Case No: CL-2018-000246

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

[2018] EWHC 3943 (Comm)

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

Date: 18th September 2018

Before :

HHJ Waksman QC

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Between :

British Gas Trading Limited	**Claimant**
- and -	
(1) Shell U.K. Limited and (2) Esso Exploration and Production UK Limited	**Defendant**

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Michael Bools QC (instructed by **Herbert Smith Freehills**) for the **Claimant**
John McCaughran QC, Joyce Arnold (instructed by **Clifford Chance LLP**) for the **1st Defendant**
Laurence Rabinowitz QC, Douglas Paine (instructed by **Hogan Lovells International LLP**) for the **2nd Defendant**

Hearing dates: 18th September 2018

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APPROVED JUDGMENT

HHJ WAKSMAN QC Tuesday 18th September 2018
(12.17 pm)

1. I will just give a short judgment. I have come to a clear view about this. All I have to decide today is whether there should be any preliminary issue trial in this case.
2. There are four putative preliminary issues and the parties are agreed between themselves that issues 1 and 3 are properly the subject for a preliminary issue trial. I should add that this is in a context where no party is suggesting that in relation to any preliminary issue there needs to be new evidence tendered other than that which is agreed between the parties and is already set out as agreed in the list of issues.
3. Equally it is not suggested that there will be the need for any expert evidence. We haven't discussed disclosure but all parties are effectively agreed that any preliminary issue can be decided essentially by reference to all the documents that comprise the contractual matrices in this case.
4. There are two strands to the claimant's case, although they are both said to give rise to the same loss. The claimant's case first of all is that a minimum delivery of a quantity of gas from the defendant sellers which it was obliged to take, or in the alternative pay for each day in relation to each year, could only be set by reference to such gas as the sellers were physically able to provide from the existing reservoir stocks. If that is right then, as appears to be common ground, the sellers' reservoir stocks did not make up sufficient quantities of gas to justify the delivery quantities set.
5. However, the sellers' case was that in setting the delivery quantity it could look also to further quantities of gas to which they were entitled under a separate agreement, known as the STACA agreement, which effectively provided for the repayment or the restoration to the sellers of gas which it had lent third parties and which had originated in the reservoir and the defendants

contend that if that is taken into account then the delivery quantities were set properly according to the contract.

6. That forms issue 3. If the sellers are correct in their interpretation of 6.4 it is the end of the 6.4 claim and I agree with the parties that it is fit for trial by preliminary issue.

7. There is a separate strand to the claimant's case which is that irrespective of the proper interpretation of 6.4, the 26(3) clause comes into the picture. That is because this is a clause which gives the sellers and only the sellers the right to reduce downwards the total reservoir quantity which is a separate calculation for each year although that figure also drives the delivery quantity figures.

8. The contractual process is that if the sellers issue a variation notice to reduce the TRDQ then the claimant purchasers can agree it, in which case there is no difficulty. If they do not agree it, it all goes to expert determination.

9. The claimant argues that this is a term which gives rise to an implied duty not to operate it capriciously, arbitrarily or irrationally or otherwise than in good faith. The claimant's contention is that there was a breach of this term because the defendants should, in proper exercise of this power, have determined that the TRDQ should be confined to what could be physically produced from the reservoirs at the relevant time and, says the claimant, that is so even if it is wrong on its construction of clause 6.4.

10. The consequence, says the claimant, is that if the defendants had complied with that term they could and would have ended up with a lower TRDQ and the consequence of that would have been lower minimum delivery quantities. Just as the claimant say that would be the consequence had they complied with clause 6.4. This case is somewhat unusual because the complaint is not that insufficient quantities were being offered, but rather that the claimant was obliged, because of the take or pay provision, to pay for the gas at a higher rate than would have been the case if their obligation to take the gas from the defendants was for a lower quantity so

that they could and they say they would have gone into the market and bought the gas more cheaply.

11. This case, as I expressed in argument, is effectively an overcharge case, and damages are claimed - and can only be claimed - by reference to the price differential. The defendants for their part deny that clause 26(3) is the kind of term which gives rise to these implied duties. If they are right about that, that is the end of the claimant's case on clause 26(3). Both sides are agreed that that is a highly dispositive issue and therefore I agree that issue 1 should form part of a preliminary issue trial.
12. However, the parties disagree about whether there should be two further preliminary issues numbered 2 and 4. The claimant says no, while the defendants say yes.
13. It is convenient for me to deal with preliminary issue 4 first. The claimant's argument on loss is set out paragraph 26 of the particulars of claim; this deals with the losses said to have arisen by virtue of breach of clause 6.4 (the minimum delivery quantity clause). The argument (and I express no view about it at this stage) is this: had there not been a breach of the contract as a whole in relation to their failure to maintain physical capacity, the result ultimately would have been that the claimants would not have been required to take so much gas at the relevant price from the relevant defendants, ergo their loss is the price differential.
14. That is because, it is said, the defendants could and would have been able to issue variation notices which would have avoided them being in breach of clause 6.4 at all and that is the relevant counterfactual for the purpose of considering damages.
15. The claimant say that is misconceived. The correct counterfactual is to ask what the position would have been had the defendants not been in breach of the obligation in question, which is clause 6.4, the allegation being that they did not have physical capacity for 108 terajoules per day. It is not correct, as a matter of law, to postulate how the defendants might have acted with

regard to other provisions in the contract so as to avoid being under that obligation in the first place.

16. Both sides have given me a flavour of what the argument would be and both sides have done so in short order.

17. I can see no reason why that should not be the subject of a preliminary issue. It is perfectly true that somewhat different considerations might apply in relation to the claim for breach of the implied term, because there the breach alleged is the failure to issue variation notices and if that breach did not occur and the variation notices were issued, then there is a direct line to the losses of the claimant. But it seems to me that this issue is sufficiently legal and sufficiently dispositive to sensibly form part of a preliminary issues trial; this is because what it would mean is that on the defendants' case even if clause 6.4 did not allow them to take into account the gas from the other sources, it doesn't matter because the claim for loss and damage in respect of that head of breach is misconceived. That seems to me to be an important and closely defined point and accordingly subject to any points of drafting I will order issue 4 to go forward.

18. Issue 2 is in my judgment rather more nuanced. The position here is this: the defendants in relation to the breach of the implied term point say that in deciding whether or not to issue variation notices and they decided not to, they were entitled to and did take into account the availability of gas from other sources apart from the physical capacity in the reservoir. There is an issue between the parties at the moment as to whether that was the decision-making process, but the defendants say there is a prior point which is the question of entitlement to take that into account at all.

19. In the reply the claimant say they were not entitled to take it into account. The defendants' point is that that neatly forms the final of the four issues which is expressed as issue 2. If there was an implied term, were the sellers entitled to take into account any positive outstanding amount that

may be owed to the sole pit user group under STACA when considering whether or not to exercise their rights under 6.3.

20. In the course of argument Mr McCaughran agreed that that could be quite a defined issue, in other words was it really no more than saying this: if they win under clause 6.3 so that the minimum delivery quantity had to take into account the other gas, it must follow in relation to any argument under the implied term irresistibly that they were entitled to take it into account for that purpose.

21. When I asked Mr Bools whether he would accept that position he said not necessarily; in other words, even if he lost under clause 6.3 there would still be an argument that they should not be entitled to take that point into account so far as the implied term claim is concerned.

22. I am less sure about the real dispositive nature of this issue. The dispositive nature of the issues really being at the heart of everyone's submissions today, which is why I'm not reciting at length the well-known guidance on preliminary issues.

23. The question of what can be taken into account in relation to the decision-making process is in my judgment quite closely tied to an exercise which is going to have to be done at trial anyway unless the implied term is knocked out, which is to say what was the decision-making process and indeed the defendants be content that even if they were in some way not entitled to take the other gas into account by reference to what clause 6.4 said, there was an argument that they nonetheless were not in breach because if all that meant was that they construed the contract wrongly in good faith, that would allow them to get off the hook.

24. I am persuaded that the clause 2 issue is sufficiently bound up with the other issues relating to the question of the implied term and the variation notices, even if on one interpretation a bit of it could be freestanding, that it should be left to the trial.

25. Accordingly in my judgment the appropriate preliminary issues are issue numbers 1, 3 and 4.

26. And now I will hear counsel on the consequences of that so far as today is concerned.