

Impermissible Grounds for Withholding Consent

August 21, 2020 Shu Shu Wong

PRACTICES Shipping, Litigation, Energy, Power and Natural Resources, Offshore Oil and Gas

In July 2020, the English Commercial Court ruled in [*Apache North Sea Limited v INEOS FPS Limited \[2020\] EWHC 2081 \(Comm\)*](#) that it was not permissible for a consent-provider to pre-condition the giving of a consent if the result would be to increase or enhance its contractual benefit. In the case, the court was asked to interpret a consent provision which provided for a shipment schedule in the contract to be amended at the requirement of the claimant with the consent of the defendant, such consent not to be unreasonably withheld.

Background of the case

The dispute arose out of an agreement for the transportation and processing of hydrocarbons (the “TPA”) between the claimant, Apache North Sea Limited (“Apache”) and the defendant, INEOS FPS Limited (“INEOS”). The TPA was entered into for the transportation to shore of Apache’s oil from the North Sea through the Forties Pipeline System (the “FPS”) operated by INEOS.

The FPS is a network of pipelines and associated equipment which was originally constructed in the 1970s, to service the interests of BP Plc (“BP”) in the Forties Field in the North Sea. Over the years, the output of various other offshore fields have been added to the FPS and the FPS currently transports about 30% of the United Kingdom’s offshore oil to shore.

In 2003, BP sold its interests in the Forties Field to Apache, which necessitated the conclusion of the TPA given that these interests and the FPS would be in different ownership. The TPA was originally entered into between Apache and a BP entity (BP Exportation Operating Company Limited or “BPEOC”). In 2012, Apache and BPEOC agreed a revised Attachment F to the TPA which sets out estimated production estimates to the end of 2020. BPEOC sold the FPS to INEOS in 2017 and the TPA was novated from BPEOC to INEOS.

On 14 June 2019, Apache wrote to INEOS seeking its agreement to amend Attachment F to the TPA to provide for estimates of production for the period from January 2021 to December 2040. Clause 5.05(a) of the TPA provides that if Apache “*requires to...amend Attachment F*” then subject to there being Uncommitted Capacity, INEOS “*shall not unreasonably withhold its consent to such increase.*”

However, INEOS refused its consent to the request unless Apache agreed to a revision of the tariff payable under the TPA for the transportation and processing of hydrocarbons.

Apache’s arguments

Apache’s main arguments are as follows:

- It is an established principle when construing contractual provisions which provide that one party’s consent is required before a particular step can be taken, such consent not to be unreasonably withheld, that consent cannot be withheld in order to secure a re-writing of fundamental terms of the parties’ contract.

- Pursuant to the TPA, Apache is required to ship all of the production from the Forties Field through the FPS until the TPA is terminated. The price for transporting and processing the production is fixed by clause 7.01 of the TPA, which provides for the calculation of a contractual tariff by taking an agreed base point, and escalating it by reference to a series of indices over time.
- When the TPA was initially concluded in 2003, Apache's expected production profile only ran to the end of 2020 (as reflected in the terms of Attachment F). However, the TPA contemplated that production may continue beyond the end of 2020, in which case Apache's obligation to transport that production through the FPS would continue, as would the right (and obligation) to pay for such transportation at the contractual tariff.
- Therefore, INEOS' demand for a revised tariff as a condition to agree to the amendment of Attachment F is contractually impermissible, since it seeks as the price of consent to require Apache to give up its contractual entitlement to transport hydrocarbons at the agreed tariff.

INEOS's arguments

On the other hand, INEOS presented the following arguments:

- The Court should not seek to limit the operation of clause 5.05(c) as a matter of construction, and the issue of whether INEOS is entitled to require a change to the contractual tariff as a condition of amending Attachment F is a question of fact, to be judged in light of all the available evidence and by reference to the test of whether INEOS has acted rationally, or at least in a way in which a reasonable person might act in the circumstances.
- Apache has no contractual right to transport its hydrocarbons through the TPA after the end of 2020, even less to do so at the contractual tariff. The amendment to Attachment F which Apache has asked INEOS to consent to would involve a very substantial increase in Apache's contractual rights.
- The only contractual limitation on INEOS' right to refuse or condition its consent is that the reasons for refusing or conditioning consent are relevant to INEOS' contractual relationship with Apache and to the change for which INEOS' consent is sought.
- In circumstances in which the use of the TPA to transport Apache's hydrocarbons in the period after 2020 is only possible because of the very substantial investment which INEOS intends to make in the FPS, the condition which INEOS seeks to impose is clearly referable to INEOS' contractual relationship with Apache and to Apache's request to amend Attachment F so that its estimated production profile will now run to 2040.

Judgment and implications

Ultimately, the court ruled in favour of Apache and agreed that INEOS was not permitted to impose a condition to require a revision of the tariff payable under the TPA before giving its consent to amend Attachment F to the TPA.

In reaching the judgment, the Judge, Mr Justice Foxton, cited a recent Supreme Court case, *Sequent Nominees Ltd v Hautford Ltd* [2020] AC 28 which shed light on the court's approach to consent provisions contained in leases. Even where a contractual provision imports a standard of reasonableness, the court must still construe the contract as a whole to establish what the party providing consent is entitled to do under the relevant clause. One important point to note is that these consent provisions cannot be used to re-write the parties' bargain so as to deprive the counterparty to the contract of rights it has under it.

It is worth mentioning that the court accepted INEOS' submission that the mere fact that through the imposition of a condition, the consent-provider may acquire an entitlement to something it did not previously have does not automatically render the condition illegitimate. Mr Justice Foxton stated, *"In particular, a condition may have this effect but otherwise be legitimate where it provides a mechanism for addressing a legitimate concern on the part of the consent-provider in relation to the consequences of providing consent, with the result that the benefit obtained is compensatory or mitigatory in nature."* For instance, in *Sargeant v Macepark (Whittlebury) Limited [2004] EWHC 1333 (Ch)*, the court observed:

"When considering the reasonableness of conditions, it seems to me that if the landlord would have been entitled to refuse consent on some particular ground, a condition neutralising the landlord's concern will ordinarily be reasonable. The most common example would be a case in which the landlord would be entitled to refuse consent to an assignment to a financially weak assignee, but in fact grants consent on condition that the assignee's obligations are guaranteed or that the assignee puts up a rent."

This judgment demonstrates that where an agreement contains a provision that consent must not be unreasonably withheld, it will usually not be reasonable for the consent-provider to impose a condition that is designed to increase or enhance its rights under the agreement in question. However, a condition may be permissible where it provides a mechanism for addressing a legitimate concern on the part of the consent-provider in respect to the consequences of providing consent, with the result that the benefit obtained is compensatory or mitigatory in nature. In the current case, INEOS' attempt to increase the tariff payable under the TPA was an illegitimate attempt to rewrite the bargain, where the benefit obtained was not compensatory or mitigatory in nature, and was therefore impermissible.