Neutral Citation Number: [2014] EWHC 12 (Comm)

Claim No. 2014-6

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice

Date: Monday, 6th January 2014

Before:

MR. JUSTICE MALES

B E T W E E N :

EUROIL LTD. Claimant/Applicant

- and -

CAMEROON OFFSHORE PETROLEUM SARL Defendant/Respondent

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MR. M. COOK (instructed by Shepherd and Wedderburn LLP) appeared on behalf of the Applicant/Claimant.

MR. A. WOOLNOUGH (instructed by Clyde & Co.) appeared on behalf of the Respondent/Defendant.

J U D G M E N T

MR. JUSTICE MALES:

1. This is an application made pursuant to s.44 of the Arbitration Act 1996 by the applicant, EurOil Ltd., for an injunction in support of intended arbitration proceedings, the injunction being sought against Cameroon Offshore Petroleum SARL. The application is made formally without notice by Mr. Matthew Cook, who represents the claimant, although in fact the respondent was told earlier today that the application was being made and the application has been attended by Mr. Adam Woolnough of counsel and the solicitors instructing him, although in the very short time available to him he was unable to make any substantive submissions, quite understandably.

2. I take the background from Mr. Cook's skeleton argument and, in brief, it is this. The parties are parties to a joint operating agreement in relation to what is known as the "Etinde Permit", a hydrocarbon permit covering approximately 2,300 square kilometres offshore Cameroon. The permit is an exclusive exploration authorisation granted by the Cameroon State and constituted by a production sharing contract dated the 22nd December 2008 between the Cameroon State and the claimant as contractor, although under a farm-out agreement of August 2009 the respondent, CAMOP, acquired a 25 percent interest in the contractor's share of the production sharing contract. The position therefore is that EurOil has a 75 percent interest and CAMOP has a 25 percent interest in the contract. There is, however, provision for the Cameroon State to acquire a 20 percent interest in the profits of the venture in the event that the initial exploration phase moves into development and exploitation.

3. Under the production sharing contract there is provision for an operating committee, consisting of a representative from the contractor and a representative from the Cameroon State, while under the joint operating agreement between the parties decisions are to be taken by a management committee consisting of representatives of each party. As the operator, EurOil is responsible for implementing decisions taken by the management committee. The joint operating agreement is governed by English law and provides for dispute resolution by arbitration under the rules of the London Court of International Arbitration. The Etinde permit is currently in the exploration phase but, according to the claimant's position, it is sufficiently clear already that there are proven reserves such as to justify moving forward to the development and exploitation phase. The claimant wishes to take that step and in order to do so it is necessary to obtain an exploitation authorisation from the Cameroon State authorities. In order to obtain that authorisation an application needs to be made together with a detailed development and production plan and budget. Such an application has been prepared.

4. However, in the course of the consideration of that application by the parties disagreements appear to have emerged. There are two principal arguments. The

position of CAMOP has been that no application should be made to move to the development and exploitation phase until two further appraisal wells have been drilled. That could potentially cost around US$160 million, and it is therefore an expensive step if, as EurOil suggests, it is not necessary in order to satisfy the parties and the Cameroon authorities that the project should move forward to the next phase. The second disagreement concerns whether EurOil is suitable to act as operator to carry out the proposed development. It appears that CAMOP either does not consider that EurOil is an appropriate operator or, alternatively, regardless of EurOil's suitability, CAMOP would wish to take over responsibility as operator for itself.

5. Despite those disagreements, which appear to have been ventilated at some length between the parties, although it is not necessary for present purposes to rehearse the course of those exchanges, there was a meeting on the 3rd January 2014 at which the parties agreed to approve and authorise the submission by EurOil of a development plan. I will read the resolution of the Etinde Management Committee meeting held on that day.

> "EurOil and CAMOP, as the contracting party under the Etinde PSC, hereby resolve -
>
> > (a) in accordance with Article 11.4 of the Etinde PSC to unconditionally approve and authorise the operator to submit the discovery report and the plan of development and production contained in the application for an exclusive exploitation authorisation in respect of the Etinde Permit in the form circulated to the parties (Revision 2.1) and tabled at the meeting (the EEAA) to the Etinde Operating Committee for approval in accordance with Article 7.3.2 of the Etinde PSC; and
> >
> > (b) to unconditionally approve and authorise the operator to submit the EEAA to the Minister of Industry, Mines and Technological Development for the grant of an exploitation authorisation in respect of block MLHP7 of the Etinde Permit in accordance with Article 11.6 of the Etinde PSC, in both cases subject to such amendments to Revision 2.1, if any, as the parties may jointly agree."

As appears from the terms of the resolution which I have just read, both parties supported the submission of that application, and they did so unconditionally.

6. Despite that, however, CAMOP has continued with its reservations and objections by way of correspondence to the Societe Nationale des Hydrocarbures (SNH), the relevant Cameroon State body. There may have been other contact but the only one in evidence before me is a letter dated the 4th January 2014, that is to say

Saturday, in which concern is expressed about the application which is submitted for the approval of SNH to the effect that the EEAA may not be fully compliant with the relevant petroleum law provisions of the State of Cameroon. CAMOP requested that the joint venture should be required, before approval is given, to demonstrate three points: first, that the operator, EurOil, can fully demonstrate a capability to undertake such a development technically and financially; second, a firm funded appraisal drilling campaign to certify resources to underpin the GSAs for both the Government sponsored fertiliser and LNG projects before FID; and, third, a full development plan of all the resources discovered to date on the licence. These requests express in more formal language the two concerns or disagreements to which I have referred. It may be that they also cover other matters in addition but, in any event, concern about additional appraisal wells and EurOil's capability as operator is included in the letter.

7. It is EurOil's case that that communication is a breach of the terms of the joint operating agreement, in particular of clause 6.6.1, and that pursuant to the provisions of that clause it is EurOil who has effectively the exclusive right to communicate with the Government authorities in relation to the application for approval to move to the next stage of the project. EurOil is concerned also that follow-up communications to similar effect as in the CAMOP letter of 4th January will be extremely damaging to the prospects of approval being granted and will therefore put at risk the very substantial investments in the project which have already been made in the exploration phase as well as putting at risk the future profits which may be expected from the venture if it does proceed.

8. Clause 6.6 is headed "Representation of the Parties", and contains two paragraphs. Paragraph 6.6.1 is as follows:

> "Unless otherwise directed by the Management Committee and except where otherwise provided in the Participation Agreement with respect to the Exploitation Committee, the Operator shall represent the Parties regarding any matters or dealings with the Government or third parties insofar as the same relate to the Joint Operations, provided that there is reserved to each Party the unfettered right to deal with the Government in respect of matters solely relating to its own Percentage Interest. The Operator shall provide the Parties with copies of any correspondence exchanged with the Government."

The submission of Mr. Cook is that the right to represent the parties to the Government regarding "any" matters or dealings with the Government insofar as the same relate to the joint operations is effectively an exclusive right, subject only to the proviso relating to matters solely relating to an individual participant's own percentage interest. The second paragraph, 6.6.2, is as follows:

> "Where the Operator has been informed or has reason to believe that matters of material importance to the Parties are to be discussed at a meeting with the Government or third parties it shall, where reasonably practicable, give notice of such meeting to the Parties and consult with them in relation thereto. Any Party shall be entitled to attend such meeting with the Government provided that the Operator shall leave the discussions with the Government."

9. Meetings are due to take place tomorrow and the day after at which the licence application is to be discussed with the Government authorities. That is a meeting at which matters of material importance to the parties are to be discussed within the meaning of clause 6.6.2. There was therefore an obligation to give notice of the meeting and to consult CAMOP in relation thereto. EurOil says, and it seems to me to be correct, that that has been done. There has been consultation about the meeting. There has, so far as the unanimously and unconditionally approved resolution is concerned, been agreement about the meeting and the application, although the letter subsequently sent by CAMOP to the authorities calls into question the extent to which CAMOP in fact does agree with that to which it appears to have signed up in approving the resolution. It follows that CAMOP is entitled to attend the meetings which are about to take place and it is clear from the final sentence of clause 6.6.2 that EurOil as the operator is entitled to lead the discussions which will take place with the Government. A question arises, however, as to what role, if any, CAMOP representatives who are entitled to attend the meeting are entitled to take at that meeting. For example, are they permitted to have some input into the meeting? Are they constrained in any way as to what they can say if the Government asks questions of them as to their attitude to the exploitation licence? It seems to me, although I make no final decision about this and, in any event, the true construction of these provisions will be for the arbitrators to determine as and when they are appointed, that it would be rather difficult to conclude that CAMOP can attend but are obliged to remain silent.

10. In this circumstance EurOil seeks an order under s.44 to restrain CAMOP from doing two things. The first is that CAMOP should not engage in any correspondence with SNH or the Cameroon authorities in respect of the Etinde permit so far as these dealings relate to joint operations between the parties, and the second is to restrain CAMOP from making any communication to SNH, although with the clarification that the order should not prevent CAMOP from attending the meetings due to take place on the 7th and 8th January, subject to complying with the requirement not to make any communication to the authorities. It is Mr. Cook's primary submission that an order should be made in those terms, the effect of which, as it seems to me, would be to entitle CAMOP representatives to be present at the meeting but would require them to maintain silence at any rate in relation to any substantive discussions.

11. The powers of the court to grant an injunction in these circumstances are contained in s.44 and, in particular, sub-section (3) of the 1996 Act. That provides that:

> "If the case is one of urgency the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets."

If the case is not one of urgency then the court can act only if an application is made with the permission of the arbitral tribunal or the agreement in writing of the other parties. The arbitral tribunal has not been appointed in this case and therefore that provision does not arise. Sub-section (5) provides that:

> "In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively."

Since this dispute has blown up only in the last few days arbitration has not yet been commenced, although EurOil is apparently in a position to commence arbitration and submit a request to the LCIA in very short order. However, it will clearly take some time, even with expedition, before a tribunal can be appointed, and the requirements of sub-section (5) are there satisfied.

12. Accordingly, an injunction can only be granted if it is necessary for the purpose of preserving assets. In the case of *Cetelem SA v. Roust Holdings Ltd.* [2005] E.W.C.A. Civ.618 and [2005] 1 W.L.R.3555, the Court of Appeal gave a construction of the word "assets" in s.44(3) which extended to contractual rights and choses in action, although the court also held, at para.46, that s.44(3) was intended to interfere as little as possible with the arbitral process and to limit the power of the court in urgent cases to the making of orders which it thinks are necessary for the preservation of evidence or assets. As I said in the case of *ZIM Integrated Shipping Services Ltd. v. European Containers,* 6th November 2013, the *Cetelem* case makes clear, and it is in any event apparent from the terms of s.44 as a whole, that s.44(3) is intended to be a limiting provision and does not extend to making any kind of interim injunction. It is also an important consideration that an injunction should not usurp the function of the arbitrators.

13. In the present case I am prepared to accept, at any rate for present purposes, that the contractual rights contained in clause 6.6.1 to be the representative of the parties regarding any matters or dealings with the Government insofar as the same relate to the joint operations is an asset within the meaning of s.44(3). I am not prepared to hold that there is an exclusive right at any rate if by that it is meant that the other party to the joint operating agreement who is entitled to attend a meeting of the type described in clause 6.6.2 is required to remain silent at that meeting. It

seems to me that the provisions of clause 6.6 must be read as a whole and that, at any rate as I currently understand the position, those provisions do give a right to the operator to be the representative of the parties and to take the lead in discussions with the Government, but do not go so far as to rule out altogether any input at all from the other party. As I said earlier, the true construction of these provisions will ultimately be for the arbitrators and I make no final decision about that. I am satisfied, however, again at least for present purposes, that it is appropriate to reach the provisional conclusions which I have and that doing so does not trespass on the arbitrators' ultimate decision making.

14. It seems to me that there is at any rate a seriously arguable case that the communications which the respondent has so far made to the Government in its letter of the 4th January, which appears to contradict the agreed resolution at the meeting on the previous day, would constitute a breach of clause 6.6.1 and that further communications to the same effect may constitute further such breaches. There is, it seems to me, at least a serious issue to be tried about that and if the result of those communications or further communications were to frustrate the application for a development licence or to cause the Cameroon authorities to lose confidence in the parties to the joint operating agreement, the consequences could be extremely serious financially and may well not be capable of being compensated in damages given that, as I am told, CAMOP is a shell company with no assets other than its share in the Etinde permit.

15. It seems to me that the balance of convenience is in favour of the grant of an interim injunction at any rate for a very short period so that the respondent, CAMOP, can put its case to the court, provided that an order can be formulated which both protects whatever rights CAMOP does have under, in particular, the final sentence of clause 6.6.2, and has sufficient clarity so that CAMOP is clear as to what it is and what it is not permitted to do or, in particular, to say at the meetings over the next two days. It seems to me that the order as formulated by Mr. Cook as his primary submission does not satisfy those requirements. Although it has the merit of clarity in requiring the CAMOP representatives in effect to remain silent, it seems to me, as I have already indicated, that that would be potentially and perhaps actually depriving them of their contractual right to participate at any rate to some extent in the meeting, pursuant to the final sentence of clause 6.6.2. This is a case where if an injunction goes too far to protect the claimant's contractual rights to be the representative of the parties and to communicate with the Government it will in fact be depriving the respondent of whatever rights it may have.

16. However, when I expressed that concern to Mr. Cook he formulated an alternative wording of the proposed injunction to the effect that the defendant shall not, until the return date or further order, (1) engage in any correspondence with or (2) make any communication to SNH or the Cameroon authorities generally in respect of the

Etinde permit so far as these dealings relate to joint operations between the parties, but with the proviso that that should not prevent the respondent from attending the meetings on the 7th and 8th January and permitting them to participate in those meetings provided that they make no communication which contradicts or undermines the application jointly approved by the parties on the 3rd January 2014. It seems to me that at any rate for the short term such an order would strike the balance fairly and would provide sufficient clarity as to what the defendants are and are not entitled to do and say. However, such an order should be in place only for a short time so that the matter can be fully considered if it is necessary to do so. To some extent the order, or indeed any order, may involve an attempt, as it were, to shut the stable door after the horse, consisting of the concerns expressed by CAMOP in the form of the 4th January 2014 letter to the Cameroon authorities, has already left the stable. That letter cannot be unwritten but it seems to me that, at any rate so far as the meetings over the next two days are concerned, the position should be maintained as in the terms of the order which I propose to make.

17. I will hear the parties, in particular Mr. Woolnough, as to the time for which the order should remain in place prior to the return date. In principle, it should come back before the court in short order, perhaps of the order of 48 hours. If, however, the respondents need longer to respond to the evidence which has been filed I will hear them as to when the return date should be.

MR. COOK: My Lord, thank you very much. In terms of when your Lordship wishes it to come back before the court, the parties, as you know, are obviously going to be in meetings for the next two days which, from our side, perhaps matters less in the sense that we are ready, and we were ready in front of your Lordship. But from the point of view of the respondent that may be difficult because there are going to be individuals out there in Cameroon so it will be difficult for them to prepare probably until those meetings are over, which will mean preparing on Thursday, and maybe a hearing on Friday will perhaps be more realistic, my Lord.

MR. JUSTICE MALES: Yes. Do you want to take instructions about that, Mr. Woolnough, as to when you want to come back? If you were ready I would say come back in 48 hours but you may need a little bit longer than that in view of the fact that some of your people are in Cameroon and you have got this to respond to.

MR. WOOLNOUGH: Can I have five minutes to take instructions, my Lord?

MR. JUSTICE MALES: Yes, all right. Let me just see if there are any other points on the terms of the order.

MR. COOK: My Lord, I apologise, I think I stopped going through it at para.4.

MR. JUSTICE MALES: Yes.

MR. COOK: Paragraph 5 was costs are reserved to a return date. Simply, my Lord, I would not invite you to make a costs order without there being a proper opportunity for submissions from the other side.

MR. JUSTICE MALES: No.

MR. COOK: Paragraph 6 is the standard right to vary or discharge, and interpretation. Again this is all taken from the standard terms of the freezing injunction to sort of amend it as appropriate.

MR. JUSTICE MALES: Yes.

MR. COOK: Interpretation makes clear that the respondent must do things by its directors, officers, etc. Paragraph 8 again is making the freezing injunction effective on third parties.

MR. JUSTICE MALES: Yes, that all seems quite straightforward. Let us just look at schedule 2. On the whole I do not like "as soon as practicable" because one does not know when it is, but you could probably do all those things -- well, you could do two or three tomorrow, could you not?

MR. COOK: My Lord, I believe 2 is -- we have actually already issued the claim form, I believe. (After taking instructions): Yes, that is done.

MR. JUSTICE MALES: Right, so that can come out. You have got a request ready to go I think you said?

MR. COOK: My Lord, I have produced one, and I think my instructing solicitors probably have not had a chance to read it through in as much detail as they might like.

MR. JUSTICE MALES: All right - 4 p.m. tomorrow, and you have probably already served, or at least you have provided them to Mr. Woolnough and those instructing him, have you?

MR. COOK: We have and they have confirmed that Clyde & Co. have instructions to accept service so they are not sending them on to Cameroon in the post system, my Lord.

MR. JUSTICE MALES: Right.

MR. COOK: Then, my Lord, I should note the paragraph which incorporates schedule 2 and schedule 3, and again I am instructed to give that undertaking on behalf of BowLeven plc, which is the parent company, and the practical position, my Lord, is that it is the plc, the ultimate parent, that has the resources. The balance sheets are in the bundle and show it has resources of in excess of 450 million whereas my client is not so well resourced an entity, and so ----

MR. JUSTICE MALES: Yes.

MR. COOK: ---- would not be in a position to give a valuable undertaking of its own.

MR. JUSTICE MALES: All right. I will for the moment accept that undertaking in the form of schedule 3. If there is any question of further fortification of the injunction, if it continues beyond the return date, then there can be argument about that on the return date.

MR. COOK: My Lord, I am grateful.

MR. JUSTICE MALES: All right. Mr. Woolnough, would you like five minutes to go and find out when you want to come back to court?

(Short adjournment)

MR. WOOLNOUGH: My Lord, 48 hours would be too short - preferably some time next week in fact, maybe on Monday.

MR. JUSTICE MALES: Yes. I will be ----

MR. WOOLNOUGH: Or later in the week even. The clients are in Cameroon at least up until Friday and possibly part of the weekend, so if Monday is not appropriate then maybe later on in the week.

MR. JUSTICE MALES: Later on in next week?

MR. WOOLNOUGH: Yes.

MR. JUSTICE MALES: Yes. Well, I think I will say Tuesday, the 14th.

MR. WOOLNOUGH: Thank you.

MR. JUSTICE MALES: Because it is probably sensible, now I have got hold of the case this far, that I keep it, but after the 14th I shall not be around because I am off on circuit, so that is the last date it could be consistent with having me deal with the return date. It does not have to be me but obviously there is a certain amount

of familiarisation if it is. So on the assumption that I will be able to do it then - and I will have to check - I will say the 14th, which means that your evidence should be served by when? First thing Monday?

MR. WOOLNOUGH: Monday.

MR. JUSTICE MALES: Which gives you ----

MR. WOOLNOUGH: Ten a.m.

MR. JUSTICE MALES: ---- the weekend - yes, all right, 10 a.m. Monday.

MR. COOK: My Lord, if you were going to make the evidence 10 a.m. Monday could I ask you to order that the hearing should be not before 2 p.m. on the Tuesday, which simply gives us that additional time to accommodate anything which is in it?

MR. JUSTICE MALES: Yes, all right. I will say 10 a.m. Monday for any evidence from the respondent, skeletons by 5 p.m. Monday, and the hearing I think I will say not before 12 on Tuesday, which will give you a bit of time, but you will just have to cope as best you can.

I do not know whether it is going to be practicable to order a transcript of the judgment which I have given. If it is that would certainly help me. If it is not then as full an agreed note as you can manage, please.

MR. COOK: Very well, my Lord, yes. My Lord, I think it would be practical to order one but whether it is practical to actually receive one is perhaps ----

MR. JUSTICE MALES: Yes, I understand that.

MR. COOK: My Lord, in terms of getting a sealed copy of the order tonight, I anticipate you are probably wishing to get home.

MR. JUSTICE MALES: Yes.

MR. COOK: As long as there are going to be no objections taken on the other side on the basis they have not received a sealed copy of the order until tomorrow morning we are comfortable with dealing with it tomorrow morning.

MR. JUSTICE MALES: Yes. You had better discuss that with them. If you need a final version of it then I am on duty out of hours, so if you send the final version of what I have ordered, and you can probably fill in the gaps in your draft ----

MR. COOK: Yes.

MR. JUSTICE MALES: ---- to the out of hours duty clerk, who will in fact be my clerk, who can then forward it to me and I can confirm that that is approved. But I have made the order so it is binding as of now.

MR. COOK: My Lord, thank you.

MR. JUSTICE MALES: Thank you very much.

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