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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF
ENGLAND & WALES
COMMERCIAL COURT (QBD)
[2021] EWHC 1470 (Comm)



No. CL-2021-000247

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 10 May 2021

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

(In Private)

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN INTENDED ARBITRATION

B E T W E E N

- (1) AT
- (2) DV
- (3) SD
- (4) HG

Claimants

- and -

OIL & GAS AUTHORITY

Defendant

MR A. MACLEAN QC and MR M. VINALL (instructed by [details redacted by agreement between the parties]) appeared on behalf of the Claimant.

MISS K. GALLAFENT QC and MISS J. COLLIER (instructed by the Oil and Gas Authority) appeared on behalf of the Defendant.

APPROVED REDACTED JUDGMENT

By agreement between the parties, this judgment has been redacted and some details abridged for publication. Any application for further publication must be made with notice to the parties.

Where passages in this judgment have been redacted or removed and reproduced in a confidential schedule, they have been replaced with text in square brackets indicating that material has been redacted by agreement between the parties. Where words have been replaced, or additional words have been inserted, to assist clarity in view of those redactions, that additional or replacement wording is shown underlined.

JUDGE PELLING:

- 1 This is a hearing of an application by the claimants under s.44(3) of the Arbitration Act 1996 for an order restraining the defendant (hereafter “OGA”) from circulating a redacted version of a Notice [details removed and reproduced in a confidential schedule by agreement between the parties].
- 2 The OGA opposes this application, both on the basis that the Arbitration Agreement on which the claimants rely does not apply to the dispute the subject of these proceedings and because, in all the circumstances, the balance of convenience does not lead to the conclusion that the injunction sought should be granted.
- 3 It is common ground that, if the Arbitration Agreement does not apply, then the only remedy available is judicial review. Accordingly, if I conclude the Arbitration Agreement does not apply then (a) the claimants offer an undertaking to commence judicial review proceedings in the Administrative Court either forthwith or within a very short fixed future period of time and (b) both parties accept that it is appropriate to decide this application as if it were a claim for interim relief in a judicial review claim.
- 4 The Licences are in terms that are required to be adopted by operation of either the Petroleum Production Regulations 1966 or the later Petroleum Licensing (Production) (Seaward Areas) Regulations 2008, in each case made pursuant to the Petroleum Act 1998 or its predecessor primary legislation.
- 5 It is common ground that I should determine this application on the basis that each of the relevant Licences is subject to the model clauses set out in Schedule 1 of the 2008 Regulations.

6 [Paragraph 6 of the judgment has been removed and reproduced in a confidential schedule by agreement between the parties.]

7 [Paragraph 7 of the judgment has been removed and reproduced in a confidential schedule by agreement between the parties.]

8 [Paragraph 8 of the judgment has been removed and reproduced in a confidential schedule by agreement between the parties.]

9 [Paragraph 9 of the judgment has been removed and reproduced in a confidential schedule by agreement between the parties.]

10 [Sentence removed and reproduced in a confidential schedule by agreement between the parties] As I have said, the OGA served its [Notice] referred to earlier. It is neither necessary nor desirable that I set out all the detail contained in that Notice, not least because large parts of the contents will be redacted if the OGA proceeds, as it wishes to do so, by communicating the contents of the Notice to [details removed and reproduced in a confidential schedule by agreement between the parties] supposedly interested third parties. Inclusion of the material may also be relevant to whether and, if so, in what terms this judgment should be published.

11 The [Notice] is lengthy, but for present purposes it is paras.1 to 4 that are material. They are in these terms:

“INTRODUCTION

1. [This paragraph has been removed and reproduced in a confidential schedule by agreement between the parties.]

2. The OGA considers it appropriate, before serving the notice, to give you the **opportunity to make any representations** that you wish on the content, and/or propose any commitments or other mitigations that may address the OGA’s concerns, as expressed herein.

3. **Any such representations and/or proposals and the like shall be sent to the OGA by [date redacted by agreement between the parties]**

4. For the avoidance of doubt, the OGA is under no legal obligation to provide you with an opportunity to make representations on whether the OGA should (a) serve such a notice or (b) send a copy of this [Notice] to [redacted by agreement between the parties], but considers that it is appropriate to do so in this particular case ...”

12 "The stimulus for the present proceedings comes primarily from the covering letter from the OGA under which it delivered the [Notice] to the claimants. That letter is in the following terms:

[details removed and reproduced in a confidential schedule by agreement between the parties]

The OGA considers it appropriate to give you the opportunity to make any representations that you wish, and/or to propose any commitments or other mitigations that may address the OGA's concerns. For the avoidance of doubt, the OGA does not consider that it is under any legal duty to do this, but considers it appropriate to do so in this case. Any such representations and/or proposals should be sent to the OGA by [date redacted by agreement between the parties]"

[details removed and reproduced in a confidential schedule by agreement between the parties]

- 13 [Paragraph 13 of the judgment has been removed and reproduced in a confidential schedule by agreement between the parties.]
- 14 This leads the claimants to submit that the OGA's proposed course of action is (a) unlawful in the public law sense and/or (b) it is in breach of the terms to be implied into the Licences and/or (c) is irrational in the public law sense.
- 15 The first issue that I have to decide is whether this dispute is one to which the Arbitration Agreement on which the claimants rely applies at all. This, in truth, gives rise to two disputes, being (a) whether, as the claimants maintain, the applicability of the Arbitration Agreement is to be tested by reference to the first and threshold *American Cyanamid* test - that is whether there is a serious issue to be tried as to whether the dispute comes within the scope of the Arbitration Agreement - or, as the defendants maintain, it is to be an issue for the court to resolve as a matter of construction and (b) whether applying whatever test applies, the dispute is one to which the Arbitration Agreement applies. It is plain that this issue has to be addressed both because of the way the parties have argued this application and because s.44(1) of the Arbitration Act 1996, is clear that the powers conferred by it are "... *for the purpose of ... arbitral proceedings* ..." If applying whatever test applies, the dispute is not one to which the Arbitration Agreement applies then the court does not have jurisdiction to make an order under that section.
- 16 No relevant authorities were cited by either party that addressed the first of these issues. This was unfortunate. The first of these issues consists, potentially, of two sub issues arise being (a) whether the Arbitration Agreement relied on has been concluded at all and (b) whether the Arbitration Agreement that has been concluded applies to the particular dispute which, in turn, will depend upon its true construction. The first of these issues does not arise on the facts of this case and I prefer to express no concluded view as to the test that would have to be applied if such a dispute arose in a context similar to that that arises in this case.

- 17 The second of the two issues that I have identified does, however, arise. As I have said, it is an issue that goes to the jurisdiction of the court to make the orders sought under the Arbitration Act 1996. As such, it is a question, in my judgment, that the court will normally decide rather than treating it as dependent on whether there is a serious issue to be tried or some similar test - see in this regard *EF Hutton & Co (London) Ltd v Mofarri*. [1989] 1WLR 488 at 495 and *Chellaram v. Chellaram (No. 2)* [2002] 3 AER 17 at para.136 applied in *Altimo Holdings Limited v. Kyrgyz Mobil Tel Limited* [2011] UK PC 7; [2012] 1WLR 1804 at para.81 which, in turn, was applied in *Flota Petrolera v. Petróleos de Venezuela SA* [2017] EWHC at 3630 (Comm.) at para.14. Whilst the context in which these principles were applied in the cases that I have referred to is different from that which arises in this case, the rationale that underlines the approach adopted in those cases applies with equal force to the issue that I have to decide in this case.
- 18 It was submitted on behalf of the claimants that I ought not to proceed in this manner because, ultimately, the question whether an arbitral tribunal has jurisdiction to determine a particular dispute is one for the arbitral tribunal itself to decide. In my judgment, that is not a correct approach to adopt in the circumstances of an application such as this. In my judgment, this case or the issues that arise on this case are precisely similar to the issues which would arise on an application for a stay under s.9 of the 1996 Act and, in that context, it has been held, consistently, that a court has no jurisdiction to order a stay unless it is satisfied that (a) there is a concluded arbitration agreement and (b) that the dispute was a matter which, , was to be referred to arbitration under the arbitration clause relied on by the party applying for a stay - (see most recently *Albon v. Naza Motor Trading* [2007] EWHC 665 (Ch).
- 19 In this case, I am satisfied that the approach I ought to adopt is that identified in the authorities I have referred to above, because the OGA maintains that, on proper construction of the Licence, applying well-known principles of construction that apply to the construction of all documents in English law, the effect of the Arbitration Agreement is to exclude expressly the dispute that arises in this case from the scope of the arbitration provision the claimants rely on. It is not suggested by either party that there is any factual context evidence that is material to the construction issue that arises, much less such that is disputed. The issue of construction is a question of law, neither party suggests that all the relevant material is not before the court, neither party suggests that I should look at any material outside the clauses to which the parties have referred for the purposes of construing the arbitration provision within the licences and no disputed issues of fact arise, in these circumstances, that are material to the construction issue that arises.
- 20 I now turn to the construction issue. The Arbitration Agreement is contained in clause 43 of the model clauses and is in the following terms,
- “43(1) If at any time any dispute, difference or question shall arise between the Minister or the OGA and the Licensee as to any matter arising under or by virtue of this licence or as to their respective rights and liabilities in respect thereof then the same shall, except where it is expressly provided by this licence that the matter or thing to which the same relates is to be determined, decided,

directed, approved or consented to by the Minister or the OGA, be referred to arbitration as provided by the following paragraphs ...”

Clauses 43(2) to (5) are concerned with the appointment of arbitrators in default of agreement. Neither party submits that they are material to the construction issue or, indeed, any other issue that arises on this application. I, therefore, leave those to one side.

- 21 The OGA submits that (a) the dispute between the parties is not one arising under or by virtue of the Licences or is as to the respective rights and liabilities of the parties thereunder or (b) the dispute is one that falls within the express exception contained within clause 43(1).
- 22 In my judgment, the OGA is wrong as to the first of these points, but correct in relation to the second of these issues as a matter of construction. My reasons for reaching that conclusion are as follows.
- 23 Turning to the first of these submissions, it is plain that the language used before the proviso in clause 43(1) are wide words. In my judgment, the dispute between the parties is clearly a “... *dispute ... between ... the OGA and the Licensor ...*” and, equally, that dispute is “... *as to any matter arising ... by virtue of this Licence or as to their respective rights ... in respect thereof ...*” But for the proviso, there is no basis for submitting that, because the dispute concerns essentially public law principles, that it does not fall within the scope of the language used. There is no provision within either the Arbitration Agreement or any other provision within the Licence that excludes disputes other than the express proviso to which I turn in a moment. Thus, unless the dispute comes within the scope of the proviso to clause 43(1), it is within the scope of the Arbitration Agreement.
- 24 Whilst it may be true to say that the remedies available to the Administrative Court would not be available to the arbitrator, I regard that as immaterial, because there would be nothing to preclude an arbitrator formulating his or her award in the form of a declaration or by a prohibitory order precluding the OGA from proceeding as it intends to do. I do not accept that, because the procedure that the OGA is proposing to adopt is not one expressly permitted by the Licence, a dispute concerning it is not, in principle, amenable to arbitration. The process that the OGA has adopted is incidental or ancillary to the exercise of its powers [details removed and reproduced in a confidential schedule by agreement between the parties] and as such the dispute as to its fairness is one that arises either by virtue of the Licence or as to OGA’s rights in respect of it.
- 25 I now turn to the proviso. The proviso applies “... *where it is expressly provided by the Licence that the matter or thing to which the same relates is to be ... decided ... by the ... OGA ...*” The words “... *matter or thing ...*” refer back to “... *any matter arising ... by virtue of this Licence or as to their respective rights and liabilities ...*” and focuses attention on the subject matter of the dispute. In my judgment, it is plain that the decision [details removed and reproduced in a confidential schedule by agreement between the parties] is a “... *matter or thing ...*” to be decided by the OGA because the power [details removed and reproduced in a confidential schedule by agreement

between the parties] is expressly conferred on the OGA by [the Licence], as I have explained.

- 26 It was submitted on behalf of the OGA that there was a distinction to be drawn between the operative provisions within the Licence and matters that raise public policy issues. There is no justification for that distinction in the language used, either in the Licence model terms, generally, or in the Arbitration Agreement, in particular. The sole distinction is between disputes falling within the general language of clause 43(1) that relate to matters to be decided by either the Minister or the OGA, expressly, and those that do not. As was submitted on behalf of the claimants, there are provisions within the Licence that are operative in nature but are expressly provided to be decided by either the Minister or the OGA. The distinction suggested by the OGA would make no sense in such circumstances. However, the distinction that I have referred to makes plain sense, because, generally, decisions by Ministers and a public authority, such as the OGA, will be capable of challenge only on public law grounds, which most naturally belong in and should be determined in the context of judicial review proceedings before the Administrative Court, whereas, for example, a dispute concerning the territory covered by a particular licence or any other dispute that might arise by virtue of the Licence, but which does not concern a matter that is expressly provided to be determined, decided, directed, approved or consented to by either a Minister or the OGA does not.
- 27 It was submitted, on behalf of the claimants, that this could not apply to a decision to [details removed and reproduced in a confidential schedule by agreement between the parties], because there is no provision within the Licence that expressly empowers the OGA to adopt such a course. In my judgment, that submission is mistaken. As I have said, the words “... *matter or thing* ...” in the proviso refer back to the subject matter of the dispute referred to in the first part of clause 43(1). The proviso applies to any such dispute if it “... *relates* ...” to a matter or a thing to be determined by the OGA. The word “*relates*” in this context is very wide in its scope and effect and in the context of this dispute plainly encompasses, not merely any decision [to exercise its power], but also to decisions by the OGA as to how to exercise that discretion, including its decision making in relation to consultations prior to exercising that power. There would be no logic at all in construing the clause so as to require a dispute concerning how the OGA has decided to approach the exercise of its power to arbitration whilst at the same time leaving the decision [to exercise the power] outside the scope of the Arbitration Agreement. All such decisions are ones that, by their nature, are more appropriate for the Administrative Court and judicial review than for determination by an arbitrator, both because of the need for public scrutiny and also because of the need to ensure consistency of decision making by public bodies.
- 28 In those circumstances, if and to the extent that the application is made under s.44 of the 1996 Act, it fails because the dispute is not one to which the Arbitration Agreement applies.
- 29 It is necessary now to consider whether and if so what relief ought to be granted on the basis that (a) the claimants undertake to issue judicial review proceedings within a fixed short future period from today and (b) the application is treated as if it were a claim for interim relief in judicial review proceedings.

- 30 I have asked myself whether I should make any order at all on this basis, notwithstanding the concession by both parties that I can, in principle, approach the application in this way. The rationale for requiring challenges to decisions made by public bodies to be commenced in the Administrative Court is because of the safeguard provided to such authorities by the procedure that applies in judicial review proceedings. These include the requirement to commence proceedings promptly and to obtain permission to continue the proceedings once they have been issued. As to these considerations, (a) the OGA does not argue that I should not proceed on the alternative basis, (b) it is not suggested by the OGA that if proceedings were to be commenced in the Administrative Court within a short future time of today, they would not have been commenced promptly [details redacted by agreement between the parties]. Finally, it is not submitted by the OGA that I ought not to entertain the application because permission is likely to be refused to continue any judicial review proceedings under CPR r.54.4.
- 31 In judicial review proceedings, the question whether an interim injunction should be granted is tested generally by applying a modified version of the test set out in *American Cyanamid v. Ethicon Ltd* [1975] AC 396 - see in this regard *R (on the application of X) v. Ofsted* [2020] EWCA Civ. 434; [2020] EMLR 22 per Lindblom LJ at para.63. This modified test starts by asking, first, whether there is a serious issue to be tried and then whether the balance of convenience requires an order to be made in the terms sought. In the course of the hearing, I asked Miss Gallafent QC, who appears on behalf of the OGA, whether she contended that there was not a serious issue to be tried. She confirmed that she was not so submitting. In those circumstances, the only issue becomes whether the balance of convenience requires an order to be made. This concession of itself is a further reason for me to proceed on the basis accepted by both parties namely that I should treat this application as an application for an interim injunction in judicial review proceedings.
- 32 In considering the balance of convenience test, in the judicial review context, it itself is modified, because it must be applied taking account of the interests of the public generally - see in that regard *R v. Secretary of State for Transport (ex parte Factortame) (No. 2)*, [1991] 1 AC 603 per Lord Goff at 673. In the end, the question is a matter for discretion to be exercised by asking what course will minimise the risk of an unjust result - see *R (on the application of X) v. Ofsted*, *ibid.* per Lindblom LJ at para.65. I do not accept, and in the end Miss Gallafent did not maintain, the position that the claimants' application was an attempt to restrain the publication of a final report. The particular principles that apply to such attempts have no application in the circumstances of this case notwithstanding a suggestion to contrary effect in the evidence filed on behalf of the OGA.
- 33 I turn, therefore, to the balance of convenience, as it is to be understood in the public law context, as it applies in the circumstances of this case.
- 34 I am satisfied that I ought to restrain the OGA from communicating the [details removed and reproduced in a confidential schedule by agreement between the parties] [Notice] until after determination of the claimants' application for permission to

continue the judicial review proceedings it undertakes to issue. My reasons for reaching that conclusion are as follows.

- 35 I accept that there is a risk that the claimants will suffer serious and irreparable harm if the [Notice] is published to the third parties identified by the OGA in the form that the OGA presently intend to publish it. The [Notice] is not a neutrally-phrased invitation for submissions from interested parties as to whether the OGA should exercise its powers [details removed and reproduced in a confidential schedule by agreement between the parties]. The OGA propose to send to the identified third parties [details removed and reproduced in a confidential schedule by agreement between the parties] a copy of the redacted [Notice]. [Details removed and reproduced in a confidential schedule by agreement between the parties.] In my judgment, it is entirely unreal to suppose that the recipients will not act in their own commercial best interests on the basis of this information. [Details removed and reproduced in a confidential schedule by agreement between the parties]. These risks are summarised in the evidence in support of the application at para.41 and following. Even if those receiving the copies of the redacted notice did not further disseminate the material and, in my view, there is a significant risk that the information will leak out, significant commercial damage will, nevertheless, result. Why this matters is because the original ostensible purpose of issuing the [Notice] was to enable the claimants to respond to it and, if they could, persuade the OGA to withdraw it or modify it or modify the scope of it. It is, at least arguably an unfair consultation process if the mechanisms adopted will cause avoidable commercial damage to the claimants before they have had the opportunity to address these issues within the timescale that the OGA itself has set unilaterally.
- 36 As things stand, the OGA has invited the claimants to make representations [details removed and reproduced in a confidential schedule by agreement between the parties]. The claimants maintain that the OGA's decision making is fundamentally flawed and is based on erroneous conclusions, in turn based on out-of-date and inaccurate information, and they wish to attempt to persuade the OGA to change its mind. While it is arguable that, if the OGA considers it appropriate to consult third parties about the position, the information ought to be available to be considered when the OGA meets with the claimants [details removed and reproduced in a confidential schedule by agreement between the parties], it is arguably not a fair process if the third party information has been gathered in a way that suggests that the OGA has reached even a provisional conclusion on something so fundamental and serious [details removed and reproduced in a confidential schedule by agreement between the parties]. Even if the OGA considered it appropriate to consult the third parties on the issue before the final meeting it is to hold with the claimants, manifestly it could have done so in an objectively-neutral manner rather than circulating its provisional decision. In the end, OGA's basis for resisting the application is that it if granted it may result in some delay. That is not a basis for concluding that what is arguably not a fair consultative process and one which could inflict avoidable but very severe and irremediable financial loss on the claimant, should, nevertheless, be permitted.
- 37 [Paragraph 37 of the judgment has been removed and reproduced in a confidential schedule by agreement between the parties.]
- 38 Much if not all of the delay that the OGA maintains will be caused could have been avoided if it had simply invited submissions from interested third parties in an

objectively-neutral form, then formulated its provisional decision, which would then be supplied to the claimants, and then invite the claimants to submit any representations that it chose to submit and attend a meeting and make further representations, if so advised, with a view to seeking to persuade the OGA to adopt a different course; at which point all the findings could have been discussed without the prejudice that, at least arguably, will result from the process which it is proposed should be adopted.

- 39 Balancing as best I can, on the material available, the harm to the public posed by the fears expressed about the conduct of the claimants, on the one hand, and the harm that will be inflicted on the claimants, if the OGA proceeds as it proposes to, lead me to conclude that the balance comes down firmly in favour of granting the injunction sought applying the *Factortame* test I identified earlier. However, provisionally, I would expect an undertaking from the claimants to issue judicial review proceedings no later than three days from today's date and ideally earlier than that. I would expect the claimants also to undertake to invite the Administrative Court to determine the permission application on an expedited basis and the order I make will be conditional on the usual cross-undertaking in damages from the claimants and, in addition, there will be liberty to the OGA to apply to vary or discharge the order on short notice should there be a change of circumstance.