Neutral Citation Number: [2017] EWHC 2258 (Comm)

Case No: CL-2017-000297

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 16/08/2017

Page Count: 9
Word Count: 3928
Number of Folios: 56

Before:

MR. JUSTICE MALES

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Between:

APACHE BERYL I LIMITED	**Claimant**
- and -	
(1) MARATHON OIL UK LCC	**Defendants**
(2) CENTRICA RESOURCES LIMITED	
(3) JX NIPPON EXPLORATION AND PRODUCTION (UK) LIMITED	
(4) TAQA BRATANI LIMITED	
(5) TAQA BRATANI LNS LIMITED	

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MR. D. ALLEN QC (instructed by **Clyde & Co.**) for the **Claimant**
MR. M. FEALY QC AND MR. P. ASHLEY (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendants**

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APPROVED JUDGMENT

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MR. JUSTICE MALES :

1. This is an application by the claimant, Apache Beryl I Limited, for an expedited trial to take place at the beginning of next term, that is to say in two months' time or less, with a view to judgment or at least a decision being given if possible before 21st October 2017. For present purposes I can summarise the facts briefly taking them from the claimant's skeleton argument in support of this application.

Background

2. The claimant is an energy company that explores for, develops and produces natural gas, crude oil and natural gas liquids. Until 9th January 2012 it was known as Mobil North Sea Limited and was a wholly owned subsidiary of Exxon Mobil Corporation. Thereafter, it was acquired by a subsidiary of the Apache Corporation, a major independent oil and gas company formed and incorporated in Delaware in 1954.

3. The claimant is a participant under the Scottish Gas Evacuation System Heads of Agreement entered into on 14th June 1990 and restated on 28th February 2005 ("the SAGE HOA"). The defendants are participants in the SAGE HOA too. There are a number of them and they are known collectively as the Brae Group. The venture was for the ownership, operation and use of infrastructure to transport hydrocarbons. The infrastructure included the Beryl pipeline, the Brae pipeline, the main pipeline and the processing terminal. The claimant holds a 37.27 per cent interest in the SAGE HOA assets.

4. On 5th December 2016 the claimant emailed the defendants expressing its intention first to transfer its interests in the SAGE HOA to a wholly owned subsidiary, Sage North Sea Limited ("SNSL"), and, secondly, to sell the shares in SNSL to Ancala Midstream Acquisitions Limited ("Ancala") pursuant to a put and call option. The email enclosed an execution deed which the defendants were invited to sign to enable the deal to proceed.

5. Clause 15 of the SAGE HOA permits a participant to assign all or part of its interest provided that it procures that "the assignee will be legally bound by the same liabilities and obligations and entitled to the same rights in respect of the interest transferred as was the assignor." For this purpose the clause provides that appropriate novation agreements shall be executed by the participants. However, it goes on to provide in paragraph (c) that:

> "No assignment of an interest in the Main Pipeline and Processing Terminal shall become effective until the Participants have received such reasonable assurances as they may require to ensure that the assignor's obligations under this Heads of Agreement, including but not limited to abandonment, will be performed".

6. It is this clause which has given rise to the present dispute. The claimant contends that it has provided all of the assurances to which the defendants are entitled. The defendants dispute this. If the claimant's position is correct, it is entitled to go ahead with the transfer of its interest under the proposed sale to SNSL followed by the sale to Ancala and the defendants are obliged to execute the necessary novation

agreements. If not, the claimant is not entitled to go ahead and any purported assignment would be ineffective. At present, therefore, the parties do not have certainty as to whether the transfer can proceed.

7. There is a longstop date in the put and call option of 21st October 2017. As I understand it, after that date Ancala would be entitled to terminate the option agreement if the transfer agreement has not been completed by then.

8. The position is explained in the evidence of Mr. David Bernal, Apache's assistant general counsel. In his first witness statement dated 14th August 2017 he explained that the position of Ancala was that if the transaction did not proceed and funds drawn down were returned to them, those funds had to be redeployed on other investments within twelve months of the draw-down and that, accordingly, Ancala required a longstop date eleven months after the conclusion of the option agreement to give it time to find an alternative destination for its capital. Ancala indicated that if completion looked imminent after eleven months it could be "pragmatic" but it needed to have the capital invested within twelve months of the draw-down. Mr. Bernal concluded from this that if the longstop date of 21st October was reached and completion was not imminent it seemed probable that Ancala would terminate the option agreement and thus that the transaction would not proceed.

9. In a second witness statement provided today that position has been corrected in some respects, in particular that the position is now understood to be that the Ancala investors have an expectation of a longstop date for completion by 21st October 2017 but that some funds from which the monies in question were drawn down require return of the funds if a transaction is not completed within a period which is longer than twelve months while others will permit redeployment of the relevant funds within a longer period than twelve months. That position, therefore, is not so clear-cut as it appeared to be in the first witness statement which indicated, essentially, a twelve-month deadline. Nevertheless, Mr. Bernal continues to express the view that there is a real risk that the put and call option will come to an end if the longstop date of 21st October is not met, and that although no one can say with certainty what will happen in the future, his view is that if the longstop date is not met, the practical consequence is that the deal will end unless a resolution is immediately in sight.

Legal principles

10. The principles applicable to this application for expedition are not in dispute. The procedure is set out in paragraph J.1 of the Commercial Court Guide which provides that the Commercial Court is able to provide an expedited trial in cases of sufficient urgency and importance and that a party seeking an expedited trial should apply to the judge in charge of the list on notice at the earliest opportunity which should normally be after service of the claim form but before service of the particulars of claim. That did not happen in this case.

11. It is agreed between the parties that the decision whether to order expedition is discretionary and that there are four factors which need to be taken into account. First, there is a threshold question whether objectively there is urgency. Second, the court should have regard to the state of its list. Third, the procedural history including delay by the applicant is a factor. Fourth arises the question of whether there will be any irremediable prejudice to the respondent to the application. The authorities also

show that so far as the respondent's position is concerned it is the last of these, the question of prejudice, which is important with other matters being comparatively unimportant, although they are matters about which the applicant will need to satisfy the court.

12. Mr. David Allen QC for the claimants refers me also to what was said by the Court of Appeal in the case of *W.L. Gore & Associates GmbH v Geox SpA* [2008] EWCA Civ 62, in particular in the judgment of Lord Neuberger at [31]:

> "So far as the proper conduct in this case is concerned, subject to one point, it seems to me clear that a hearing around six months from today can easily be accommodated in this case. It is not a simple case, but it is not a particularly complicated case. It would be very unfortunate if a case of this sort could not be ready for hearing within eight months of directions being agreed, and within 11 months of the proceedings actually being issued. The Patents Court in London is a court which seeks, like the Commercial Court and the Chancery Division, to assist commercial people in resolving their disputes, and, as far as is consistent with the interests of others and with justice and fairness, it should accommodate, and make it clear that it accommodates, concerns such as those of Gore in this case."

13. I accept and apply that approach. Clearly, that was a very different case on the facts, including the timing of the procedural steps involved. Nevertheless, the principle stated is valid, although it is important to note the emphasis not only on assisting commercial people in resolving their disputes but also doing so in a way which is consistent with the interests of others and with justice and fairness. Once again a critical matter is whether a fair trial is possible.

Urgency

14. I begin with the threshold question of urgency. The claimant's case is that it is principally the longstop date in the put and call option agreement which makes the resolution of the issues objectively urgent and important and that in this respect the present case can be contrasted with other cases in the court's list where usually an expedited trial is not applied for or required and the events which form the subject matter of the dispute lie in the past.

15. As I have explained, there is a question whether Ancala will be willing to wait longer than the longstop date of 21st October and if so for how long. Not surprisingly, it has not been prepared to give any assurance that it is prepared to wait longer or to commit itself either way. It remains the formal position, therefore, that it is entitled to terminate the agreement if the transaction has not been completed by 21st October and that there is a concern that it will do so unless there is an imminent end to the current impasse.

16. I accept in these circumstances that there is a degree of urgency about resolving the present dispute in advance of the longstop date or, at any rate, by around that time. I accept that there is a real risk that if the dispute is not resolved before that date or at least if an imminent resolution is not in sight, the transfer of the claimant's interest

will not proceed because Ancala will terminate the put and call option. It seems to me that it is only common sense that Ancala will wish to know within a relatively short timescale whether this transaction is going to proceed. If it is not, or if it is impossible to say whether it is, Ancala will not be prepared to wait indefinitely with its deposit tied up and the loss of opportunity to deploy its funds in other investments. In this regard I should note that if expedition is not ordered and this case is simply fixed for trial in the ordinary way it is likely that it would not come on to trial until October 2018 as that is when trials of four days in length, which is the parties' estimate, are currently being listed. It seems to me to be most unlikely that Ancala will be willing to wait that long. Accordingly, I accept that there is a risk that the transaction will fail if the dispute is not resolved before or very soon after the longstop date and that the risk is considerably higher than that if steps are not taken to resolve this dispute much sooner than if it is required to take its ordinary place in the queue.

17. The consequences of failure of the transaction would clearly be serious for the claimant who would if it is right in its position in this litigation have a claim in damages against the defendants but that would potentially be a complex matter to resolve and, in any event, would not be as good a situation as if the deal were able to proceed. It is also a factor that the United Kingdom Oil and Gas Authority is taking an interest in this transaction and has already on 3rd July expressed concern about the progress, or perhaps more accurately lack of progress, made to date on the partner approvals required by Apache and Ancala to complete the transaction. That it seems to me is also a factor relevant to the question of urgency.

18. Of course, even if expedition is ordered and if a judgment is given before the longstop date, that would not rule out the possibility of an appeal to the Court of Appeal with some continuing uncertainty as a result. Nevertheless, a decision of this court would give a solid basis on which the parties could make their decisions about how to act.

The state of the list

19. So far as the state of the court's list is concerned, there is currently no readily available free space for a trial in October. There are already a number of substantial trials due to start in October, as is usual at the beginning of the legal year, all of which have been fixed for a considerable time. If one of those trials was to be vacated at considerable expense to the parties in whatever case was selected, that would no doubt leave them with a real and justified sense of having been unfairly treated.

20. My understanding is that the latest position, as of a few minutes ago, is that there is a possibility that the present case could be accommodated for a four-day trial beginning on 16th October which may involve having to stand another case out of the list but that the state of the list is changing as the court is notified of settlements and, therefore, the position is somewhat uncertain. I must therefore approach this present application on the basis that if I accede to it, it may but will not necessarily be necessary to stand out another case. Nevertheless, if it is really necessary to do this in an appropriate case it has to be done, albeit reluctantly and as a last resort.

Procedural history

21. So far as the procedural history of this case is concerned the claimant has explained that it is the longstop date in the put and call option agreement which gives rise to the urgency. However, it has known about that date since the option agreement was concluded back in December 2016, but expedition is only sought now in August 2017. These proceedings were commenced in mid-May. Expedition was not sought at that stage as it could have been and should have been in accordance with the Guide, in part because the claimant hoped to resolve the matter by negotiation but also because it was unwilling to disclose what the longstop date was as it did not want the defendants to use this for negotiating leverage. As it happens, the claimant's solicitors appear to have revealed this information anyway in a letter dated 16th May 2017, although it may be that this disclosure was overlooked. To some extent, therefore, there was a deliberate, tactical decision by the claimant not to apply for expedition, although I accept also that there was a hope that matters could be resolved by agreement and that it was only after a lengthy meeting on 31st July that it became apparent that this hope was to be disappointed.

22. In these circumstances, I consider that the procedural history is a factor against expedition but I do not regard it as a decisive factor. To borrow the phrase used by Lord Neuberger in the *Gore* case at [37], in my judgment it would be "disproportionately penal" to refuse the application on this ground if it is otherwise appropriate to order expedition.

Prejudice/fair trial

23. Finally, I turn to the question of prejudice or, as it was put in *Gore* at [30], the good administration of justice. The question arises in particular whether a fair trial is possible in early October. To my mind this is the critical issue. If a fair trial is not possible it follows necessarily that an unfair trial should not be ordered. On the other hand, if a fair trial is possible and if there is a prospect that the court can accommodate it, the approach set out at [31] of the *Gore* case would strongly encourage the court to do so.

24. On the pleadings the dispute appears to involve a number of issues. First, it would be necessary to identify the assurances which the defendants have required. They have done this in paragraphs 19 and 20 of their Defence. Second, there may be an issue whether the defendants' requirements for assurances have to be made known within a reasonable time of them being told about the transfer or are otherwise subject to some time limit. I can see that there may be -- I only say may be -- scope for an argument that there is some such requirement in clause 15(c) either because it is implicit that a requirement must be made known within a reasonable time or perhaps because a requirement only made known at a late stage could not be regarded as reasonable. However, while there appear to be some arguments along these lines raised on the pleadings it is not apparent that they have much to do with the principal assurances sought by the defendants on which the dispute is likely to turn. Third, there may be issues as to whether or to what extent the assurances required by the defendants have in fact been given by the claimant, although that does not seem likely to be a matter of significant dispute.

25. Fourth, and this is likely to be the main issue, to the extent that assurances required by the defendants have not been provided there will be an issue whether the defendants' requirements are reasonable. The essential issue here is the defendants' demand for

either a parent company guarantee from Ancala of the obligations to be undertaken by SNSL or a letter of credit to guarantee those obligations or cash deposited in escrow, although Mr. Michael Fealy QC for the defendants indicated in argument today that despite the defendants' pleading, even a parent company guarantee from Ancala would not be acceptable. It seems to me that whether these critical assurances are reasonable requirements is a very limited point which would not require much in the way of evidence.

26. It is, I think, fair to say, meaning no disrespect, that the pleadings as they currently stand are not a model of clarity as to the parties' respective positions on these various issues. There is as yet, although Particulars of Claim, a Defence and a Reply have been served together with various requests for further information, no agreed case memorandum or list of issues. Various requests are outstanding, some of which seem more important than others. In addition, the defendants propose to serve a Rejoinder setting out their case on the reasonableness of the assurances which they have required. All this, it seems to me, tends to make the dispute appear more complex than it really is.

27. What is needed is a succinct and clear statement of each party's position on: (1) what assurances the defendants have required, this being essentially a matter for the defendants to define which they say they have done in paragraphs 19 and 20 of their Defence; (2) whether and if so why (or why not) each such requirement is reasonable; and (3) whether there is any other reason, such as delay, why the defendants should not be entitled to require such an assurance if it is reasonable to do so. Since the parties have been addressing their minds to precisely these questions both in the course of this litigation so far and in negotiations it should be possible for such a succinct and clear statement to be provided in very short order.

28. The process of disclosure has not yet taken place, although this is a case where disclosure is likely to be limited -- possibly to documents which each party relies on with scope for specific requests where necessary and possibly some disclosure going to delay if there are live issues about delay in relation to important assurances which have been required. There will, no doubt, need to be some factual witness evidence either by way of background or to explain as a matter of fact to the extent there is any dispute what assurances have been required on the one hand or provided on the other. It seems likely, however, that such evidence would be very limited. Similarly, expert evidence will be limited to an explanation of Ancala's financial model. It will not be for experts to opine on the reasonableness of any assurances required by the defendants, that being a matter for the court.

29. Bearing in mind what is involved in this case, I consider that a fair trial would be possible in October.

Decision

30. In view of the limited scope of what is in dispute as I have described it and the real urgency which I have found to exist and balancing all the considerations which I have mentioned, I am persuaded that this is a case for expedition. Accordingly, I fix the trial for 16th October with an estimate of four days. That does not mean that the parties will have the trial judge's answer before the longstop date which would be the Saturday following the beginning of the trial on the Monday but it gives a prospect

that they will have it in sufficient time afterwards for the deal to be saved, assuming that, as currently appears, Ancala would wish it to go ahead if that is possible. It may also be that the process of preparation for trial will itself enable the parties to take a view about what the outcome is likely to be.

31. Urgent directions will need to be given. I will hold a case management conference tomorrow. In the meanwhile, the parties should discuss what directions will need to be given at that CMC.
