Case No: CL-2019-000471

Neutral Citation Number: [2019] EWHC 2382 (Comm)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/08/2019

Before :

THE HONOURABLE MRS JUSTICE CARR DBE

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Between :

TAQA BRATANI LIMITED **TAQA BRATANI LNS LIMITED** **JX NIPPON EXPLORATION & PRODUCTION (UK) LIMITED** **SPIRIT ENERGY RESOURCES LIMITED**	**Claimants**
- and –	
ROCKROSE ULCS8 LLC	**Defendant**

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Mr David Foxton QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) appeared on behalf of the **Claimants**.
Mr Sa'ad Hussain QC and **Mr Richard Eschwege** (instructed by **Pinsent Masons LLP**) appeared on behalf of the **Defendant**.

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JUDGMENT

MRS JUSTICE CARR:

Introduction

1. This is an application by the Claimants (together and for ease of reference only "TAQA") for the expedited determination of their claim for declaratory relief against the Defendant ("RR UK") and for the expedited determination of a preliminary issue within the expedited trial timetable. The application has been deemed suitable for vacation business.

2. All parties ask the court to resolve this dispute on an expedited timetable. However, RR UK seeks an expedited timetable which would result in the determination of the dispute on the basis of disclosure, witness statements and, if the court were to permit, expert reports on "oil and gas industry practice in relation to any MERUK and/or decisions to transfer Operatorship" at a three to four day trial to be listed before the end of December 2019. It contends that this is sufficient to meet the requirement of expedition. TAQA, on the other hand, believe that there is a threshold legal issue which, if decided in TAQA's favour, would be decisive and which is capable of being determined at one day hearing in September 2019. A hearing in December 2019 will be too late if transfer of operatorship, which lies at the heart of this dispute, is to take place by the end of June 2020, the date for transfer stipulated by TAQA. TAQA seeks a direction for the expedited determination of that preliminary issue on that basis.

3. RR UK says there is no real urgency requiring a trial by the end of September 2019 and certainly none that cannot be addressed in the short or medium term by sensible arrangements between the parties. The estimated timeframe for transfer estimated by by TAQA at nine months is incorrect. The notice period of 365 days given by TAQA is arbitrary. The very recent suggestion, made for the first time on 14 September 2019, that there should be a certain preliminary issues trial in September 2019 is a treacherous shortcut. It is impractical, ignores the fact that there could be an appeal, and is potentially duplicative of costs and resource. The fact that TAQA now accept that there could be a trial in December 2019 undermines the basis of its application for expedition in September 2019.

4. On the application, I have had before me a multitude of witness statements, eight bundles, and two volumes of authorities. Given the nature of the application, I am required to make a ruling now. I express at the outset my gratitude to all counsel not only for their helpful but also extremely able submissions.

Background

5. The background and issues for my consideration are set out in detail in the parties' skeleton arguments. The dispute relates to an unincorporated joint venture between the parties concerned with the extraction of petroleum from the UK continental shelf. RR UK, formerly known as Marathon Oil UK LLC ("Marathon Oil") and recently acquired by Rockrose Energy PLC ("Rockrose"), is the current operator of three particulars fields in the Greater Brae area charged with their day to day running. TAQA contend they have given valid notice to RR UK to transfer the operatorship of the fields from RR UK to the First Claimant. The effect of the notice is contended to be discharge of RR UK on 365 days' notice ending June 2020 at the latest and to appoint the First Claimant, subject to the consent and approval of the Secretary of State.

6. RR UK does not accept that this is the effect of the notice and so will not work to facilitate transfer of operatorship. RR UK says the circumstances of its dismissal are unprecedented in the North Sea oil and gas business and the dismissal came "out of the blue". RR UK will argue that any contractual

power to discharge is necessarily subject to a number of implied restrictions, namely of good faith, not to be exercised for improper purpose, or arbitrarily or irrationally. As a matter of oil and gas industry practice, there should be a justifiable, economic, operational, and technical basis for removing an operator not least because of the parties' statutory obligations to maximise the value of economically recoverable petroleum from the Greater Brae area. RR UK will contend that TAQA's steps are designed to frustrate the sale of Marathon UK's assets to Rockrose. It is said there appears to be no evidential basis for TAQA's decisions. No supporting contemporaneous documentation has been produced by TAQA. RR UK seeks to infer as well that there was a failure by TAQA to give due consideration to the scheme governing the pension arrangements of those who work on the fields.

7. TAQA contend that the legal premises of RR UK's arguments are wholly misconceived. Their rights to terminate RR UK's position as operator or to appoint the First Claimant as operator are not subject in any way to any such legal limitation. TAQA seek declarations accordingly as to the validity of their actions.

Procedural History

8. The proposals and votes by TAQA were made and taken respectively on 5 and 6 June 2019. On 13 June 2019 RR UK disputed their validity. TAQA served notices on 20 June 2019 and scheduled a meeting for 15 July 2019. On 3 July 2019 RR UK requested some costings without prejudice to its position on invalidity. On 5 July 2019 TAQA sent a letter before claim and there followed further correspondence and meetings between the parties. The current proceedings were issued on 26 July 2019 together with an application for expedition.

9. RR UK, as I have already outlined, has indicated that it intends vigorously to defend the claim against it. This morning, it served a draft outline case setting out the factual matrix upon which it will rely together with the implied terms contended for, albeit on a preliminary and draft basis.

Principles Relating to the Proper Basis for Expedition

10. The criteria for ordering an expedited trial can conveniently be found in a judgment of Males J, as he then was, addressing an application in a similar context in Apache Beryl I Ltd v Marathon Oil UK LCC & Ors [2017] EWHC 2258 (Comm) at [11]. There, he applied the guidelines identified by the Court of Appeal in *W.L. Gore & Associates GmbH v Geox SpA [2008] EWCA Civ 622* at [25] in particular. In summary only:

    (a) The decision whether to order expedition is discretionary;

    (b) There is a threshold question whether objectively there is urgency;

    (c) The court will then have regard to the state of its list;

    (d) The court will have regard to the procedural history, including any delay; and

    (e) The court will consider whether there will be any irremediable prejudice to the respondents.

11. Lord Neuberger went on (at [31]) to emphasise the practice of the Commercial Court, amongst others, to seek to assist commercial people in resolving their disputes to accommodate cases so far as

is consistent with the interests of others and with justice and fairness.

12. As I identified at the beginning of the hearing, in principle, I can see a sound basis for expedition of a full trial of three to four days along the lines suggested by the parties (if there is not to be a trial of preliminary issues). Objectively, there is a degree of urgency. The state of the list is a consideration, but for a trial of three to four days, this is the type of situation where the court should be able to accommodate the parties' need at this distance in time. There has been no undue delay nor would there be any irremediable prejudice to RR UK.

13. The real question for my determination is whether or not there should be an expedited trial of preliminary issues next month.

Principles Relating to Preliminary Issues

14. The court has in the past warned against the trial of preliminary issues where those issues have not been precisely and clearly defined, or where relevant facts or assumptions are not agreed such that trials of preliminary issues serve to increase the time and cost of resolving the dispute (see, for example, Bond v Dunster Properties Ltd [2011] EWCA Civ 455 at [107]; SCA Packaging Ltd v Boyle [2009] UKHL 37 at [9]; and Steele v Steele [2001] C.P. Rep. 106). In *Steele v Steele* Neuberger J, as he then was, set out a list of questions that the court should ask itself before considering whether or not to order a preliminary issue trial including the following:

    (a) Would it dispose of the case or at least one aspect of it?

    (b) Would it significantly cut down the cost and time involved in pre-trial preparation?

    (c) If an issue of law arises, how much effort would there be in identifying the relevant facts for the purpose of the preliminary issue? The greater the effort, the more questionable the value of ordering a preliminary issue;

    (d) To what extent can the issue be determined on agreed facts?

    (e) If not agreed facts, to what extent does that impinge on the value of the preliminary issue at all or to what extent may there be an unreasonable set up in achieving a just result?

    (f) To what extent is there a risk of a determination of a preliminary issue, increase in costs, and/or delay in trial?

15. It is therefore important, as Lord Neuberger said in Rossetti Marketing Ltd v Diamond Sofa Co Ltd [2012] EWCA Civ 1021 at [1], to remember that it may often be appropriate to resist what may be an initial attraction to order a preliminary issue.

16. At the same time, Mr Foxton QC for TAQA rightly comments that the ordering of preliminary issues is a regular feature of the practice of this court. Indeed, the parties are obliged to consider the appropriateness of seeking a preliminary issue at every relevant stage - including a stage such as the present.

The Proposed Preliminary Issue

17. By the conclusion of the hearing before me, TAQA's application was limited to an application for a single issue to be determined as a preliminary issue at a one-day hearing to be fixed for a date no

later than 27 September 2019. The issue is currently framed as follows:

> ”Whether, as a result of a term to be implied in or on the proper construction of each JOA, the exercise by each claimant as a participant of its right to vote for the termination of the operatorship was subject to constraints that it be exercised (1) in good faith, (2) for proper purpose, and/or (3) otherwise and arbitrarily or irrationally.”

TAQA’s Case on the Preliminary Issue

18. TAQA submits that the issue of whether or not TAQA’s exercise of its voting rights under the Joint Operating Agreements (or Unitisation and Unit Operating Agreements) to serve notice on RR UK and to appoint TAQA as an operator is a “textbook” preliminary issue. It raises distinct points of law and construction well capable of determination within a single day and which, if decided in TAQA’s favour, will be determinative. It cannot sensibly be said, submits Mr Foxton, that there can be any real factual matrix issues of any contention that could be relevant to the determination of the preliminary issue. He points in particular to Reda & Anor v Flag Ltd (Bermuda) [2002] UKPC 38 at [43] - [45]. Essentially, it cannot be said anything other than that the answer to the preliminary issue lies within the contract itself. It is therefore wholly unrealistic for RR UK to say as it does that any contested facts will be necessary for consideration by the court. There will be no need for any investigation. At the same time, nor will there be any requirement for TAQA to accept permanently or otherwise the correctness of matters relied upon by RR UK.

19. It is submitted for TAQA that the ordering of a preliminary issue would obviate the need for the factual and evidential enquiry for which RR UK seeks orders, for example, by way of disclosure and the service of factual witness statements and expert evidence and the three to four-day trial contemplated by RR UK. Further, if the court were ultimately to conclude that TAQA’s legal arguments were correct, it would follow that RR UK had no right to access the documents relevant to the internal decision-making of each Claimant which may well contain matters of commercial sensitivity in circumstances in which each of the four parties to the litigation are competitors with each other. By contrast, the course for which RR UK contends will involve RR UK obtaining access to those materials through the disclosure process in advance of any determination of whether they are entitled in the first place to them at all, and would involve RR UK having to disclose its own internal and confidential materials relating to the decision to acquire MO UK, the significance of the operatorship in that context, and the consideration which was given to the other parties transferring the operatorship.

20. Finally, for reasons relied upon in the context of the application for expedition, TAQA submits that there is a very strong case for the expedited and urgent determination of the parties’ dispute. While RR UK has confirmed its willingness to agree to an expedited timetable for the full trial, TAQA believes that there is a very real risk that determination of the dispute on that timetable will not allow for the transfer of the operatorship to the First Claimant by the time when RR UK’s termination will take effect prior to or in June 2020. In summary, TAQA submit that not to order the preliminary issue would achieve the very benefit which their rights to termination were intended to avoid. The purpose of the clauses in question is to avoid the very dispute of the type contended for by RR UK.

RR UK’s Position on the Preliminary Issue

21. RR UK submits that TAQA's proposals are thoroughly misconceived, impractical, and inefficient. In particular, TAQA has formulated the issue before RR UK has even pleaded its case and well before a preliminary issue can properly be identified. Fundamentally, RR UK submits that the preliminary issue identified is not a short point of law but raises complex questions as to the scope and extent of the *Braganza* duties (see *Braganza v BP Shipping Ltd [2015] 1 WLR 1661*). At this early stage, it is simply impossible to know how much factual or, indeed, expert material may be necessary for fair resolution of the preliminary issue. At the moment, RR UK has put forward its case as best it can at this particular procedural juncture. The factual evidence contemplated is referred to, or at least identified in its draft outline case, in particular at paragraphs 6, 7, and 8. There, RR UK refers to the participants' reasonable expectation, and/or presumed intention, and/or as a matter of oil and gas industry practice as follows:

> "(6) The Participants' reasonable expectation and/or presumed intention, and/or as a matter of oil and gas industry practice, was that they would share with all Participants reasonable information relevant to the decision-making and/or the basis of such decisions at OCMs, in particular in relation to any decision to change the Operator.
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> (7) The Participants' reasonable expectation and/or presumed intention, and/or as a matter of oil and gas industry practice, was that the Participants would have regard to and would comply with their statutory obligations (as holders of interests in the Fields) at the time of any decision-making under the JOAs. At the material times, those obligations arise pursuant to the Maximising Economic Recovery Strategy for the UK ("MER UK"), which include inter alia (i) pursuant to paragraph 7, taking steps to secure the maximum value of economically recoverable petroleum from the Fields; and/or (ii) pursuant to paragraph 28, collaborating and/or cooperating to improve recovery and/or reduce costs.
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> (8) The Participants' reasonable expectation and/or presumed intention, and/or as a matter of oil and gas industry practice, was that decisions in respect of Joint Operations, in particular any decision to change the Operator, would have a proper evidential basis which took account of relevant economic, operational, and technical considerations affecting the Joint Operations and/or satisfied any regulatory criteria (as set out by the Oil and Gas Authority)."

22. At this stage, therefore, the current position is that RR UK expects confidently to be advancing material that will go to support the matters to be pleaded including as to industry norms and process, and as to the regulatory background. Reliance is placed on the sensitivity of the existence of implied terms in situations such as this by reference to, for example, Yam Seng Pte v International Trade Corp [2013] 1 All ER (Comm) 1321 , in particular at [141] - [142], [147], and [154]. It is not for the court today, submits Mr Hussain QC for RR UK, to determine whether or not its submissions are right or wrong; but what the court cannot say today is that none of the material identified could possibly be relevant.

23. Further, RR UK submits that TAQA's proposed directions provide for witness evidence to be filed and liberty to any party to request specific disclosure by copy. However, any preliminary issue trial should proceed, if possible, on the basis of agreed facts and assumptions. That is clearly not the stage that has been reached here. Reference is made to the dangers identified by Neuberger J in Steel v

Steel (supra) as to the dangers of ordering a preliminary issue trial where there are relevant facts in dispute.

24. RR UK also submits that the proposed two-step approach, namely, a preliminary issue trial on an expedited basis followed closely on its heels by an expedited full trial, does not guard against wasted costs. Rather, it risks duplication and/or waste of costs. By way of example only, the proposed timetable contemplates the parties engaging further in the disclosure exercise as from early October at a time where it may very well be that there is still no judgment on the preliminary issue following the trial in the week of 23 September.

25. Finally, RR UK makes the point, obvious perhaps, that there is always the possibility of an appeal. It is in those circumstances best for the court to resolve all matters in this litigation at the same time rather than piecemeal. Mr Hussain points to the possibility of TAQA winning the preliminary issue but then losing on an appeal in December 2019 in the Court of Appeal. There would then have to be a fresh trial at a much later stage than is currently contemplated. Thus, the proposals put forward by TAQA will potentially result in two trials in the space of three months, leaving aside the question of any appeal. That is wholly unrealistic. RR UK also says that it simply would not be in position fairly to be ready for a trial of the preliminary issues in the week of 23 September, despite best endeavours on its part.

Expedition on the Preliminary Issue

26. The question of expedition on the preliminary issue requires a consideration as to what the degree of urgency is and, in particular, whether there is an urgent need in all the circumstances for a ruling at the end of September or early/mid October 2019. TAQA says that it is vital for the transitioning process to commence by the end of September 2019 because of the operator transition process.

27. Evidence has been served from Mr Neil Fowler on behalf of TAQA setting out why he considers that a nine-month period for a safe and proper transition is necessary and why nine months from a trial in December 2019 would be insufficient. Mr Foxton submits that the 365-day notice period was chosen by TAQA as a realistic period. He points to the fact that RR UK has said that it would not cooperate on what is an essential part of the transitioning process, in particular the safety case, without requiring an undertaking from TAQA that TAQA would not contact any third parties on the basis of RR UK coming out of the picture and the First Claimant coming into the picture as a new operator. Mr Foxton submits that internal workings will not be sufficient to complete the transition process. It is therefore essential that the court determine whether the operatorship has been validly transferred nine months before the end date of June 2020.

28. For RR UK reliance is placed on the evidence of Mr Graham Taylor. He takes issue with the time period suggested by TAQA. His view is that no more than six months would be required for a safe and proper transfer of operatorship and, indeed, it would most likely take less time than this. He accepts that now is not the place for a detailed examination of the merits and demerits of the respective witnesses' positions but makes the point that RR UK has offered to provide TAQA with the updated safety case, an original copy of which TAQA already had from 2017. There is nothing to preclude internal work within TAQA on the safety case. There are also overstatements, says Mr Taylor, by Mr Fowler of the hurdles in the timetable identified, including in relation to the need to fully overhaul various aspects of the cases and to train staff, for example.

29. RR UK also states, accurately, that the 365-day notice period that leads to the June 2020 date for transfer of operatorship is a self-imposed timetable chosen by TAQA in the full knowledge that there

was, at the very least, a real possibility of the sort of dispute that is now before the court. A year's notice is considerably longer than the minimum 90 day contractual notice period but RR UK submits that there would be nothing to stop TAQA extending, so far as necessary, the 365-day period in the event that there were problems on timing with transfer of operatorship in the light of this litigation.

30. TAQA complain that the effect of this requirement would be to impose RR UK on TAQA as operator against TAQA's will beyond the contractual period and timings to which TAQA say they are entitled. It would effectively give RR UK the same benefits as the injunctive relief which, on traditional principles, the court would not be willing to grant. TAQA also point to the undesirability and commercially damaging nature of any further delay and uncertainty.

Ruling

31. The parties clearly find themselves in a difficult situation because of the timetable that has arisen under the contractual relationship and the notices served by TAQA.

32. TAQA's submissions have an attractive simplicity which has been compellingly advanced by Mr Foxton. However, I am going to resist what is undoubtedly a temptation to order a preliminary issue as sought, in summary for the following reasons.

33. First, I consider that it is premature safely to order the preliminary issue sought. There is, as matters stand, no pleaded defence (and counterclaim). It is arguably not a case of a straightforward termination right. The relationship was one of an unincorporated joint venture involving the conduct of an operating committee in a regulated environment. It is RR UK which argues for the existence of the implied terms contended for. I have not felt myself able to say with the necessary confidence that what may be disputed facts will categorically be irrelevant to the proposed preliminary issues. There may be - on the materials before me at present and on the procedural position as it currently stands - relevant factual and/or expert material.

34. Secondly, so far as urgency is concerned, the 365-day period was self-imposed by TAQA in the knowledge of this, at least, potential dispute. It is not clear on the evidence before me that a full nine months would be needed. Certainly, it is a suggestion which is hotly contested. I pause to comment that, even with a hearing at the end of September, it might well be that TAQA would not have the certainty that they seek in time to allow a full nine month period to expire before June 2020. However, importantly for present purposes, there is no suggestion of irremediable harm. There is no suggestion of any danger to the operation in the event that RR UK has to continue. In the absolute exigency where TAQA had to extend the 365-day period, they could do so in circumstances where RR UK has indicated in principle its willingness to agree to an extension.

35. Thirdly, there is, in my judgment, the clear potential for duplication or at least wasting of costs in circumstances where preparations for a trial in December will be underway.

36. Fourthly, there is the possibility of an appeal from any ruling on the preliminary issue hearing. It is important not to overplay this factor but it is material when there is a full trial in such close sight. There is, it seems to me, real benefit in having everything dealt with in such circumstances in one go.

37. Fifthly, I am concerned about the timetabling issues in preparation for what would have to be a fair hearing of a preliminary issue on 23 September. TAQA's current timetable proposes service by RR UK of its defence and counterclaim in 48 hours' time. This has been a substantial hearing with a

great deal of preparation. Whether or not RR UK would be granted the full period of up to 6 September which it seeks for service of a defence, on any view, the timetable is a very tight one.

38. Finally, whilst it would not be impossible to find a one-day hearing with necessary pre-reading for a preliminary issue hearing in the week of 23 September, the fixing of such a hearing would undoubtedly cause serious disruption to the business of the Commercial Court lists running, as they are, on a vacation basis. TAQA made an enquiry as to judicial availability on 1 August. It is, of course, now 20 August 2019 and no date has been held for such a hearing in the interim.

39. For these reasons, I dismiss the present application for the hearing of a preliminary issue as sought by TAQA. I would emphasise that with completed pleadings and a clearer picture of the scope of the issues, more time, no urgency and full notice, the outcome might have been different. However, that is not where we are. In all of the present circumstances, proceeding on the basis of an expedited trial of all issues to be heard in December 2019 is the appropriate way forward. In the exercise of my case management powers that is the order that I make.