

Apache Beryl Limited v Marathon Oil U.K. LLC, Centrica Resources Limited, JX Nippon Exploration and Production (U.K.) Limited, Taqa Bratani Limited, Taqa Bratani LNS Limited



No Substantial Judicial Treatment

Court

Queen's Bench Division (Commercial Court)

Judgment Date

29 September 2017

Case No: CL-2017-000297

High Court of Justice Business and Property Courts of England and Wales Queen's Bench Division Commercial Court

[2017] EWHC 2462 (Comm), 2017 WL 04359104

Before: Sir Jeremy Cooke

Date: Friday, 29th September 2017 Start Time: 12:06 Finish Time: 12:36

Representation

Mr. David Allen QC , Mr. Jason Robinson and Mr. Henry Moore (instructed by Clyde & Co. LLP) for the Claimant/ Respondent.

Mr. David Foxton QC and Mr. David Davies (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the Defendants/Applicants.

Approved Judgment

Sir Jeremy Cooke:

1. The Defendants apply to amend their defence in a number of respects with objection being made to that application by the Claimant. I need not set out the detailed timetable of the proceedings but draw attention simply to the fact that Males J on 16th August ordered an expedited hearing which is scheduled to take place on 16th October.

2. He made some detailed directions in relation to the serving of an Assurances Schedule which involved the parties setting out their cases in relation to what was seen as the primary dispute between the parties which centred on the terms of clause 15(c) of what is described as the "SAGE HOA". That provided:

"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."

3. In his short judgment Males J set out the essence of the parties' positions in relation to that and the central issue of the reasonableness of assurances that had been sought and were given. That is essentially what the expedited trial has been set to determine.

4. The effect of ordering expedition was that the Defendants had to change counsel who had previously been instructed and was not available for the date fixed. It is in consequence of that change of counsel – as has been frankly accepted by the Defendants – that amendments are now being applied for. Additional thought has been given and, of course, that often happens in a case where there is a change of counsel. The amendments are said to be amendments that go simply to questions of construction of the SAGE HOA and other documents relating to the operation of the infrastructure at the root of the dispute but with reference also to other documents that deal with wider issues relating to the oil fields and upstream and downstream processes. It is not necessary for me to go into detail on that for the moment for reasons that I will come to.

5. It is, however, said that there are not simply questions of construction which arise here as a result of the proposed amendments. The Claimant, in particular, says that it would have to investigate factual matters in order to determine whether or not there is an argument available to it of waiver, forbearance, acquiescence or estoppel. Moreover, it is specifically said by the Claimant, that given the expedited trial date, there is insufficient time available for matters properly to be explored and for the Claimant to grapple with the arguments that have been put forward in a manner which is consonant with the interests of justice. It is said that the preparation for trial, which has involved extensive working hours on the part of all those involved – solicitors, counsel and client – would be disrupted and that, in this context of an expedited trial, that is not fair and not right and should not be permitted.

6. I have been taken to the decision of Coulson J in *CIP Properties v. Galliford Try Infrastructure Limited and Others* [2015] EWHC 1345 (TCC) and in particular to the paragraphs which are commonly referred to in applications of this kind, namely paragraphs 14 through to 19. In paragraph 19 the Judge summarised what he considered to be the right approach to amendments having gone through the history of cases which dealt with the appropriate approach to amendments over the years. There is no doubt – and as is recognised, I think now, by all – that the approach set out in Cobbold is no longer the approach that the court should adopt. At paragraph 19 the Judge points out that:

"(a) The lateness by which an amendment is produced is a relative concept ... An amendment is late if it could have been advanced earlier" [which, in a sense, goes without saying] "or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps already taken in the litigation (such as disclosure or the provision of witness statements and expert's reports)" – both of which are said to be the case here so far as the Claimant is concerned.

7. Furthermore, it is said in paragraph 19 of the judgment that:

"(b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date" [that too is said to be the position here]. "... Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason ..."

8. Thirdly, the Judge drew attention to the importance of the reason for the lateness of the amendment being sought. Fourthly, questions of clarity are said to arise. Although Mr. Allen QC has said that he cannot see how any of these amendments make any sense, that is because of his construction of the contractual provisions and I do not at the end of the day take the view that there is any need for additional precision or clarity subject to one point about information to which I shall come.

9. Fifthly, the question of "prejudice to the resisting parties" is of importance but that too is a spectrum. At one end, there is the question of being 'mucked around'" and there is the question of "disruption and additional pressure on the lawyers in the run-up to trial ... and the duplication of costs and effort ... towards the other, with the final question of the need for an adjournment.

10. Lastly, "Prejudice to the amending party" is a factor but not one which weighs heavily with the court if the other factors are of significance because although a party would be unable to advance its amended case, if the application were refused, that may well simply have come about through its own fault.

11. Here, the question of adjournment really does not arise because neither party is seeking it. The date was set as an expedited date because of the longstop date (as it is referred to) in the agreement between the Claimant and Ancala, at which point there is an option to withdraw from the transaction on the part of Ancala. Although one suspects that both Ancala and the Claimant remain keen to persist with the deal and an extension is possible, that is not the basis upon which this court can proceed. As matters currently stand, there is an expedited trial because of the longstop date and the expedited trial date must be heard on the scheduled date.

12. At the end of the day, notwithstanding what Coulson J says and the factors which fall to be taken into account, the ultimate concern of this court is the interests of justice for both parties. The court would therefore wish the parties to be able to advance the cases that they wish to advance unless the factors which are set out in the judgment of Coulson J militate to the contrary.

13. It then becomes necessary to see just whether or not these matters which are raised by way of amendment can be dealt with and dealt with properly in the context of the trial date as currently fixed. Mr. Allen QC has drawn attention to the timetable as it has been set out, but the other factors to which Mr. Foxton QC draws attention are these. The order of Males J for expedition was made on 16th August. The draft amendments were first sent to the Claimant on 7th September, some three weeks ago. There remains just over 2 weeks from now until the trial date which gives rise to a period over all of some 38 days between the date of service of the draft amendments and the trial itself. The main point which weighs with me, in this context, is the nature of the amendments. Those amendments are indeed amendments which go essentially to questions of construction because there is little, if any, issue really between the parties as to the underlying facts which bear upon the issues of construction raised save for the question of estoppel to which I will come.

14. In Mr. Allen's skeleton argument there are extensive submissions as to the absence of any real prospects of success on any of the points which are now raised by the Defendants. Those are explored in some detail and I have heard from Mr. Foxton QC as to why he says there are realistic prospects of success on them all.

15. I have come to the conclusion that the arguments are not hopeless and that there are realistic prospects of success. In those circumstances, the less I say about the arguments themselves the better. They will be a matter for the trial judge. He will be better versed in all the intricacies of the contractual documents to form a view about the points that are made.

16. Given that the amendments raise points of construction, I would see no difficulty in the parties being ready for trial to deal with those arguments. They may be complicated arguments because a number of different documents have to be looked at, but they are not arguments which competent counsel, familiar with Commercial matters, and in particular with the North Sea Oil and Gas Industry, would not be able to deal with, master and present contrary arguments within, in my judgment, a matter of 24 hours or thereabouts. Since these points were put forward in amendments on 7th September, I can see no difficulty about those matters being dealt with at a trial on the 16th October.

17. The question then becomes one which turns on the issue of fact, as it is put forward, by the Claimant. Is there an issue of fact here which requires a re-visiting of work already done, in the sense of going through documents that have already been looked at for one purpose and now have to be looked for another; and is there a need to interview witnesses, one potential witness being apparently unavailable during the course of next week, with the result that the necessary work cannot be done, or cannot be done without undue disruption of other work for the trial, so as to make it unfair on the Claimant to have to deal with the amendments and be ready for trial on October 16.

18. For the purpose of examining that issue, it is necessary to look at the pleadings as they currently stand. In the existing defence at paragraph 8(c) the Defendants take the point that the e-mail of 5th December 2016 was not a notice of assignment under clause 15(a) of the SAGE HOA. Instead, it is said, it was preliminary to any such assignment and sought the Defendants comments on the draft deed of assignment that was attached. At paragraph 23 the Defendants pleaded that they were not in breach of contract because the Claimant had not served a notice of assignment under clause 15(a). The way in which that plea was understood appears from the terms of paragraph 5(d) of the reply which reads as follows:

"Further or alternatively, both ABIL" [that is the Claimant] "and the Defendants all conducted themselves after 5th December 2016" [that is the date of the e-mail] "on the basis that a valid notice for the purposes of clauses 15(a) through (c) had been given by the same e-mail. No point was taken by the Defendants at any time thereafter that there was anything defective in the notice or that a further or subsequent notice was required and ABIL has relied upon this state of affairs. In the premises, and if contrary to the above, the e-mail dated 5th December 2016 was not a sufficient notice for the purpose of clause 15(a) of the SAGE HOA, the Defendants have waived their right to insist upon the same/or are estopped from doing so now".

19. It can be seen from the way in which that subparagraph was framed that the Claimant understood that what was being said by the Defendants was that no valid notice had been served on 5th December 2016 for the purposes of clauses 15(a) through to (c). It is also clear from the way in which the subparagraph is phrased that the argument about waiver and estoppel

turns on the alleged fact that no point was taken by the Defendants at any time after 5th December that there was "anything defective in the notice or that a further or subsequent notice was required".

20. The material which therefore goes to establish the estoppel that is already being put forward would be good in respect of any argument that notice was defective, for whatever reason. That appears to be me to be of great significance in the context of the new amendments to the pleadings for which permission is sought.

21. I turn then to those new pleas. At paragraphs 6 and 7(A) there are new pleas setting out specific terms of the agreements. They do not put forward a new case but are a preliminary to the new case that is put at paragraph 8A. They stand or fall, therefore, in that context. The substance of the point made at paragraph 8A is expressed in the opening lines:

"Further or alternatively, the Claimant's purported notice under clause 15 of the SAGE HOA as put forward on 5th December 2016 and as subsequently explained by the Claimant, was not a valid notice under clause 15 of the SAGE HOA."

Thereafter, there appear particulars as to why it is said as a matter of argument that the notice was not a valid notice, turning on the various points of construction that have been the substance of submissions made to me today and in the skeleton arguments.

22. It is the question of the validity of the notice which lies at the centre of the new amendments and the estoppel argument (as I have already said) goes simply to that question of validity on the basis that it was treated as being valid throughout the period after 5th December. The particular reasons that are now being advanced for the notice being defective, which are additional to those which have been put forward before in the existing defence, add nothing to the investigation and evidence that would be acquired from the Claimant in order to deal with the point.

23. In those circumstances, I can see no reason why that Claimant and Defendants cannot be ready for trial on the expedited date and cannot be ready to present their cases properly and why they would not be in a position to do themselves justice in doing so. It will, undoubtedly be the case that some additional work will be required because we are talking about points of construction and estoppel, but it is really not a huge amount of work as the issues are mostly issues of law. I am in no doubt that the Claimant and its advisers feel under some pressure, but I am afraid that this is what happens when there is an expedited trial on a matter of this size. There have, however, been many cases where points of construction have been taken at the last moment and in some cases even during the course of oral argument where parties have been taken by surprise, which is unfortunate. Here, however, there is no question of surprise because, since September, the Claimant has been well aware of what is being put forward and has been able, in an extensive skeleton argument, to put forward the reasons why it is said that the arguments are lacking in substance.

24. In the context, therefore, of all the factors which are set out in the judgment of Coulson J, I see no basis upon which it would be proper not to allow the amendments. The only just solution is that the Defendants be allowed to make the amendments that they seek with one particular point on particularisation that I have already discussed with counsel and that they be able to advance the case they wish to advance, whether the pleas at the end of the day are seen to be good or bad, as a matter of construction.

25. They will, of course, have to bear the costs of and occasioned by the amendments in the ordinary way. I have heard no argument about the costs otherwise and, of course, will wait until I do hear such argument before making any order beyond that.

26. The one point which arises by way of particularity is in paragraph 8A(b) where the plea is that:

"... the Claimant failed to provide the information referred to in clause 15(d) of the SAGE HOA and Schedule 3 of the Master Deed ..."

27. In reality that is understood as referring specifically to the wording of clause 15(d) but it behoves the Defendants to spell that out by way of particularisation to that paragraph. I require the Defendants to do that as part of the permission for leave to amend.

28. I think there is nothing else I need to say at this stage. There remains the question of specific disclosure to deal with.

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