regards the extent of the Environmental effects that BEIS should take into account as part of its assessment. Specifically, whether BEIS was required to take into account Scope 3 emissions in considering the *'direct or indirect significant effects of the relevant project.'* Had that aspect been in favour of Greenpeace, it might have had an impact on future decisions reached by BEIS.

Following the decision, Greenpeace has expressed an intention to appeal the Inner House's judgment to the Supreme Court. It will be interesting to see the outcome of any further appeal.

In the interim, the United Kingdom continues to rely on oil and gas for its energy needs. The decision of the Inner House accepted that: '*Exploitation was important for economic growth, employment and revenue. There was insufficient gas and oil in the North Sea to meet domestic needs. Reduction in domestic production would lead to higher imports*'.

It is apparent that Environmental campaigners are monitoring BEIS and OGA (now the North Sea Transition Authority) consent requirements increasingly closely. There have been repeated attempts to intervene in those processes and challenge the outcome. Even unsuccessful challenges can have a disruptive impact on developments, such as energy companies should factor into development plans rights associated with delay arising from legal challenges.

Judges: Manzies L, Pentland L and Carloway LP.



Judicial review of Oil and Gas Authority's Strategy dismissed

In *R (on the application of Cox and others) v Oil and Gas Authority and another* [2022] EWHC 75 (Admin) the Administrative Court dismissed a legal challenge to the Oil and Gas Authority (the '**OGA**') Strategy.

Facts

The regulatory regime for the United Kingdom offshore oil and gas industry, established in 2016, is based on a requirement known as the '*principal objective*', which is defined in the Petroleum Act 1998 (the '**Petroleum Act**') section 9A as '*the objective of maximising the economic recovery of UK petroleum…*' known as '*MER*'. The OGA is also required to publish one or more strategies for the purpose of enabling the principal objective to be met.

The original MER Strategy was implemented shortly after the establishment of the OGA in 2016. On 11 February 2021, a revised strategy, the '*OGA Strategy*', took effect. To enable the principal objective to be met, this imposes on industry a '*Central Obligation*' in two parts:

1. Like its predecessor, the Central Obligation glosses the principal objective by requiring regulated companies to take the steps necessary to '*secure that the maximum value of economically recoverable petroleum is recovered from the strata beneath relevant UK waters*'.

2. In addition (and for the first time) there is a second limb to the Central Obligation, so that regulated companies are required, in seeking to comply with the first limb, to '*take appropriate steps to assist the Secretary of State in meeting the net zero target, including by reducing as far as reasonable in the circumstances greenhouse gas emissions from sources such as flaring and venting and power generation, and supporting carbon capture and storage projects*.'

Key to the precise scope of the Central Obligation is what is meant by '*economically recoverable petroleum*'. The OGA Strategy defines the term '*economically recoverable*' in relation to petroleum as:

'*those resources which could be recovered at an expected (pre-tax) market value greater than the expected (pre-tax) resource cost of their extraction, where costs include both capital and operating costs (including carbon costs) but exclude sunk costs and costs (such as interest charges) which do not reflect current use of resources. In bringing costs and revenues to a common point for comparative purposes a 10% real discount rate will be used. Where*

relevant, UK Government carbon appraisal values for all greenhouse gas emissions will be used combined with the associated real terms social discount rate'.

Mr Cox is 65 years old and now retired, having previously worked in the downstream oil industry and then as a project management consultant. Ms Loach is 23 years old and a medical student at the University of Edinburgh. Ms van Sweeden is 54 years old, a member of the Scottish National Party, and founder of a green thinktank. Together Mr Cox, Ms Loach and Ms van Sweeden (the '**Claimants**') sought to judicially review the OGA Strategy.

The Claimants' challenge to the OGA Strategy asserted that the definition of '*economically recoverable*' was unlawful and/or frustrated the statutory purpose of the Petroleum Act because:

1. It wrongly provided for a pre-tax approach when determining economic value, which is not provided for in the Petroleum Act's definition of the '*principal objective*'; and

2. it failed to account for the financial support the industry receives, including tax breaks, meaning that activities uneconomic for the UK as a whole could be pursued as a result.

Separately, the Claimants challenged the OGA Strategy on the grounds of irrationality, arguing that the Strategy's definition of '*economically recoverable*' was irrational, as it would result in increased levels of oil and gas production and thus increased greenhouse gas emissions, so conflicting with the purpose of the Climate Change Act 2008 and the government's Net Zero Target.

Decision

Ground 1 – Unlawfulness

There were two aspects to the Claimants' claim that the OGA's decision was unlawful: (i) the role of the court and (ii) the proper statutory interpretation of the relevant provisions.

The role of the court

First, the Claimants argued that the meaning of a statutory provision is a question of law for the court, that there can be only one permissible interpretation of a statutory provision and that the OGA cannot choose its own definition. The Administrative Court rejected this argument.

There are cases where what is in issue is simple statutory construction and where an answer may be determined by the court to be right or wrong. However, the authorities also acknowledged that there are cases where statutory wording is inherently imprecise or '*open-textured*' and considered this was such a case:

'*Here we have a provision which is effectively instructions to a specialist authority; which is couched in imprecise terms – certainly broad enough not simply to call of the exercise of judgment, but in all the circumstances hallmarking the exercise as one to be done by reference to the authority's specialist understanding and judgment. It is, to my mind, a very considerable distance from the kind of case where an exercise of statutory construction could determine a single right answer.*'

Statutory interpretation

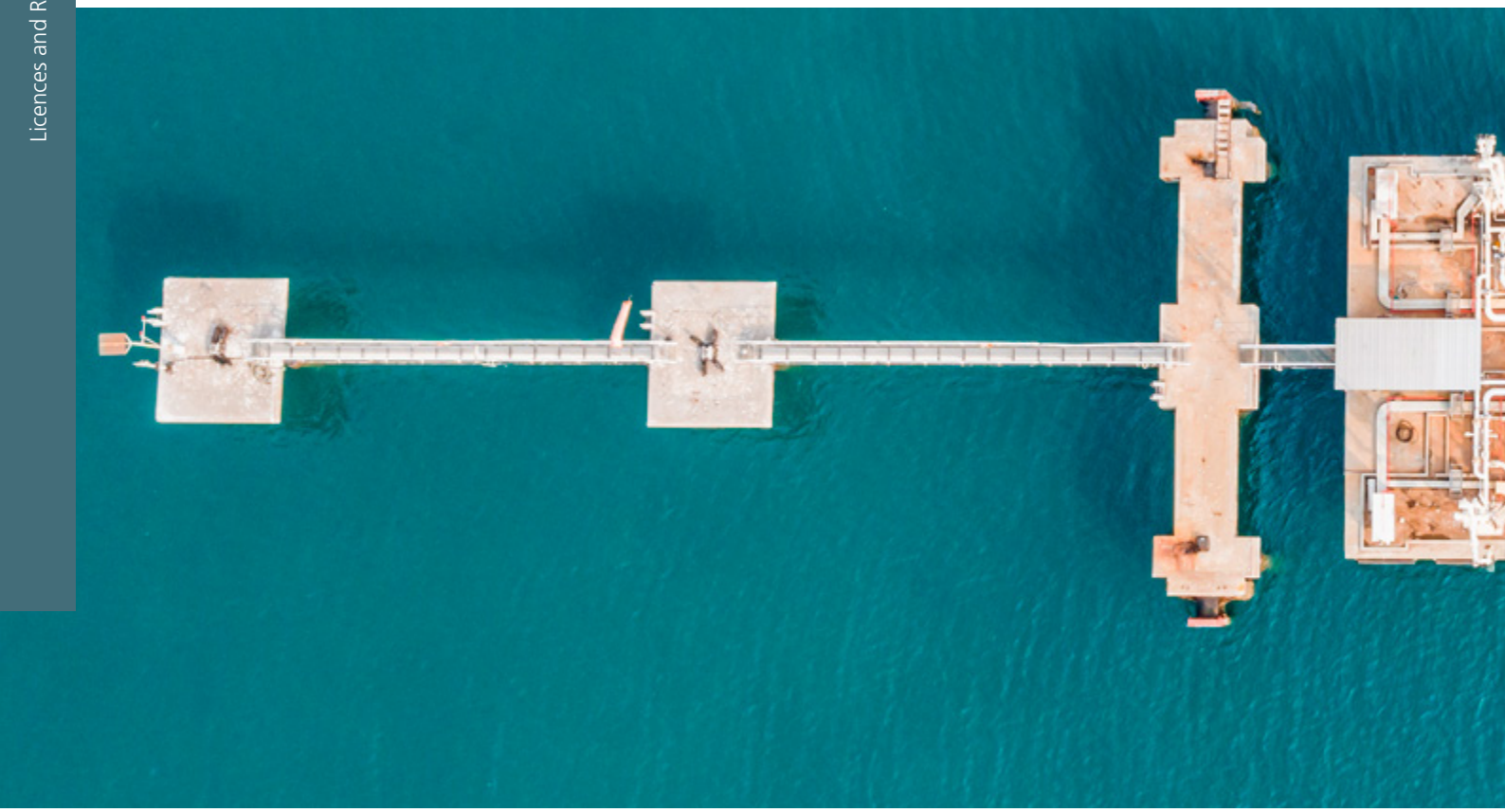
Having determined that interpretation of the term '*economic recovery of UK petroleum*' was a matter for the OGA, the question of whether it was incorrect in that interpretation did not fall to be determined. However, the Administrative Court went on to consider it in case it was incorrect on the first point.

The Claimants argued that the term '*economic recovery of UK petroleum*' meant recovery of UK petroleum that is economic to the '*UK as a whole*' including when it comes to the public purse and therefore has to take account of the fact that oil companies in certain circumstances receive repayments of tax from the Treasury. The OGA's decision to assess the question of economic recovery pre-tax was therefore inconsistent with the statutory definition proceeds on the basis of an error of law and has frustrated the statutory purpose behind section 9A of the Petroleum Act.

The essence of the Claimants' claims was that, by ignoring the effect of government-backed financial support, the OGA Strategy has stretched the definition of '*economically recoverable*' too wide, such that activities that are not truly '*economic*' for the UK are nonetheless still sought to be maximised through the OGA Strategy.

The Administrative Court decided that the Claimants were wrong. Several issues led to this conclusion:

— Interpretation began with looking at the words in question but also required a review of the background, which in this case included the Explanatory Notes to the Bill and the Wood Review. From the background (such as the Explanatory Notes



to the Bill and the Wood Review) it was clear that Parliament must have been aware of the fiscal aspects of oil and gas regulation but there was no evidence that it intended the OGA to depart from the traditional approach of economic assessment on a pre-tax basis. Parliament could have used plain, specific language if it intended to require the OGA to take a different approach. It did not do so.

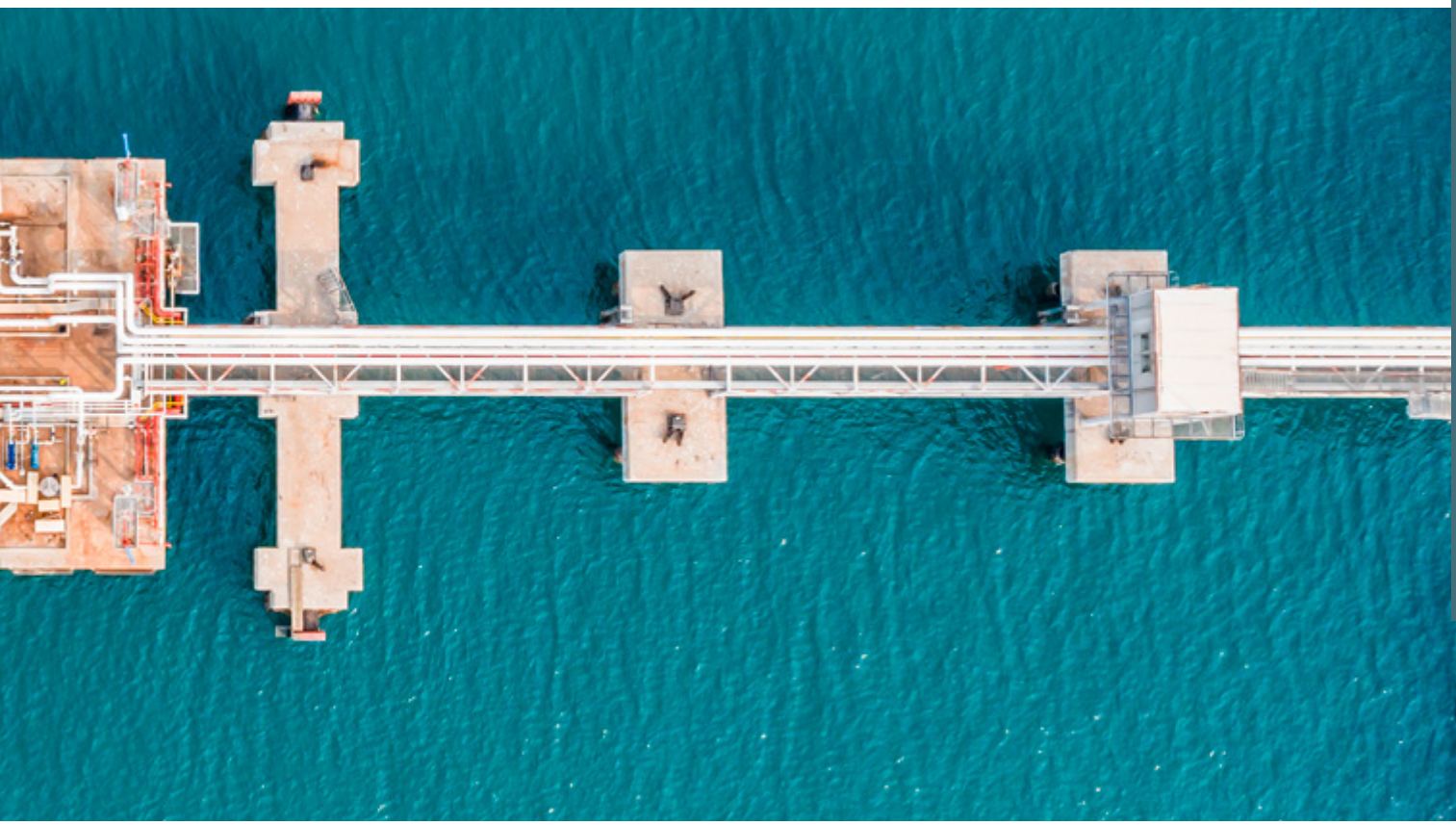
— In the tri-partite system established following the Wood Review, issues of taxation remained the remit of the Treasury. It would make no sense to impose on the OGA – which does not control taxation decisions – a responsibility which involves meeting an objective which (if it were to be considered other than on a pre-tax basis) is in part dependent upon an input which it cannot control.

— It was significant that the Claimants had no clear alternative interpretation of the statutory provision in question. The Claimants contended that the assessment of what is '*economic*' needs to be carried out by reference to the UK as a whole. However, the reference to '*the UK as a whole*' did not appear in the statute. Moreover, the Claimants were focused on only one aspect of those benefits (tax revenues) while the Wood Review stressed the need for consideration of the wider benefits of MER which flow for the UK as a whole including reduced imports, enhanced security of supply of primary fuels and employment.

— The Claimants' arguments around the impact of decommissioning tax relief were misconceived. They focused on the fact that in certain years the Treasury might pay out more in tax relief to oil and gas companies than it received from those companies in oil and gas taxation but this was to ignore the wider picture, which meant that a company would never receive more by way of rebate than has been paid by way of tax, even where an asset has changed hands and the repayment may go to a different company to the one that paid the tax:

'The complaint is essentially this: that I should conclude that the approach to the Strategy is wrong because it is possible there may in individual cases be net payments to particular companies in particular years because of the way in which the taking over of particular concessions is organised. So, while the tax position over the life of the concession is at worst neutral, because A may be the incumbent in years 1-18 with net positive tax position but B is the incumbent in years 19-20 with net negative tax position, the whole strategy needs to be changed. This is, frankly, a strained and nonsensical approach.'

— The concern regarding payments to foreign companies was misconceived because a company that wishes to join a licence and take an interest in a producing field must be either a UK company or have a fixed place of business in the UK, and any licence



holder will be taxed in the UK on its production activity and any distribution of profits, whether to UK resident or non-UK resident shareholders, will be made from post-tax profits.

Ground 2 – Irrationality

The Claimants made an alternative argument that (even if they were wrong and the OGA had discretion to determine the meaning of '*economic recovery of UK petroleum*') the OGA's exercise of that discretion was irrational since maximising economic recovery would increase the amount of petroleum recovered and thus increase the amount of greenhouse gases. This was inconsistent with the Net Zero Target and with the OGA's own duty under section 8(1) of the Energy Act 2016 to have regard when exercising its functions, so far as relevant to, *inter alia*, the development and use of facilities for the storage of carbon dioxide, and how that may assist the Secretary of State to meet the Net Zero Target.

The Administrative Court was not persuaded. The '*have regard*' duty under section 8 of the Energy Act 2016, which is the foundation of the Claimants' irrationality argument, was a process duty. The question of how to balance various objectives is a matter for the regulator, not the court. The OGA, in consulting on and adopting the OGA Strategy, manifestly had regard to UK domestic action on climate change, so the requirement was met.

In any event, it was not clear that the consequence of the definition would be extra emissions. The Claimants' argument oversimplified the OGA Strategy and the OGA's economic assessment to the point of misunderstanding it. The assessment to be performed does not necessarily result in maximised extraction since '*relevant persons are obliged to maximise the expected net value of economically recoverable petroleum not the volume expected to be produced*.'

The Claimants' approach also entirely failed to take account of the fact that carbon costs have now been brought within the assessment of economic recovery – with reference particularly to carbon appraisal values for greenhouse gas emissions and the associated social discount rate.

A further argument arose orally as to whether the OGA was required to have regard to the downstream oil and gas Scope 3 emissions from any increased production. Scope 3 emissions are commonly understood to mean those not directly produced by an economic activity, but from its value chain, both upstream in the supply chain and downstream from the use of the product. So, in the case of oil and gas production, upstream Scope 3 emissions may include for example emissions from helicopters or shipping of material. Downstream Scope 3 emissions in the case of oil and gas include the emission

from the use of oil and gas required in, for example, transport, electricity generation and heating.

The Administrative Court agreed with the OGA that these emissions are not an area which can be regulated in a OGA Strategy for offshore production. Further, there is authority to suggest that there would be no duty on the OGA to take into account the ultimate consumption of the refined product: *Greenpeace Limited v the Advocate General and Another* [2021] CSIH 53 at [64-65]:

'The question is whether the consumption of oil and gas by the end user … are 'direct or indirect significant effects of the relevant project'. The answer is that it is not … The ultimate use of a finished product is not a direct or indirect significant effect of the project … It is the effect of the project, and its operation, that is to be considered and not that of the consumption of any retailed product ultimately emerging as a result of a refinement of the raw material.'

The only argument left to the Claimants was, in effect, to say that the OGA is legally required to take steps, through its OGA Strategy, to '*undermine (or limit) the maximisation of 'economically recoverable' petroleum*':

'The essential problem with this argument is that it finds no basis in the statute – and indeed contradicts the whole concept of MER, and not merely the iteration of MER which the Claimants are seeking to challenge. Were the Claimants' argument in this respect right it would effectively override s.9A of the Act. That cannot be right – not least when the principal objective of MER was put on a statutory footing seven years after the CCA 2008 [Climate Change Act 2008] was enacted.'

Ultimately, the Administrative found that the Claimants' claim failed, and the claim was dismissed.

Comment

The OGA unsurprisingly welcomed the judgment and stated its intention to continue to regulate and influence the industry in a manner which both secures energy supply and supports the transition to net zero.

The option remains for the Claimants to appeal the decision and it will be interesting to see whether they choose to do so.

Regardless, it seems likely that environmental campaigners will continue to utilise judicial review as a mechanism for seeking to challenge BEIS and the OGA (now the North Sea Transition Authority) on issues of wider strategy, as well as individual projects and developments.

One repeated facet of challenges by environmental campaigners is the issue as to the extent to which Scope 3 emissions should be taken into account in respect of decisions and consents. The correct answer will likely turn upon the specific power being exercised. However, the trend in raising this issue seems to have been clearly established.

Judge: Cockerill J.

Court of Appeal confirms on the scope of emissions to be considered

In *R (On the Application of Finch) v Surrey CC & Ors* [2022] EWCA Civ 187, the Court of Appeal confirmed that it was lawful under EU Directive 2011/92 and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the '**EIA Regulations**') for Surrey County Council, as the relevant mineral planning authority for a crude oil extraction project, not to require the environmental impact assessment of an oil and gas development to consider the impact of greenhouse gas emissions resulting from the eventual downstream use of the oil extracted on the site.

Facts

The appellant, Sarah Finch on behalf of the Weald Action Group, appealed against the dismissal of her claim for judicial review by Holgate J in *R* (*Sarah Finch) v Surrey County Council* [2020] EWHC 3566 (Admin). The High Court case concerned Finch's application for judicial review of the 2019 decision of Surrey County Council to grant planning permission to Horse Hill Developments Limited for the retention and expansion of the existing Horse Hill oil well site, near Gatwick Airport, in addition to the drilling of four new wells for the production of crude oil over a 20-year period.

High Court Decision

The application for judicial review focussed on obligations under regulation 4 of the EIA Regulations for the required environmental impact assessment of the project to consider *'the direct and indirect significant effects of the proposed development'* on the following factors:

'(a) Population and human health;

(b) biodiversity, with particular attention to species and habitats protected under [any law that implemented] Directive 92/43/EEC and Directive 2009/147/EC;

(c) land, soil, water, air and climate;

(d) material assets, cultural heritage and the landscape;

(e) the interaction between the factors referred to in sub-paragraphs (a) to (d).'

The principal issue considered by the High Court was whether the developer's obligations under the EIA Regulations, as set out above, should include the assessment of downstream greenhouse gas emissions resulting from the use of the end product originating from the development, i.e. the ultimate use of oil extracted from the development.

The High Court found that the developer's environmental impact assessment was not required to consider the

greenhouse gases that would be emitted when the crude oil produced from the site was refined and used by consumers, as, for example, fuel for motor vehicles. The legal test to establish the scope of effects to be considered under regulation 4 of the EIA Regulations was whether an effect on the environment was an effect of the development for which planning permission was sought. Whilst the downstream use of the crude oil extracted on the site of the development was clear, the greenhouse gas emissions could not be attributed as significant indirect effects of the particular Horse Hill site, as refinement and the ultimate use occurred in different locations and were not part of the planning application.

As such, the assessment of downstream greenhouse gas emissions from the future combustion of refined oil products originating from the development site was, as a matter of law, incapable of falling within the scope of the assessment required by the EIA Regulations for the planning application which had been approved by Surrey County Council. Therefore, the Council's decision was found to be lawful and the application for judicial review was refused.

Court of Appeal Decision

Finch was granted permission to appeal the first instance judgment by Lewison LJ and the hearing was held in November 2021 with the judgment handed down in February 2022. The Court of Appeal set out the four issues in the appeal as follows:

— First, was the judge wrong to hold that the '*true legal test*' of whether an impact constitutes an indirect likely significant effect of the development on the environment is whether it is '*an effect of the development for which planning permission is sought*'?

— Second, was he wrong to hold that the EIA Regulations are not directed at environmental impacts which result merely from the consumption, or use, of an '*end product*' – for example, a manufactured article or a commodity such as oil, gas or electricity?

— Third, was he wrong to hold that the EIA Directive and the EIA Regulations did not require the assessment of '*Scope 3*' or '*downstream*' greenhouse gas emissions arising from the combustion of the refined products of the oil which would be extracted by the development?

— Finally, was he wrong to hold that the Council's reasons for not requiring an assessment of those greenhouse gas emissions were lawful?

Concerning the first issue, the Court of Appeal found that the true legal test was not whether a particular environmental impact is '*an effect of the development for which planning permission is sought*' as stated in the

High Court judgment. Instead, the degree of connection required between the development and its putative effects needs to be considered. Therefore, it was not possible to say that an impact, such as the downstream emission of greenhouse gases, would be legally incapable of being an environmental effect requiring assessment under the legislation. As such, the outcome of the appeal turned on the lawfulness of Surrey County Council's decision on the indirect effect rather than the legal possibility of downstream emissions being an environmental effect requiring assessment.

On the second '*end product*' issue, the Court of Appeal highlighted that the term itself does not appear in the relevant legislation and furthermore, in European Court of Justice case law (*Abraham v Region Wallonne (C-2/07)*), '*end product*' has been used to describe the outcome of the project, in this case the operational well site and its use for the extraction of oil rather than its downstream refinement and use. The case of *R*. (*on the application of Squire) v Shropshire Council* [2019] EWCA Civ 888 and its acknowledgement that environmental effects caused by the use of a by-product of a development under consideration could be indirect effects under the EIA Regulations was considered; however, it was held that that decision does not result in a requirement for an environmental impact assessment to consider indirect effects resulting from the ultimate consumption of use of an '*end product*' as suggested by the appellant's counsel.

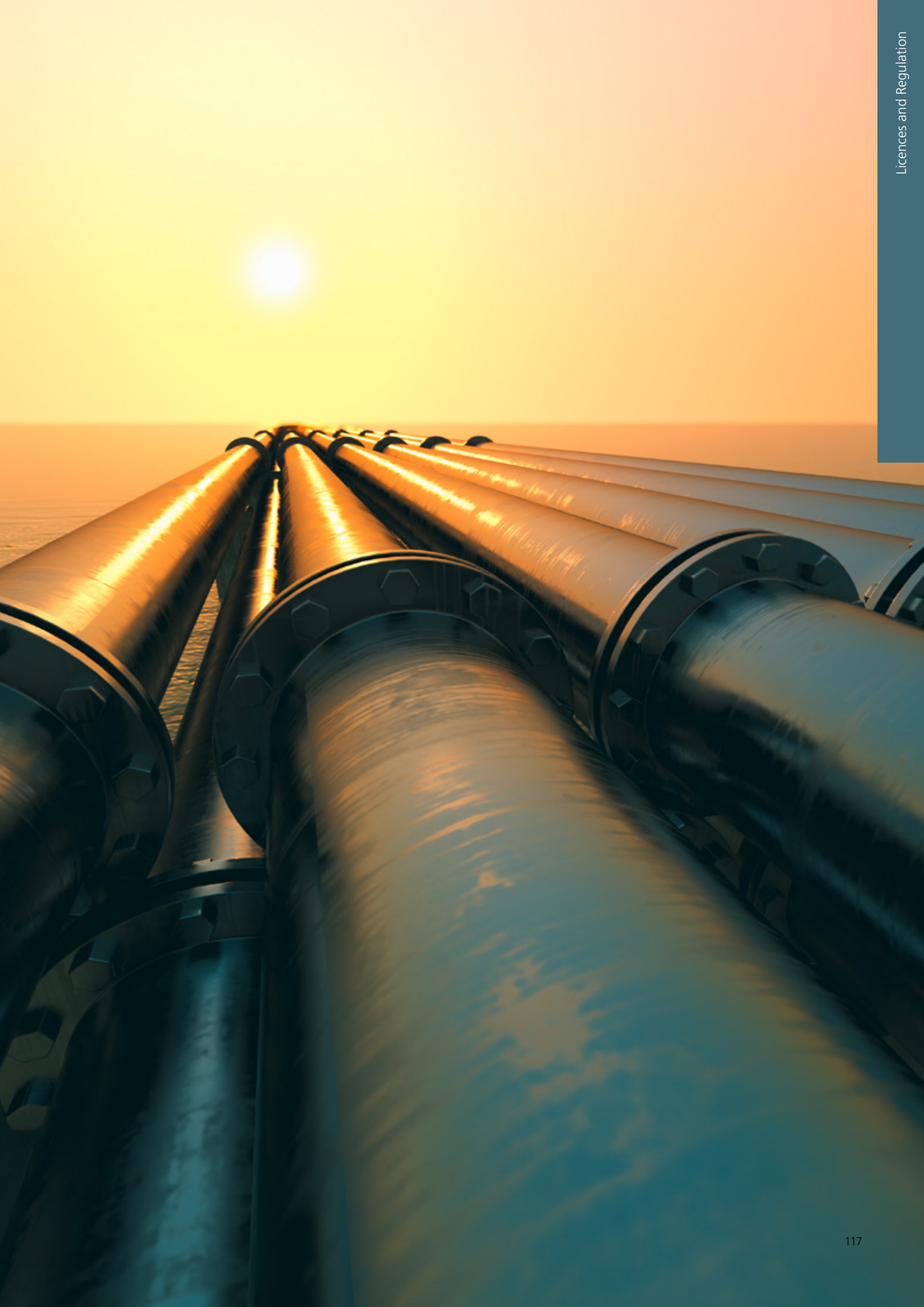
Taking the third and fourth issues together, the Court of Appeal held that the assessment of downstream greenhouse gas emissions (also known as Scope 3 emissions) and whether they constitute indirect effects was a matter for the evaluative judgment of Surrey County Council in its capacity as planning authority rather than a required assessment under the EIA Regulations. The Court of Appeal held that the Council's decision that there was not a causal connection between the project and the particular impact on the environment (in this case the inevitable downstream greenhouse gas emissions) and its decision not to require an additional assessment was reasonable and lawful. Finally, the Court of Appeal found that Council's judgment did not rely on any immaterial considerations and its decision was not otherwise unlawful in concluding that the causal connection between the development and the impact of downstream greenhouse gas emissions was absent.

Comment

Although the appeal was dismissed and the planning authority's original decision was upheld by the Court of Appeal, *R (On the Application of Finch) v Surrey CC & 'Ors'* [2020] EWHC 3566 (Admin) is a case of note in relation to developments and projects for hydrocarbon extraction which are or will be applying for planning permission. In particular, the Court of Appeal's finding that greenhouse gas emissions from the downstream use of refined oil products said to originate from the development site are capable, as a matter of law, of being environmental effects requiring assessment under EIA Regulations. Applying this to other developments and projects with different circumstances surrounding extraction and refinement, downstream greenhouse gas emissions could be regarded as '*indirect*' effects on the environment, and it may be reasonable and lawful for the relevant planning authority to require their assessment which could in turn lead to less favourable outcomes concerning planning permission.

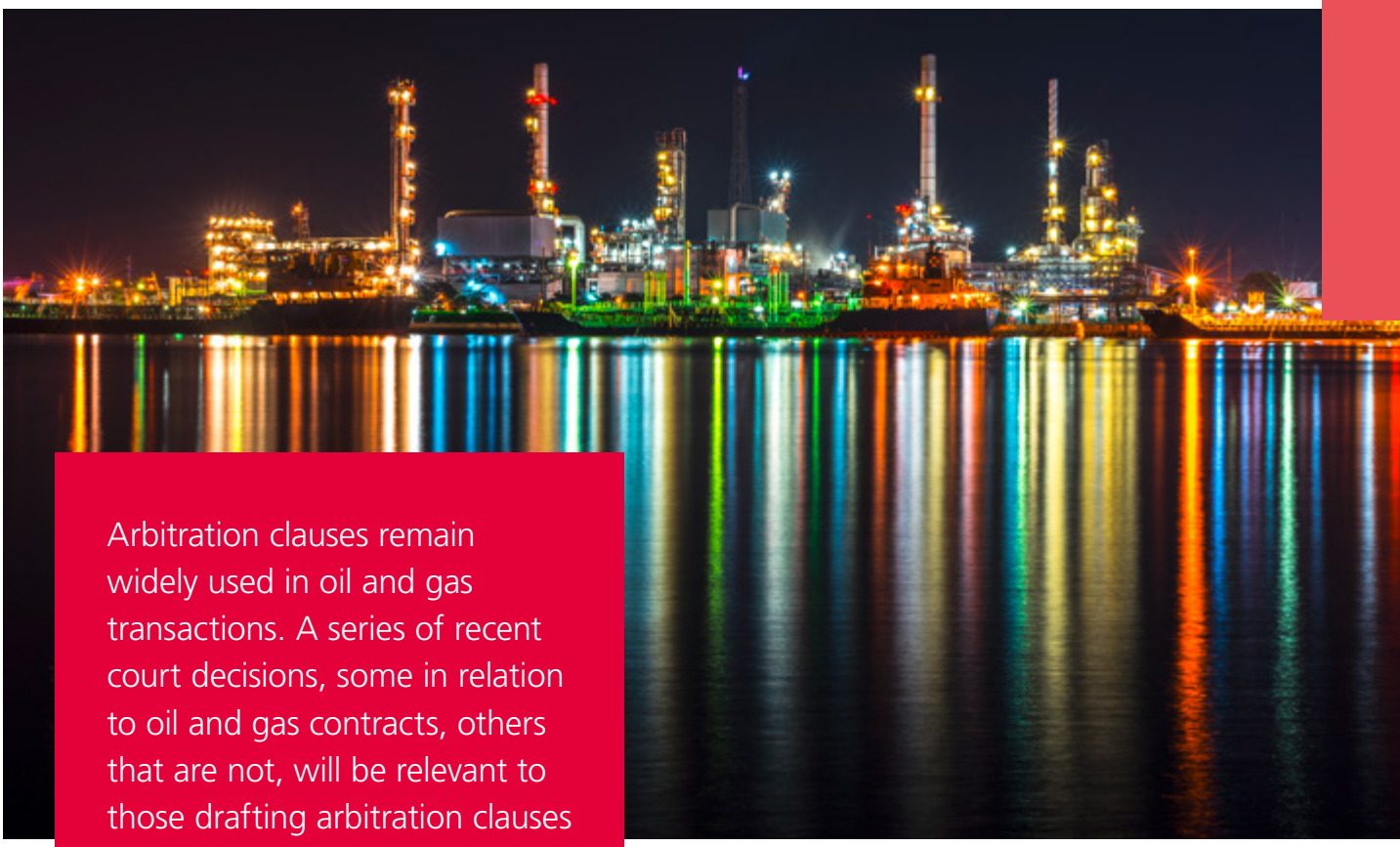
High Court Judge: Holgate J.

Court of Appeal Judges: Lewison LJ, Sir Keith Lindblom P and Moylan LJ.



Chapter 9

Arbitration



Arbitration clauses remain widely used in oil and gas transactions. A series of recent court decisions, some in relation to oil and gas contracts, others that are not, will be relevant to those drafting arbitration clauses and/or managing disputes:

1. In *Union of India v Reliance Industries Ltd* [2022] EWHC 1407 (Comm) the Commercial Court found that an arbitral tribunal may preclude submissions made by a party on the grounds that they could, and should have been, made at an earlier stage in the proceedings.

2. In *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323 the Supreme Court of Western Australia has set aside an arbitral award on the basis that the three-member arbitral tribunal was *functus officio*.

3. In *NWA and others v NVF and others* [2021] EWHC 2666 (Comm) the Commercial Court dismissed an application under the Arbitration Act 1996 that the arbitral tribunal did not have jurisdiction due to a failure to complete a pre-arbitration mediation process in the contract.

4. In *Kabab-Ji Sal (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 the Supreme Court delivered further guidance to on the issue of the governing law of arbitration agreements that will have an impact on companies within the same group that may be included in the arbitration process.

Res judicata and its application in arbitration proceedings

In *Union of India v Reliance Industries Ltd & Anor [2022] EWHC 1407 (Comm)*, the Commercial Court found that an arbitral tribunal can preclude submissions made by a party on the grounds that they could, and should have been, made at an earlier stage in the proceedings.

Facts

The Union of India ('**Government**') entered into two long-term production sharing contracts ('**PSCs**') with three contractors for extracting oil and gas from two fields in the Arabian Sea. The three contractors were Reliance Industries Ltd ('**Reliance**'), BG Exploration and Production Ltd ('**BG**'), a Government-owned company. Under the PSCs, the contractors were entitled to recover costs from the total yearly petroleum production, and these costs were capped by the PSCs. In certain specified circumstances, the cap could be exceeded, if agreed to by a committee consisting of representatives from both the contractors and the Government, with the latter having an effective veto power. Disagreements within the committee could be resolved by arbitration. The PSCs were governed by Indian law.

In December 2010, Reliance/BG commenced a London-seated arbitration against the Government, seeking an increase to the cost cap. As of May 2022, the Tribunal had issued eight substantive partial awards. One of these, issued in October 2018, was challenged by Reliance/BG before the Commercial Court in 2020 *(Reliance Industries Ltd v Union of India* [2020] 1 Lloyd's Rep 489). The Commercial Court later held that the arbitral tribunal had not considered certain documentary evidence and remitted related issues for a further arbitral hearing. During that further hearing, the Government filed submissions in relation to the documentary evidence and raised some objections, based on principles of Indian constitutional law. Reliance/BG *inter alia* contended that the objections were barred by *res judicata.*

Arbitral Award

The arbitral tribunal issued its award on 29 January 2021 (the '**2021 Award**'). It agreed with Reliance/BG stating that although the Government was now raising the objections in relation to the documentary evidence, such submission applied equally to the remaining case previously considered in the October 2018 award. The Government had failed to provide any good reason as to why it had failed previously to make such objections. In the circumstances, the arbitral tribunal found that the submissions were barred on grounds of *res judicata*, and in particular the principle in *Henderson v Henderson* [1843-60] All ER Rep 378. According to the *Henderson* principle, a party cannot raise matters in a subsequent

proceeding that had not, but could and should have been, raised in an earlier proceeding.

The Government challenged the 2021 Award in the Commercial Court, principally raising two questions: first, whether the arbitral tribunal was correct in deciding the question of *res judicata* in accordance with English law, because the seat of arbitration was in London; and second, whether the *Henderson* principle applied to earlier phases in the same arbitral proceedings?

Commercial Court Decision

The Commercial Court upheld the arbitral tribunal's application of the *Henderson* principle and agreed that the Government was now precluded from making submissions that it could and should have made earlier during the proceedings. It decided that the *Henderson* principle is part of procedural law and therefore governed by the law of the seat, and it can be applied to earlier phases in the same arbitration proceeding.

The Government had contended that the *Henderson* principle was part of substantive English law and therefore could not be applied where the substantive contract was governed by Indian law. However, it accepted, that if *Henderson* was a matter of procedural law, its objection would be rendered null.

The Commercial Court referred to the Supreme Court decisions in *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2014] AC 160 and *Takhar v Gracefield Developments Ltd* [2020] AC 450, which had recognised the *Henderson* principle as being procedural in nature and as always directed against abuse of process. This had also been reflected in the Arbitration Act 1996, which casts the duties on the arbitral tribunal to give reasonable opportunity of a hearing to the parties (s33(1)(a)), and to avoid unnecessary delays or expenses (s33(1)(b)).

In the alternative, the Commercial Court observed that English and Indian authorities on *res judicata* followed similar lines and the Supreme Court of India even cited *Virgin Atlantic* with approval.

The Government had advanced three arguments against this conclusion, all of which were rejected by the Commercial Court:

First, that the relevant observations in *Virgin Atlantic* and *Takhar* are *obiter* and not binding on the Commercial Court: This argument was summarily rejected on the grounds that it would be '*fanciful*' for the Commercial Court to not follow two Supreme Court decisions supported by all members of that Court.

Second, that compared to litigation, the *Henderson* principle had limited impact on arbitration, given its consensual nature: The Government relied on *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] Bus LR 1289, where the Commercial Court recognised some limits on *res judicata* in arbitration. Rejecting this

argument, the Commercial Court observed that *Nomihold* specifically agreed with the principle that a party is precluded from raising issues that it could and should have raised in an earlier reference. In any case, a later decision of the Technology and Construction Court in *Daewoo Shipbuilding and Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* [2020] EWHC 2353 (TCC) had held that the *Henderson* principle applied in arbitration.

Finally, that if set up as a defence to a claim, the *Henderson* principle was substantive in nature: The Commercial Court noted that in *Virgin Atlantic* and *Takhar*, the principle was discussed *inter alia* as a possible defence against claims. Consequently, the arbitral tribunal was correct in applying *res judicata* under English law.

As regards the second question, the Government argued that there is no binding precedent that the respondent (and not the claimant) may be debarred by application. The same has been applied in *Daewoo Shipbuilding*, however, this is as an *obiter* and the authorities discussed there are not on point. Therefore, the Government submitted that there is no authority on application of *Henderson* to respondents in an arbitration. The Government had not anticipated the claims, and fairness required that it should be allowed to take a fresh look at what arguments it could make.

The Commercial Court agreed that there was no direct authority on this point. However, there was substantial general support for application of *Henderson* to all stages of the same proceeding and to defences as well as claims. The object of *Henderson* is to limit abuse and replication of process and to assist in the achievement of decisional finality. This is served equally in arbitration and litigation. In any case, the Government was not confronted with novel claims and hence, the arbitral tribunal was justified in using the *Henderson* principle.

The Government also had raised challenges to the award on grounds that its case on Indian constitutional law was not heard and that the award was contrary to Indian public policy. The Commercial Court rejected these challenges on grounds that: (a) the hearing was on narrow issues remitted to the Tribunal; (b) the *Henderson* principle had precluded some arguments; and (c) the arbitral tribunal had indeed considered and then rejected the Government's arguments.

Comment

The Commercial Court's decision will be of some comfort to parties that wish to achieve cost effective, speedy and final outcomes of issues arbitrated.

In recognising that the principle of *res judicata* applies to arbitrations seated in England and Wales, the Commercial Court will assist the arbitral tribunal and parties seeking to resist duplication and/or re-litigation of proceedings.

The decision also illustrates the importance of electing an effective seat of arbitration in an arbitration clause. The English law principle of *res judicata* is a procedural law principle. As such, it will only apply if the seat of arbitration is in England and Wales. That is not to say that other jurisdictions may not have similar doctrines seeking to prevent re-litigation. However, such issues should be considered when drafting arbitration clauses – especially where the other side may be minded to re-litigate issues already debated.

Judge: Cranston J.

The functus officio principle – a different approach to the *res judicata* solution

In *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323 the Supreme Court of Western Australia has set aside an interim arbitral award on the basis that the three-member arbitral tribunal was *functus officio*. The *functus officio* doctrine in arbitration means that once an arbitral tribunal has performed its duty by rendering an award regarding the issues submitted, the arbitrator's mandate or jurisdiction is at an end. This may lead to disputes where interim or partial awards are issued (such as where bifurcation is ordered) if one party asserts that certain issues have not been addressed and remain within the arbitral tribunal's jurisdiction.

Facts

Chevron Australia Pty Ltd ('**Chevron**') engaged a joint venture between CBI Constructors Pty Ltd and Kentz Pty Ltd ('**CKJV**') to provide construction and other related services for Chevron's Gorgon offshore oil and gas project off the north-west coast of Western Australia.

Following commencement of arbitration proceedings between CKJV, as claimant, and Chevron, as respondent and counterclaimant, a three-person arbitral tribunal was constituted comprising Mr Philip Greenham, the Honourable Christopher Pullin QC and Sir Robert Akenhead, as chair.

The underlying dispute in the arbitration concerned labour costs whereby Chevron contended that it had overpaid CKJV. Conversely, CKJV argued that that it was owed more than it had been paid.

On the second such application by CKJV, the arbitral tribunal issued a procedural order to bifurcate the arbitration into two separate stages. Liability issues would be determined first (the '**First Hearing**'), and quantum issues would be dealt with at a subsequent hearing (the '**Second Hearing**').

After the First Hearing, the arbitral tribunal made an interim award with the effect that CKJV was only partially successful ('**First Interim Award**').

CKJV subsequently submitted a further pleading asserting an amended case on quantum.

Chevron objected to CKJV's further pleading and applied to strike out the pleading on the basis that the new pleading was, in substance, a fresh case upon liability for labour costs. Chevron relied upon *res judicata* (cause of action estoppel), issue estoppel or *Anshun* estoppel (a type of estoppel which, if applicable, prevents a party from raising claims that ought to have been pursued in earlier proceedings), and also asserted that the arbitral tribunal was *functus officio* in relation to all issues of liability.

The arbitral tribunal then made procedural orders which, in effect, referred the strike out application to the Second Hearing.

Arbitral Award

After the Second Hearing, by a further interim award ('**Second Interim Award**'), the majority of the arbitral tribunal (Sir Robert Akenhead and Mr Phillip Greenham) held that CKJV was not prevented from advancing the additional liability arguments regarding labour costs (whether by *res judicata*, issue estoppel or *Anshun* estoppel, or as a result of the arbitral tribunal being *functus officio* in relation to liability).

Supreme Court Decision

Chevron's applications relied upon section 16(9) of the Commercial Arbitration Act 2012 (WA) ('**CAA**') and section 34(2)(a)(iii) of the CAA.

Section 16(9) of the CAA

Section 16(9) of the CAA permits a party to request from the court, within 30 days after receiving a ruling by the arbitral tribunal (as a preliminary question on its jurisdiction), whether the arbitral tribunal does in fact have jurisdiction.

The Supreme Court dismissed Chevron's application under section 16(9) of the CAA on the basis that the arbitral tribunal did not rule against Chevron's objection that the arbitral tribunal was *functus officio* as a '*preliminary question*'; this issue was resolved in the Second Interim Award.

In reaching this conclusion, the Supreme Court agreed with the UNCITRAL explanatory note that where a jurisdictional ruling by an arbitral tribunal has been combined with a merits award, curial recourse is only available via Article 34 or Article 36 of the Model Law (analogues CAA section 34 and section 36) which is a view that is also supported internationally by the Singapore High Court decision in *AQZ v ARA* [2015] SGHC 49.

Section 34(2)(a)(iii) of the CAA

Section 34(2)(a)(iii) of the CAA empowers the court to set aside an arbitral award if '*the award deals with a dispute not contemplated by, or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration…*'.

The wider legal arguments that had been before the arbitral tribunal based on estoppel were narrowed to arguments that only concerned whether the arbitral tribunal was *functus officio* when heard by the Supreme Court, although the Supreme Court acknowledged that these wider legal challenges '*display an overlapping foundation with the functus arguments*.'

The Supreme Court found that a set aside application arising out of an assertion that an arbitral tribunal *functus officio* falls within the parameters of section 34

(2)(a)(iii) of the CAA because the *functus officio* doctrine engages with the phrases '*not falling within the terms of the submission to arbitration*' or '*decisions on matters beyond the scope of the submission to arbitration*.' This conclusion was reached in reliance on the Singapore Court of Appeal decision of *CRW Joint Operations v PT Perusahaan Gas* [2011] SGCA 33 concerning an arbitral tribunal exceeding its authority when the arbitral tribunal improperly decided matters that had not been submitted to it.

As to whether it is the court or the arbitral tribunal that decides whether a tribunal is *functus officio*, the Supreme Court referred to both local and international cases in deciding that, ultimately, it will be a matter for the court to decide. The Supreme Court referred to the decision of the Supreme Court of England and Wales in *Dallah Real Estate v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 where it was observed that the arbitral tribunal's own view of its jurisdiction had no legal or evidential value.

The Supreme Court evaluated the merits of the assertion that the arbitral tribunal was *functus officio* and (save for matters requiring minor corrections or clarifications) largely accepted the dissenting reasons of arbitrator Pullin in the Second Interim Award that the arbitral tribunal was *functus officio* upon all issues of liability following the publication of the First Interim Award. The Supreme Court's reasons included that all liability issues had been '*unquestionably dealt with*' in the First Interim Award, the further claims by CKJV were freshly articulated contractual liability issues and that the opportunity to raise them was at an end after the publication of the First Interim Award.

Finally, on the question of residual discretion, the Supreme Court concluded that, notwithstanding its observations on minimal curial intervention, a set aside order under the present circumstances should be '*virtually automatic*.'

Comment

The approach of the Supreme Court of Western Australia will be of interest to practitioners in England and Wales. The result reached, in substantive outcome, is materially similar in effect to *Union of India v Reliance Industries Ltd* [2022] EWHC 1407 (Comm). However, the route to reaching that outcome was different.

The common theme is the reluctance of courts in common law jurisdictions to permit the raising of issues that should have been decided in previous steps of the arbitral process – so as to ensure finality of outcome and prevent re-litigation of past issues.

The concept of finality is crucial to the arbitral process. As noted by the Supreme Court, an approach which seeks to take '*multiple bites at the cherry*' cannot be accepted. Undoubtably, the approach of the Supreme Court will be of interest to English lawyers.

For parties involved in arbitral proceedings, the decision demonstrates the critical importance of ensuring its written and/or oral submissions to an arbitral tribunal address any issues that the arbitral tribunal is likely to deal with on a final basis before the relevant interim (or final) award is rendered. This will of course require careful consideration of, and adherence to, procedural orders throughout an arbitration - particularly so where it is clear that some issues will be dealt with finally (prior to the final award) given that the arbitral tribunal must not revisit issues once they have been finally determined.

Judge: Kenneth Martin J.

The CMS Oil and Gas Disputes Survey: Managing Disputes Risk – the In-House Perspective

The CMS Oil and Gas Disputes Survey examined the key drivers of disputes and dispute management in the oil and gas industry, and how sector participants are moving towards new approaches to minimise conflicts and disputes. Based on more than 50 responses from senior legal managers and senior in-house counsel in the oil and gas industry across Europe, the Middle East, Asia Pacific, Africa and Latin America, it provides interesting insights into how disputes arise and are managed around the globe.

The survey elucidates that the oil and gas giants, traditionally considered as being able to handle the downsides due to their profitable portfolios and partnerships, can no longer afford that luxury. Despite the survey suggesting an increase in dispute opportunities, at the same time it encourages the adoption of an increasing amount of prevention and mitigation measures against the same.

Access the guide here:

cms.law/en/gbr/publication/oil-and-gas-disputes-survey-2021-22

As reported in the **Insider**, The Oil and Gas Dispute Survey found that:

'more could be done to prevent disputes, highlighting a number of areas where disputes could be mitigated - including managing change in projects; better understanding of local market factors prior to project execution; and better record keeping'

Dispute resolution clauses: Is mediation necessary?

In *NWA and others v NVF and others* [2021] EWHC 2666 (Comm), the Commercial Court dismissed an application under section 67(1)(a) of the Arbitration Act 1996 (the '**Act**') to set aside an award on the basis of non-compliance with a requirement in the arbitration agreement to mediate before proceeding to arbitration. The issue was a question of admissibility, to be determined by the arbitrator, not one of jurisdiction for determination by the Commercial Court.

The decision demonstrates the Commercial Court's robust approach to the question of admissibility versus jurisdiction and is consistent with the recent decision in *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm) that only a challenge to jurisdiction may be brought under section 67 of the Act.

Facts

The parties had entered into a commercial contract containing a dispute resolution clause that provided:

'*10.2 Disputes*

(a) In the event of a dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, termination, interpretation or effect, the relevant parties to the dispute shall first seek settlement of that dispute by mediation in accordance with the London Court of International Arbitration ('LCIA') Mediation Procedure, which Procedure is deemed to be incorporated by reference into this clause insofar as they do not conflict with its express provisions. Any mediation shall take place in London.

(b) If the dispute is not settled by mediation within 30 days of the commencement of the mediation or such further period as the relevant parties to the dispute shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules from time to time in force ('the Rules'), which Rules are deemed to be incorporated by reference into this Agreement insofar as they do not conflict with its express provisions.'

In essence, the relevant clause provided for mediation in accordance with the LCIA Mediation Procedure. The Clause continued to provide that, to the extent any dispute was not resolved within a period of 30 days from commencement of the mediation, or such further period as the parties may agree, it should be referred to and finally resolved by arbitration under the LCIA Rules.

The defendants issued a Request for Arbitration which included a request for a stay prior to the constitution of the arbitral tribunal for the parties to engage in mediation in accordance with the LCIA Mediation Procedure. The

LCIA wrote to the claimants seeking their comments on that proposal, but received no response and ultimately appointed a sole arbitrator. The defendants made further attempts to refer the dispute to mediation during the arbitration, but no mediation occurred and the arbitrator issued a partial award finding that his jurisdiction to deal with the dispute was not affected by the lack of mediation.

The claimants issued an application challenging the award under section 67(1)(a) of the Act on the basis that the obligation to arbitrate had not accrued because no mediation had taken place, and accordingly the arbitrator did not have substantive jurisdiction to decide the dispute.

The Issue

Section 67(1)(a) of the Act permits a party to arbitral proceedings to apply to the court to challenge an award of the arbitral tribunal as to its '*substantive jurisdiction*'. '*Substantive jurisdiction*' is defined in section 82(1) of the Act by reference to the matters specified in section 30(1) of the Act, namely:

'*(a) whether there is a valid arbitration agreement*

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.'

The central issue was to determine whether the non-compliance with the requirement for LCIA Mediation prior to any arbitration was a matter merely affecting the admissibility of the claim or if it went to the arbitral tribunal's substantive jurisdiction to determine the claim at all.

Decision

In interpreting the contract, the Commercial Court held that ordinary principles of contractual interpretation applied, and it had to consider the contract as a whole. To the extent that there were two possible constructions, the Court was entitled to prefer the construction which was consistent with business common sense (*Lukoil Asia Pacific Pte Limited v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm)). Further, the Commercial Court considered that the arbitration clause should be interpreted in line with the principles set out in *Premium Nafta Products Ltd and others v Fili Shipping Company Ltd and others* [2007] UKHL 40 ('**Fiona Trust**'). In that case, the House of Lords held that in construing an arbitration clause, it should be presumed that commercial parties are unlikely to have intended to split claims between different fora.

It was clear that the parties, as rational businesspeople, agreed and intended that any dispute arising out of or in connection with the agreement should be referred to arbitration. It was not intended that their disputes should be litigated in whole or in part (and in fact elsewhere in the contract the parties had waived '*any right of recourse to national courts in order to challenge or appeal against any arbitral award*'). The parties'

intention was to obtain a swift and final resolution of the dispute. In the circumstances, the dispute resolution clause should be construed in light of that intention, and a construction that would allow one or other party to frustrate that intention should be avoided.

Against that background, the Commercial Court found that section 67(1)(a) of the Act was not engaged because the failure to mediate did not mean that the arbitration clause was invalid or inoperative. The Commercial Court held that the issue of whether the dispute must first be referred to mediation was a matter of admissibility, not jurisdiction, and a procedural issue for the arbitrator to determine. Non-compliance with the pre-arbitration mediation procedure should not affect whether it is a dispute of the kind which the parties agreed to submit to arbitration. Further, failure to conduct mediation did not result in there not being a '*valid*' arbitration agreement or in the agreement to arbitrate being inoperative.

Comment

Whilst the outcome of each case will depend on the proper construction of the arbitration agreement, there is a developing trend for English law to construe pre-arbitration steps as issues of admissibility rather than jurisdiction (depending upon the exact words of the clause). The distinction is important. If a pre-arbitration step must be completed before the jurisdiction of the arbitral tribunal arises, it may mean that a request for arbitration or notice of arbitration cannot be validly given before that step has taken place. In turn, if a party is close to the end of a limitation period for commencing a claim, the effect of such requirement may be to 'time bar' a claim even though the period for limitation has not yet expired. Further, it may encourage tactics by the respondent party to seek to prevent any pre-arbitration step occurring.

Conversely, if a pre-arbitration step is one of admissibility, the arbitral tribunal will have jurisdiction – but may exercise its powers to stay proceedings pending out outcome of the pre-arbitration step.

The practical solution for drafters to adopt, if a dispute resolution clause is to include pre-arbitration step(s), is to ensure that the clause makes clear that any pre-arbitration step will not prevent proceedings being issued – but the arbitral tribunal may exercise its powers to stay proceedings.

Judge: Calver J.

Using arbitration to pierce or lift the corporate veil

In *Kabab-Ji Sal (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 the Supreme Court delivered further guidance to commercial parties and arbitration practitioners on the issue of the governing law of arbitration agreements. Absent express words, the issue is not straightforward – even for experienced arbitration practitioners. Although not an oil and gas case, it is relevant to many arbitration provisions.

Facts

The underlying dispute arose out of a franchise agreement between Kabab-Ji SAL ('**Kabab-Ji**'), a Lebanese company, and Al-Homaizi Foodstuff Co WWL ('**AHFC**'), its Kuwaiti licensee. Following a corporate reorganisation, AHFC became a subsidiary of Kout Food Group ('**KFG**'), the respondent to the proceedings. The franchise agreement contained: (i) an express choice of English law as the law of the main contract; (ii) an arbitration agreement providing for arbitration in Paris; and (iii) a no oral modification clause.

Kabab-Ji referred its dispute with KFG to arbitration in Paris under the ICC Arbitration Rules. A majority of the arbitral tribunal decided that the question of whether KFG was bound by the arbitration agreement was governed by French law, but that English law governed the question whether KFG had acquired substantive rights and obligations under the franchise agreement by a novation of the agreement from AHFC to KFG. The arbitral tribunal then found that KFG was in breach of the franchise agreement and awarded Kabab-Ji damages.

KFG filed an annulment application with the French Court (as the competent authority of the country in which the award was made). In the meantime, Kabab-Ji applied to the English Court for the award to be recognised and enforced.

Commercial Court Decision

The Commercial Court decided that the choice of English law in the franchise agreement constituted an express choice of law for the entire agreement, including the arbitration agreement. The Commercial Court also reached the provisional conclusion that, applying English law, the no oral modification clause meant that there was no novation of the franchise agreement from AHFC to KFG, and Kabab-Ji had not satisfied the conditions for estoppel that would have precluded AHFC by its conduct from relying on the no oral modification clause. However, the Commercial Court thought it was possible that further evidence might emerge in the course of the French proceedings that might alter this conclusion, and therefore declined to make a final ruling on the point. The Commercial Court adjourned any further hearing until after the Paris Court of Appeal had decided KFG's application to annul the award. Both parties appealed.

Court of Appeal Decision

The Court of Appeal agreed with the Commercial Court that the parties' express choice of English law to govern the main contract was also an express choice of the same law to govern the arbitration agreement. Where there was no indication that the arbitration agreement was to be construed separately from the rest of the contract, the contract should be construed as a whole and the express choice of law applied to all its clauses. The express choice of Paris as the seat of the arbitration did not impliedly override this choice, since an implied provision cannot displace an express one.

The Court of Appeal also agreed with the Commercial Court that the contract had not been novated. However, it held that it had been wrong to refuse to make a final order. There was no real prospect that new evidence would come to light that would allow Kabab-Ji to satisfy the conditions for an estoppel. The recognition and enforcement of the award was refused.

Kabab-ji appealed to the Supreme Court.

The French Court Judgment

In the interim, in a conflicting judgment, the Paris Court of Appeal rejected KFG's application to annul the award. KFG had argued that the arbitral tribunal did not have jurisdiction because KFG was not a party to the franchise agreement. In refusing to annul the award, the French Court found that French law, not English law, was the governing law of the arbitration agreement.

Indeed, the French courts have consistently held that the existence and validity of an arbitration agreement must be considered solely in light of the requirements of international public policy, irrespective of any national law, even a law governing the form or substance of the main contract. The French courts instead apply substantive rules of international arbitration, including the '*separability principle*'. In this case, the French Court held that as the parties had not expressly agreed that English law would govern the arbitration agreement specifically, the arbitral tribunal was instead bound to apply the substantive law of the place of the seat of arbitration (French law). Under French law, KFG was bound by the arbitration agreement.

The Issues

In the face of these diverging decisions, the Supreme Court was asked to decide:

1. What law governs the validity of the arbitration agreement?

2. If it is English law, is there any real prospect that a court might find at a further hearing that KFG had become a party to the arbitration agreement contained in the franchise agreement?

Supreme Court Decision

The Choice of Law Issue

The appeal was heard a few months after the Supreme Court handed down *Enka v Chubb* [2020] EWCA Civ 574 ('**Enka**'). See *CMS Annual Review of developments in English oil and gas law* (2021 Edition), page 92. In that case, the Supreme Court set out a series of English law principles to be applied when the question arises as to what law governs an arbitration agreement.

However, in the present case, the Supreme Court noted that, in its previous case, the question of governing law arose before any arbitration had taken place, and therefore the English common law rules for resolving conflicts of laws applied. However, in *Kabab-ji*, an arbitral award had been made, so the rules to be applied were those set out in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the '**New York Convention**'), as transposed into English law by the Arbitration Act 1996. The relevant provision of the New York Convention, Article V(1)(a), can be found in section 103(2)(b) of the Arbitration Act 1996, and states that '*the recognition or enforcement of the award may be refused if the person against whom it is invoked proves (…) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made.*'

The Supreme Court noted that it would be desirable, given the international status of the New York Convention, if the rules for determining whether there is a valid arbitration agreement were not only given a uniform meaning, but were applied by the courts of the contracting states in a uniform way. However, the Supreme Court noted that '*[i]t is apparent, however, that there is nothing approaching a consensus.*' Therefore, '*the English courts must form their own view.*'

The Supreme Court had regard to commentary provided at the conference at which the New York Convention was adopted, which indicated that an express agreement as to the law that is to govern the arbitration agreement is not required, and that any form of agreement will suffice. On that basis, the Supreme Court found it '*difficult to resist*' the conclusion that a general choice of law clause in a written contract containing an arbitration clause will normally be a sufficient indication of the law to which the parties subjected the arbitration agreement.

The Supreme Court also recalled the principles that it set out in *Enka*, noting that it would be '*illogical*' if the law governing the validity of the arbitration agreement were to differ depending on whether the question was raised before or after an award had been made.

The Supreme Court concluded that the effect of the clauses in the franchise agreement was '*absolutely clear.*' The agreement contained a typical governing law clause, providing that '*this Agreement*' shall be governed by the laws of England. Even without any express definition, the Supreme Court considered that that phrase is ordinarily and reasonably understood to denote all the clauses incorporated in the contract, including the arbitration agreement. The Supreme Court found there was no good reason to infer that the parties intended to except the arbitration agreement from their choice of English law to govern all the terms of their contract. Therefore, the law applicable to the arbitration agreement was English law.

The 'Party' Issue

Having established that English law applied, the Supreme Court then considered whether KFG had become a party to the arbitration agreement. The Supreme Court referred to the decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] AC 119, where the Supreme Court held that no oral modification clauses are legally effective. See *CMS Annual Review of developments in English oil and gas law* (2018 Edition), page 45. The

Supreme Court considered the various provisions and held that the clauses applied to termination of the franchise agreement (which was contemplated by Kabab-ji as part of the novation) as they did to amendments and modifications to the agreement. Yet such termination could only be affected in writing and if signed by or on behalf both of the parties, which had not been done.

The Supreme Court also found that the requirements for estoppel for relying on no oral modification clauses as laid out in *Rock Advertising* had not been satisfied, and even if there was evidence supporting an estoppel against AHFC, that would not necessarily extend to KFG.

Accordingly, the Supreme Court agreed with the Court of Appeal that as a matter of English law, there was no real prospect that a court might find at a further hearing that KFG had become a party to the arbitration agreement in the franchise agreement.

Comment

The governing law of an arbitration clause is critical to determining the proper parties to that clause. As arbitration clauses (or agreements) are severable from the main agreement they are capable of being governed by a different governing law to the main agreement.

The practical issue that has arisen is parties seeking to argue that: (i) they may arbitrate against a party that is not *prima facie* party to an English law main agreement, on the basis that the arbitration clause is not governed by English law, and that other law of the arbitration agreement permits parties other than parties to the main contract to be party to the arbitration agreement; or (ii) once the party is party to the arbitration agreement, any error as to who is party to the main agreement is an error of law that is non-appealable to the courts on jurisdictional grounds. As a result, such arguments have potentially allowed claimants (or counter-claimants) to seek to pierce or lift the corporate veil in English law contracts in a manner that would not be permitted in English law.

The decision in *Kabab-Ji* provides clarity on how the governing law of the arbitration agreement is to be determined under English law, where the governing law is not expressly stated in the arbitration agreement. The Supreme Court's reasoning is consistent with its earlier decision in *Enka* on the same issue.

However, drafters and arbitration practitioners should, nonetheless, bear in mind the diverging approach of the French courts (and indeed of other jurisdictions). The solution is to expressly state the governing law of the arbitration agreement/clause, specifically, in the arbitration agreement/clause.

Hight Court Judge: Sir Michael Burton.

Court of Appeal Judges: McCombe LJ, Flaux LJ and Sir Bernard Rix.

Supreme Court Judges: Lord Hodge DPSC, Lord Lloyd-Jones JSC, Lord Sales JSC, Lord Hamblen JSC and Lord Leggatt JSC.

Chapter 10

Energy Charter Treaty

The past 12 months have seen two cases that have accelerated the process of EU law seeking to dismantle Energy Charter Treaty investment protections that exist between investors that are nationals of an EU Member State and another EU Member State. Neither are English cases, and it remains to be seen whether the English legal system will benefit from exiting the EU legal system:

— In *Republic of Moldova v Komstroy LLC* (Case C-741/19) the Court of Justice of the European Union ruled that intra-EU arbitrations based on the Energy Charter Treaty violate EU law.

— In *Green Power Partners K/S and SCE Solar Don Benito APS v The Kingdom of Spain* (SCC Arbitration V (2016/135)) an arbitral tribunal constituted under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce unanimously refused jurisdiction over an intra-EU investment dispute arising under the Energy Charter Treaty due to EU law.

EU Court of Justice seeks to kill Energy Charter Treaty

In *Republic of Moldova v Komstroy LLC* (Case C-741/19) the Court of Justice of the European Union ('**CJEU**') ruled that intra-EU arbitrations based on the Energy Charter Treaty ('**ECT**') violate EU law. The decision is likely to cause prospective investors aiming to achieve protection under the ECT to consider (re)structuring their investments from outside the EU and to avoid EU seats wherever possible.

Facts

In 2013, a Paris-seated UNCITRAL tribunal issued an award in an ECT dispute involving Energoalians (now Komstroy), a non-EU investor, and the Republic of Moldova, a non-EU Member State. The dispute concerned debt claims arising from a series of contracts for the supply of electricity concluded with Moldtranselectro, a Moldovan public utility, which the original creditor had assigned to Energoalians. In the context of the ensuing setting aside proceedings, the Paris Court of Appeal referred to the CJEU the question of whether the acquisition of a claim arising out of an electricity supply contract constitutes an '*investment*' under the ECT.

Following the CJEU's landmark judgment in *Slovak Republic v Achmea B.V.* ('**Achmea**'), addressing investor-State arbitrations under intra-EU bilateral investment treaties ('**BITs**') and the consequential steps taken by the EU Member States to terminate their intra-EU BITs, and amid the ongoing consultations regarding the ECT's modernisation, the European Commission and several EU Member States intervened before the CJEU to seek a ruling on the question of the validity of intra-EU ECT arbitrations under EU law. This question has been the subject of considerable debate since the *Achmea* ruling, with a string of arbitral tribunals holding that *Achmea* does not extend to the ECT, a multilateral treaty to which both EU and non-EU States, and the EU itself, are parties. In March 2021, Advocate General Szpunar opined not only on the interpretation of the notion of '*investment*' under the ECT, but also the validity of intra-EU ECT arbitration.

Decision

The CJEU upheld its jurisdiction to rule on the question of the validity of intra-EU ECT arbitration based on its powers under Article 267 of the Treaty on the Functioning of the European Union ('**TFEU**') to interpret the acts of the institutions, bodies, offices or agencies of the EU. It also invoked its exclusive competence under Article 207 of the TFEU, as regards foreign direct investment, including the question of the notion of '*investment*' referred to it.

While it observed that it does not, in principle, have jurisdiction to interpret an international agreement regarding its application to disputes not covered by EU law, the CJEU grounded its jurisdiction on the EU's interest in the uniform interpretation of the disputed provisions and on the fact that the arbitration's seat in Paris called for the application of EU law by the French courts even if the dispute concerned a non-EU investor and a non-EU State.

The CJEU opined that the extra-EU nature of the dispute did not preclude its jurisdiction. In its view, it cannot be inferred from Article 26 of the ECT that this arbitration provision also applies to a dispute between an operator from one EU Member State and another Member State. The CJEU recalled that '*the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law.*' It pointed out that such autonomy is preserved through a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. The CJEU noted that an arbitral tribunal seized with an ECT dispute is required to interpret, and even apply, EU law, because the ECT itself is an act of EU law in light of it being an international agreement concluded by the Council of the EU. In line with its *Achmea* ruling, the CJEU observed that arbitral tribunals are not located within the judicial system of the EU. Moreover, their awards rendered pursuant to Article 26 of the ECT are not subject to review by a court of an EU Member State capable of ensuring full compliance with EU law and guaranteeing that questions of EU law can, if necessary, be submitted to the CJEU for a preliminary ruling.

Dismissing arguments stemming from the multilateral nature of the ECT, the CJEU noted that a provision such as Article 26 of the ECT is intended, in reality, to govern bilateral relations between two ECT Contracting Parties, in an analogous way to the provision of the BIT at issue in *Achmea*.

The CJEU found that the preservation of the autonomy and of the particular nature of EU law precludes the arbitration obligations under the ECT from being imposed on EU Member States as between themselves.

The CJEU also found that the acquisition of a claim arising out of a mere electricity supply contract cannot, in itself, be regarded as aiming at undertaking an economic activity in the energy sector for the purpose of the definition of '*investment*' in the ECT. It noted that the investor's claim did not arise from a contract connected with an investment under Article 1(6)(c) of the ECT as the contractual relationship concerned only the supply of electricity, irrespective of whether an economic contribution was necessary in order for a commercial transaction to constitute an investment.

Comment

The below are key aspects of the decision insofar as EU law is concerned:

1. EU law will not permit intra-EU investment treaty arbitrations – even under the ECT to which the EU is party.
2. The CJEU will seek to obstruct the enforcement of any intra-EU ECT arbitration awards, as incompatible with EU law.
3. The CJEU considers that it has competence to decide the meaning and effect of elements of the ECT – notwithstanding that the EU itself is a a party to the ECT.

The effect of the CJEU's decision is to seriously undermine the effectiveness of the ECT.

As arbitral tribunals constituted under investment treaties, including the ECT, are not part of the EU judicial system, it remains to be seen if the CJEU's extension of the legal effect of *Achmea* to the ECT will have any bearing on such arbitral tribunals' rulings regarding their own jurisdiction.

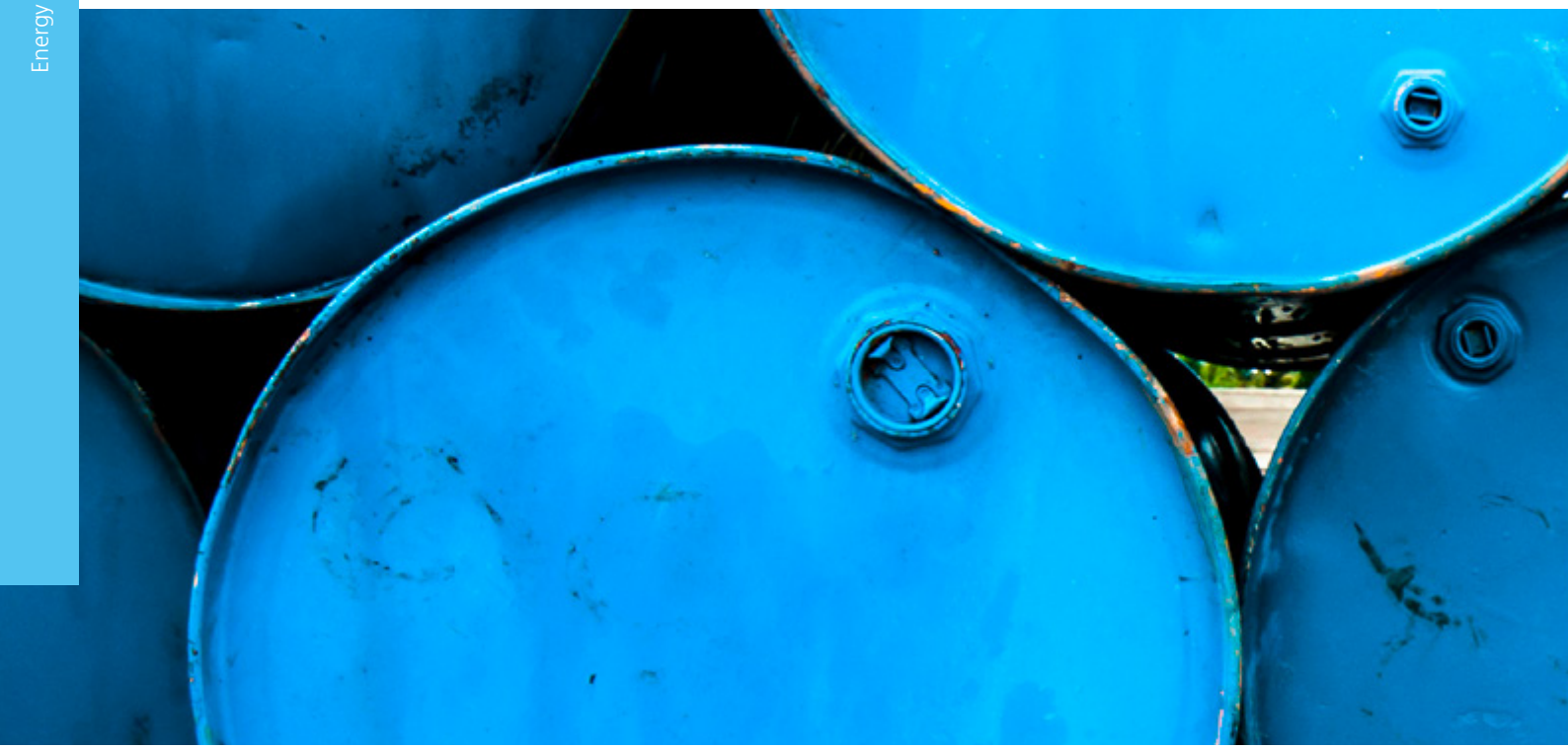
The ruling nevertheless adds to the considerable legal uncertainty in relation to the enforcement of intra-EU ECT awards. The CJEU's ruling likely will:

1. Give some investors pause for thought before placing any reliance on the ECT, perhaps looking for separate state assurances.
2. Cause some investors to seek to avoid EU-based arbitral seats in order to steer clear of a preliminary reference to the CJEU or the post-award blocking effects to which this ruling might give rise.

Indeed, even if arbitrators sitting in intra-EU ECT arbitrations were to reject the CJEU's decision in *Komstroy*—as most arbitral tribunals have done in relation to the *Achmea* decision— there is nevertheless an increased likelihood that an EU Member State on the losing end of any intra-EU award, will invoke the *Komstroy* decision to challenge and/or resist the enforcement of such an award. To avoid the challenges and uncertainty that inevitably will arise from the *Komstroy* decision, investors wishing to benefit from the ECT's protections may wish to consider how to (re) structure their investments from outside the EU and tailor their dispute resolution options.

On the upside, post-Brexit, the more pro-arbitration approach of the English courts is likely to make the United Kingdom a more attractive jurisdiction for energy investors – as a place of investment and seat of arbitration.

Grand Chamber: K. Lenaerts (President), R. Silva de Lapuerta (Vice-President), A. Prechal, M. Vilaras, E. Regan, L. Bay Larsen, N. Piçarra and A. Kumin (Presidents of Chambers), T. von Danwitz, M. Safjan, D. Šváby, C. Lycourgos, P.G. Xuereb, L.S. Rossi (Rapporteur) and I. Jarukaitis (Judges).



Stockholm Arbitration Tribunal Denies Jurisdiction over Energy Charter Treaty

In *Green Power Partners K/S and SCE Solar Don Benito APS v The Kingdom of Spain*, SCC Arbitration V (2016/135) (16 June 2022), an arbitral tribunal constituted under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ('**SCC**') unanimously denied its jurisdiction over an intra-EU investment dispute arising under the Energy Charter Treaty ('**ECT**'). This is the first known award to deny jurisdiction on the basis that EU law applies to the question of the arbitral tribunal's jurisdiction and that such law precluded the offer of Spain, as an EU Member State, to submit to arbitration a dispute with investors from another EU Member State (here, Denmark) under the ECT.

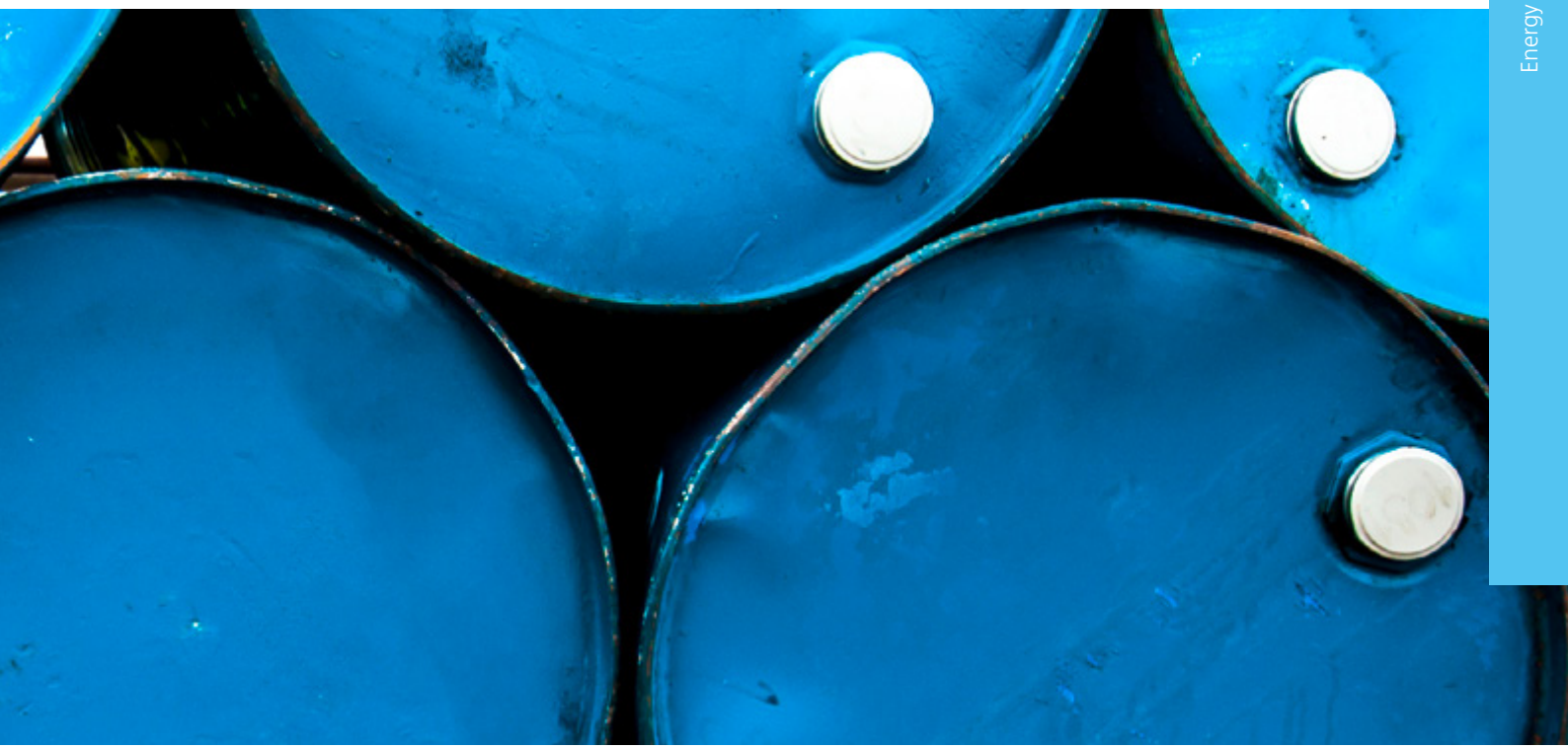
Facts

The Green Power dispute is one of more than 50 investment disputes arising from Spain's alteration of its regulatory framework applicable to solar energy. Most of these disputes have been resolved, or are still awaiting resolution, under the arbitration rules of the World Bank's International Centre for Settlement of Investment Disputes ('**ICSID**') and its attendant ICSID Convention.

Although ICSID arbitration was an option available to them, the Danish investors in this case opted for SCC arbitration. The arbitration commenced in September 2016 and proceeded in parallel with the fast-paced judicial and legal developments triggered by the landmark judgment of the Court of Justice of the European Union ('**CJEU**') in *Slovak Republic v Achmea B.V.* (2018) C-284/16 (the '**Achmea Judgment**'). In September 2021, the CJEU extended the effect of the *Achmea* Judgment to intra-EU disputes under the ECT (the '***Komstroy* Judgment**').

In accordance with the SCC Arbitration Rules, the SCC Board fixed the seat of the arbitration in Stockholm. Among other things, Spain argued that the arbitral tribunal lacked jurisdiction *ratione voluntatis* as EU law precludes intra-EU arbitration under the ECT. Spain argued, that the arbitral tribunal had to determine the validity of its offer to arbitrate in accordance with the Swedish Arbitration Act ('**SAA**') as the law of the seat of the arbitration ('*lex arbitri*'). Green Power argued that the matter should be decided in accordance with public international law on the basis that the arbitral tribunal had been established under a public international law instrument – the ECT. Green Power submitted that the choice of Sweden as the seat of arbitration by the SCC Board was '*fortuitous*' and, therefore, '*the arbitration agreement should only be affected by international law, from which it emanated.*'

The SCC Arbitration Rules are silent on the question of what law applies to the determination of the arbitral



tribunal's jurisdiction. Section 48 of the SAA provides that, in the absence of the parties' agreement, '*the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place.*'

Decision

The arbitral tribunal noted that the applicable law provision in Article 26(6) of the ECT contains a choice of law rule only for the merits of the dispute. It stated that '*this conclusion means that the Parties have not agreed on the law applicable to jurisdictional matters under Article 26(6) ECT.*'

The arbitral tribunal:

1. Distinguished this dispute from ICSID cases involving Spain on the basis that in non-ICSID cases the choice of an arbitral seat triggers the application of *lex arbitri* and the attendant supervision of the local courts.

2. Considered that '*[a]s the Parties have not explicitly agreed on the law governing the arbitration agreement and neither the ECT nor the SCC Rules, to which the Parties have agreed, determines the law applicable to the arbitration agreement, it follows that, pursuant to Section 48 SAA, Swedish law, i.e. the law of the seat, is applicable to the determination of jurisdictional matters.*' The selection of the seat in Sweden in turn triggered the application of EU law, as the law in force in every EU Member State, including Sweden.

3. Concluded that '*under the applicable lex arbitri [Swedish law], it is required to take as a starting point Article 26 ECT [i.e., the dispute settlement provision of the ECT] and then consider and, if necessary, apply other rules of both international and domestic law, as relevant for each question.*' With respect to EU law, the Tribunal determined that it can be viewed both as a matter of international and of domestic law.

4. In relation to international law:

   a. Examined Article 26 ECT pursuant to the well-established interpretation rules of the Vienna Convention on the Law of Treaties ('**VCLT**'). According to the ordinary meaning of Article 26 ECT, Spain had given its unconditional consent to arbitration.

   b. Considered the various instruments made in connection with the conclusion of the ECT and its subsequent agreements, including the 2019 Declaration of 22 EU Member States, including Denmark and Spain, on the legal consequences of the *Achmea* Judgment (the '**Declaration**').

   c. Reasoned that the effect of the Declaration was '*only of an interpretive nature*,' providing '*an additional indication of how Spain and Denmark understood and understand their*

legal relations under the ECT and EU law, including the application in such relations of a unilateral offer of arbitration by one of these countries made to an investor of the other.'

d. Concluded that '*interpreting Article 26 ECT without resorting to EU law is inconclusive in the circumstances of this case*.'

5. In relation to domestic law:

a. Considered that EU norms were relevant on the basis that the seat of the arbitration was Sweden, an EU Member State.

b. Accepted that the *Achmea* Judgment and *Komstroy* Judgment were relevant and decisive, as interpretations of the law, to the question of the validity of an investor-State arbitration clause under the applicable EU law in the context of an intra-EU dispute.

c. Observed that the Declaration is an authentic interpretation of the *Achmea* Judgment.

As a result of the foregoing, the arbitral tribunal concluded that the *Achmea* Judgment led to a '*clear answer*,' as confirmed in the *Komstroy* Judgment, that '*Spain's offer to arbitrate under the ECT is not applicable in intra-EU relations and hence there is no offer of arbitration that the Claimants could accept*.'

Comment

The decision of the arbitral tribunal in this case has caused significant debate, with widely divergent views from legal practitioners on the correctness of the award.

However, it undoubtedly marks another, and significant, step in the process of EU law dismantling treaty-based investment protections that exist between investors that are nationals of an EU Member State and another EU Member State. Investors in the energy sector in the EU will wish to give thought to the extent to which they can structure future transactions (and perhaps restructure existing transactions) to avoid the effects of *Green Power Partners* and the *Komstroy* Judgment. Such measures might include:

— Incorporating special purpose vehicles outside the EU for investments into the EU.

— Gaining specific governmental guarantees, with security for performance, that exist outside an investment treaty regime.

Where disputes do arise, investors may seek to exploit arbitration agreements in investment treaties with seats of arbitration, and arbitration agreements governed by laws, outside the EU. Alternatively, use treaties with ICSID arbitration clauses.

Post-Brexit, the more pro-arbitration approach of the English courts is likely to make the United Kingdom a more attractive jurisdiction for energy investors seeking to structure energy related investments.

However, it appears that the European Commission, supported by the CJEU, is determined to undermine the investment protections in the ECT. As a consequence, it is likely that the issue will continue to gain momentum.

Arbitral Tribunal: Prof. Dr. Hans van Houtte, Dr. Inka Hanefeld and Prof. Dr. Jorge E. Viñuales.

Chapter 11

North Sea Transition Authority

The increased focus on and pace of energy transition has been a central theme for the NSTA in the last year, as it has also sought to improve the industry's approach to governance and issued its first sanction notices:

— The NSTA's name change, Corporate Plan and Overview for 2022 placed a central emphasis on the steps required of industry to support 'net zero'.

— In *R (on the application of Cox) v Oil and Gas Authority and another* [2022] EQHC 75 (Admin) environmental activists sought to judicially review the NSTA's 2021 Strategy - the case proceeded to a full hearing in December 2021.

— For the first time, the NSTA set out in detail its governance expectations of licensees, and looks set to be given much greater control over corporate changes of control in the industry.

— It began to move from 'carrot' to 'stick' in its approach to enforcement, issuing its first two financial penalties for compliance breaches.

UK Oil and Gas Industry Regulation 2022

It has been over a year since a revised strategy was published by the North Sea Transition Authority (the '**NSTA**') which focused the UKCS industry's attention firmly on its role in supporting efforts to achieve *'net zero'*. Throughout 2021 and 2022, the impact of those changes has become more apparent, with a raft of updated guidance, reports and communications from the regulator seeking to assist and accelerate the industry's progress on energy transition in all aspects of activity. The regulator highlighted its evolving role with a name change - with effect from 21 March 2022, the Oil and Gas Authority ('**OGA**') changed its name to the North Sea Transition Authority, although this was in essence a rebrand, changing only the regulator's trading name with no change to its legal name.[1]

Despite the focus on energy transition, the NSTA has not been immune to the increased scrutiny of the oil and gas industry generally and has continued to face various court challenges, in particular by environmental activists. It has also (in common with other industries) had to adjust very quickly to the stark global *'energy trilemma'* that politicians, regulators and industry are grappling to resolve – how to balance: (i) the global demand to reduce energy costs and ensure energy supplies are affordable; (ii) the need for energy security in an increasingly fragile market (exacerbated by the consequences of the Russian invasion of Ukraine); and at the same time (iii) accelerate progress towards alternative energy supplies to ensure sustainability and reduce reliance on energy obtained from fossil fuels.

The NSTA has also continued to advance its regulatory approach. In particular, we have seen the first two sanctions notices, in the form of financial penalty notices, and further development of the NSTA's increased focus on the corporate governance of the companies it regulates.

The NSTA's own corporate governance has also led to several announcements during the year, including:

— **A new chief executive**: Dr Andy Samuel has been Chief Executive of the NSTA since it was created in 2015. After 8 years in the role, he will step down at the end of 2022 and Stuart Payne (who also joined the NSTA when it was created and is presently Director of Supply Chain, Decommissioning and HR) will assume CEO responsibilities in his place from 1 January 2023.

[1] In this chapter we have referred throughout to 'NSTA', although some of the documents and reports previously produced have not yet been updated to reflect the new terminology.

— **A Board level job share**: one of the NSTA's directors is appointed by BEIS as its shareholder representative. That appointment has been filled by the Director of Energy Development and Resilience at BEIS, a role presently shared by Fiona Mettam and Vicky Dawe. Consequently, the necessary amendments were made to the NSTA's articles to enable the director appointment also to be shared.

The NSTA's approach to energy transition and energy security

The NSTA's focus on energy transition has become a central theme in its planning and approach to all aspects of its activities, tempered by the recent increased focus on energy security and the challenges of balancing the two. For example:

NSTA Corporate Plan 2022 – 2027

Although it had only published an updated Corporate Plan in 2019, the new Strategy and focus on net zero led the NSTA to update its Corporate Plan in 2022, setting out the framework it will use for the next 5 years and identifying how it will '*lead with purpose*' and measure success on its key areas:

— *Energy*: with a focus on effective and efficient oil and gas asset stewardship; supporting UK oil and gas production while meeting demand as cleanly as possible; and secure and stable domestic supply of oil and gas.

— *Transition***:** with a focus on regulating emissions reductions; energy integration including supporting renewable energy production; electrification projects and working with government; industry and other regulators to accelerate progress; and the creation of carbon storage opportunities on the UKCS.

— *Value*: with a focus on value creation across the whole chain; investment, efficiency and jobs; and delivering the NSTA Digital Strategy.

— *Corporate/Internal Priorities*: with a focus on ensuring the NSTA is a great place to work; and enhancing the NSTA's digital, data and technology landscape.

NSTA's Overview for 2022

The NSTA's overview for 2022 emphasised the need to hold the industry to account on halving upstream emissions by 2030, whilst meeting the UK's energy demand and security. The overview report highlighted various workstreams focussed on energy transition. This included the NSTA's Energy Integration Report, which found that: (i) the UKCS could support approximately 60% of the UK's decarbonisation requirements, through platform electrification, carbon capture and storage, and offshore wind and hydrogen projects; and (ii) the Technology Leadership Board, which is co-chaired by the NSTA and industry (a) aims to ensure existing technologies are deployed to their full effect and (b)

relevant new technologies developed and adopted in the UKCS, to support and deliver MER UK and net zero by 2050.

Launch of the UK's First Ever Carbon Storage Licensing Round

A key plank in the North Sea Transition Deal and the Government's plans to reach its Net Zero Target is the development at pace of Carbon Capture and Storage ('**CCS**') Projects, in which the oil and gas industry is seen as having a central role. On 14 June 2022, the NSTA launched the first ever round of UKCS seabed carbon storage sites.

As licensing authority, the NSTA is responsible for the licensing, permitting and stewarding of offshore carbon storage sites. Prior to this licensing round, a total of six offshore carbon storage licenses in the UKCS had been issued, each on an 'ad hoc' basis. The most recent examples were two licences issued in May 2022 comprising four separate CCS sites in the Southern North Sea.

The launch of the first CCS licensing round was said to be in response to unprecedented levels of interest from companies eager to enter the CCS market and the NSTA indicated that a high level of interest had been expressed, which it hoped suggested that there would be strong competition. However, it may be some time before it is clear whether those expectations are met – it is anticipated that any new licences will be awarded early 2023, with the first injection of CO2 being some 4-6 years after the licence awards.

Decommissioning

Reducing decommissioning costs has been one of the NSTA's key concerns since it was established. Its 2022 Overview reported that it continues to make progress: the cost estimate for decommissioning UKCS oil and gas infrastructure reduced to GBP 46bn as at the end of 2022, a reduction of just over GBP 13bn from the cost estimate of GBP 59.7bn in 2016. The NSTA's strategic priorities to further reduce decommissioning costs are: planning for decommissioning; supporting energy transition; commercial transformation; and technology, processes and guidance. The NSTA has also developed a success stories tracker to allow the impact to be quantified using metrics (such as the number of emissions prevented and the decommissioning costs and time savings to industry) which align with the NSTA's obligation to support the energy transition). The success stories tracker has recorded 31 success stories between February 2021 and February 2022, and 458 success stories since the inception of the NSTA.

UK Government's Energy Security Strategy

On 7 April 2022, the UK Government published its energy security strategy the ('**Security Strategy**') aimed at increasing domestic supplies of energy in the wake of rising global energy prices and volatility in international markets exacerbated by Russia's invasion of Ukraine. The Security Strategy builds on some of the key commitments under the Energy White Paper published by the UK Government in December 2020, such as accelerating deployment of offshore wind, nuclear and hydrogen, and implements a return to licensing rounds for North Sea oil and gas projects.

Key commitments under the Security Strategy in relation to the oil and gas industry, which will drive the NSTA's activities and agenda over the next few years, include:

— Launching a licensing round for new North Sea oil and gas projects in Autumn 2022;

— Establishing Gas and Oil New Project Regulatory Accelerators to facilitate the development of projects;

— Driving industry investment in electrifying offshore production to reduce emissions further; and

— Commissioning a review on shale gas by the British Geological Society.

Challenges

Judicial review of the NSTA's Strategy

As set out on pages 108 to 112, arguably the most significant court challenge brought against the NSTA last year was that of *R (on the application of Cox) v Oil and Gas Authority and another* [2022] EWHC 75 (Admin) which sought a judicial review of the NSTA's 2021 Strategy (the '**NSTA's Strategy**'). The case proceeded to a full hearing in December 2021.

The Claimants sought to challenge the NSTA Strategy on several grounds:

1. They asserted that the definition of *'economically recoverable'* was unlawful and/or frustrated the statutory purpose of the Act because:
    a. it wrongly provided for a pre-tax approach when determining economic value, which is not provided for in the 1998 Petroleum Act's definition of the '*principal objective*'; and
    b. it failed to account for the financial support the industry receives, including tax breaks, meaning that activities uneconomic for the UK as a whole could be pursued as a result.
2. they argued that the the definition in the NSTA's Strategy of *'economically recoverable'* was irrational as it would result in increased levels of oil and gas production and thus increased greenhouse gas emissions and so conflicted with the purpose of the Climate Change Act 2008 and the government's Net Zero Target.

The Claimants were unsuccessful on all grounds.

Ground 1 – Unlawfulness

There were two key aspects:

— Interpretation of the term '*economic recovery of UK petroleum*' was a matter for the NSTA, and not a question of law for the Administrative Court with only one permissible interpretation of the statutory provision (as the Claimants had argued); and

— in any event, the Claimants were wrong in their assertion that '*…by ignoring the effect of government-backed financial support, the Strategy has stretched the definition of "economically recoverable" too wide, such that activities that are not truly "economic" for the UK are nonetheless still sought to be maximised through the Strategy.*' That conclusion was reached by the Administrative Court after considering the background and context in which the legislation was considered by Parliament. The Claimants' arguments (in particular as regards what, if any, account should be taken of decommissioning relief) ignored the wider picture and also the fact that matters of taxation were for the Treasury and not the NSTA.

Ground 2 – Irrationality

— The Claimants' alternative claim of irrationality also failed. The NSTA's duty to '*have regard*' under section 8(1) of the Energy Act 2016 (i.e. its duty to have regard when exercising its functions, so far as relevant to, *inter alia*, the development and use of facilities for the storage of carbon dioxide, and how

that may assist the Secretary of State to meet the Net Zero Target) was a process duty. The question of how to balance various objectives was a matter for the NSTA, not the Administrative Court. The NSTA, in consulting on and adopting the NSTA Strategy, manifestly had regard to UK domestic action on climate change, so the requirement was met.

— In any event, it was not clear that the consequence of the definition would be extra emissions. The Claimants' argument oversimplified the NSTA's Strategy and its economic assessment to the point of misunderstanding it and failed to take account of the fact that carbon costs have now been brought within the assessment of economic recovery – with reference particularly to carbon appraisal values for greenhouse gas emissions and the associated social discount rate.

Corporate Governance

Ensuring the industry exercises good corporate governance is increasingly part of the NSTA's agenda and the last year has seen significant developments in that area:

NSTA's Approach to Changes of Control

In a letter addressed to all licensees in December 2021, the NSTA affirmed its approach to changes of control of licensees and how it takes decisions on the exercise of its change of control powers.

As per the NSTA's production and development licences, a '*change of control*' of a licensee can be understood as any event by which a person who did not have control of a licensee when that licence was granted, or last assigned, comes to control that licensee.

Whilst licensees are not currently required to obtain permission from the NSTA prior to a change of control, the NSTA is empowered to require a further change of control after such an event. If this is not implemented, then the NSTA may use its power to revoke the licence, either completely or partially. If the licence is partially revoked, this would remove the concerned licensee from the licence while allowing other licensees of the licence to continue.

Proposed new NSTA Powers on Change of Control – Energy Bill 2022

Part 11 (Oil and Gas) of the Energy Bill 2022 (the '**Bill**'), introduced on 6 July 2022, proposes amending the powers of the NSTA to close the obvious '*gap*' in the NSTA's

existing powers on change of control, to permit the NSTA to intervene at a much earlier stage in any proposed transfer of the ownership of an offshore licensee company. The proposed new powers will permit the NSTA to intervene before a transfer takes place, requiring advance notice of any proposed changes of control and NSTA consent before the transfer of ownership can complete.

Section 228 of the Bill proposes doing so by means of amendments to the model clauses incorporated into all existing and future offshore (and onshore) production licences. In particular it proposes:

— Amending the model clauses that are contained in the Petroleum Licensing (Production) (Seaward Areas) Regulations 2008 (S.I. 2008/225) (the '**2008 Regulations**') and the Petroleum Licensing (Exploration and Production) (Landward Areas) Regulations 2014 (S.I. 2014/1686) (the '**2014 Regulations**'); and

— Inserting equivalent new model clauses into licences that were granted under the Petroleum (Production) Act 1934 or the Petroleum Act 1998.

Although it is intended that the new power will apply to all existing and future production licences (but not exploration licences), irrespective of when granted, so that future changes of control under any licenses will be caught, this amendment will not permit the NSTA to take action using these new powers in relation to previous (already completed) changes of control. Schedule 18 of the Bill outlines the specific amendments that it is proposed will be made to the model clauses. Companies contemplating a change of control will be required to apply for consent to the change of control to the NSTA in writing at least three months prior to the date on which the proposed change would occur. If prior approval is not obtained, the NSTA will be entitled to revoke the relevant licence(s) (or partially revoke, in relation to the relevant company's interest where the licence is held by more than one company).

On receipt of a request to consent to a change in control, the Bill provides the NSTA may consent unconditionally, apply conditions to consent or refuse consent. In the event the NSTA proposes to consent subject to conditions or to refuse consent, the company must be given an opportunity to make representations, and these must be considered by the NSTA.

The base position will be that the NSTA must reach a decision within three months of receipt of an application but that is not a strict deadline and the NSTA is required simply to notify the relevant parties in writing if it decides to delay its decision (and is not expressly required to provide reasons for doing so).

New Governance Guidance

The NSTA's revised Strategy introduced a new Supporting Obligation relating to corporate governance. This requires that offshore licensees '*apply good and proper governance at all times, including complying with any governance principles and practices as the NSTA may from time to time direct*' and that they must comply with '*a direction made by the NSTA*' under paragraph 3.

The new Governance Guidance (the '**Guidance**') (published in January 2022) describes what the NSTA considers to be '*good and proper*' governance and provides general principles so that licensees can then determine how they should comply.

The Guidance places responsibility for compliance on the Board of Directors of a licensee (or equivalent body which exercises effective control), which is referred to in the Guidance as the '*Relevant Board*'. The NSTA expects all licensees to adhere to an appropriate and recognised corporate governance code and observe the specific governance requirements in the Guidance, which cover five key areas:

1. **Purpose and Leadership, Board Composition and Director Responsibilities**: Relevant Boards are Expected to:

    a. Have appropriate senior level knowledge and experience of: (i) offshore upstream operations; (ii) the specific requirements and challenges of the UKCS; and (iii) all aspects of the NSTA Strategy;
    b. ensure compliance with NSTA requirements in relation to the fitness of persons who exercise control over a licensee; and
    c. include an experienced Consultative Committee of Accountancy Bodies (or equivalent) qualified officer who has responsibility for the internal control, risk management and integrity of financial statements.

2. **Delivery of Licence Commitments and the NSTA Strategy**: Relevant Boards should promote the long-term success of the licensee in the UKCS by identifying opportunities for the creation and preservation of value and the establishment of systems of oversight to identify and mitigate risks.

3. **Audit, Risk, Internal Control and Reporting**: the Relevant Board must ensure compliance with all applicable financial accounting principles as set out by the International Financial Reporting Standards and the International Accounting Standards Board and have a clear understanding of a licensee's internal controls, accountability and responsibilities.

4. **Environmental Governance Principles**: Relevant Boards should establish and embed a culture of greenhouse gas reductions in the operations of licensees. The licensee's performance should be measured, reported and tracked against UK Government targets and industry standards.

5. **Corporate Social Responsibility**: the Relevant Board must give due consideration to its social responsibilities in the performance of its operations and interactions with stakeholders.

The Guidance does not impose new compliance reporting obligations on licensees nor will the NSTA systemically track compliance. However, the NSTA will be alert for actions or behaviours which suggest non-compliance.

ESG Disclosure and Reporting

In March 2022, the NSTA issued an open letter (the '**Letter**') to all licensees on Environmental, Social and Governance ('**ESG**') disclosure and reporting. The Letter urges all licensees to focus on ESG disclosure and reporting in order to demonstrate that the UKCS is an attractive investment proposition and maintain investor confidence.

The NSTA stated in the Letter its view that attracting debt and equity investment requires high-quality, authentic ESG reporting, but recognises that this places a burden on licensees. Therefore, the NSTA worked with the industry to evolve ESG requirements and standardise the approach to ESG reporting. The NSTA intends this work will continue and will reduce the burden on licensees.

For this purpose, the NSTA ESG Taskforce (previously known as the OGA ESG Taskforce) (the '**Taskforce**') was established in September 2020 to support licensees and enhance ESG disclosure and reporting. The Taskforce's central objective is to act as a link between industry, the NSTA, and the investment community. The Taskforce: (i) aims to assist in maintaining investor confidence and access to capital; and (ii) works with relevant trade bodies and other regulators to highlight the significance of ESG disclosure and enhance the quality of reported data. The Letter states that given the number of new financial reporting policy initiatives announced in 2021 (including the UK Government's Net Zero Strategy), the Taskforce has extended its remit and is considering whether further recommendations for optimal ESG reporting are required.

While some operators and licensees, by virtue of their size or securities exchange listing, are already subject to regulatory requirements to report in this area, others are not, so the NSTA Taskforce recommendations in the Letter create a basic set of reporting parameters for those who may be unsure about where to start. If widely taken up, they also have the potential to enable investors to compare operators active in the UKCS on a like for like basis in terms of ESG performance.

Sanctions and Powers

Mediation Pilot Extended

Historically, the NSTA has emphasised that it would prefer to exercise its '*influencing*' role rather than its '*regulatory*' role in trying to assist the industry with any disputes. In February 2020, the NSTA launched a year-long '**UKCS Mediation Pilot**' to test the extent to which mediation can resolve certain UKCS licence disputes. However, it seems there has been limited use of the UKCS Mediation Pilot to date and on 10 May 2022, the NSTA announced the pilot would be extended until at least six mediations have taken place or until 31 December 2023, whichever is sooner. Although the NSTA reports positive feedback from those that have engaged in the mediation process under the pilot, the extended duration for the pilot scheme and the limited number of target mediations suggests that there is not (at least yet) widespread use of mediation in this area.

Investigations and Sanctions Notices

Under Chapter 5 of Part 2 of the Energy Act 2016 (the '**2016 Act**') the NSTA has significant powers to impose sanctions for failure to comply with a petroleum-related requirement. Before issuing a sanction notice the NSTA will first conduct an Enquiry and then an Investigation. Ultimately that process may lead to one of a number of outcomes, for example:

— The Investigation may be closed, the NSTA having determined there has been no failure; or

— the NSTA may accept work commitments in lieu or agreed some alternative approach to remedy the suspected failure; or

— the NSTA may impose a sanction notice, in the form of a financial penalty notice, an enforcement notice, an operator removal notice or a licence revocation notice.

Between 2017 and November 2021, the NSTA conducted 17 Enquiries and 9 Investigations. In 2021 alone, the NSTA reported the launch of 6 Investigations (and published brief anonymous details), showing it is increasingly considering the use of its sanction powers where there is a suspected failure to comply with a petroleum-related requirement. The details that have been made public suggest a focus on compliance with licence terms and reporting requirements, following the publication of the Thematic Review into Industry Compliance with Regulatory Obligations in October 2020.

Of these Investigations, two have led to the issue of financial penalty notices – the first examples of the NSTA exercising its powers of sanction. Both relate to licence or consent compliance issues. In July 2021, the NSTA issued a financial penalty notice imposing a fine of GBP 50,000 for breaching reporting requirements under a licence; in April 2022, a financial penalty notice also imposing a fine of GBP 50,000 was imposed for breaching field production consents. An Investigation with a different focus, namely '*transaction drag*' (which looked at the proposed sale of 13 producing fields, amidst concerns that the transaction had suffered delays) was closed in April 2022 without any sanction being issued; the NSTA's announcement on that reminded the industry for the need to collaboration promptly on transactions. Several other Investigations are reported as ongoing on the NSTA's tracker and so it seems likely further penalties may be imposed in the coming months.

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