

Risky Business? English Court Rejects Force Majeure Claim in Offshore Drilling Contract

July 5, 2018 Glenn Kangisser, Amanda Larrington

PRACTICES Litigation, Energy, Power and Natural Resources, Energy Litigation, Offshore Oil and Gas, Offshore Oil and Gas Dispute Resolution, Oil and Gas, Oil and Gas Litigation, Oilfield Services

The English High Court issued its judgment in the case of *Seadrill Ghana Operations Limited v Tullow Ghana Limited*¹ on 3 July 2018 in respect of a dispute under a long-term drilling contract between Seadrill and Tullow regarding the use of the semi-submersible drilling rig “WEST LEO” for operations offshore Ghana. The contract was signed in 2012 and its term was due to continue through to June 2018. However, in December 2016, Tullow purported to terminate the contract for *force majeure*. In doing so, it sought to rely on an order from the International Law of the Sea (“ITLOS”) which prevented “new drilling” in the TEN Field, which was one of the fields in which Tullow was operating.

Seadrill disputed Tullow’s right to terminate for force majeure, but accepted that the contract had been terminated for Tullow’s convenience.² Under the contract, that would entitle Seadrill to payment of an early termination fee of 60 percent of the day rate of the rig for the remaining period of the contract. The total amount in dispute exceeded US\$270 million.

Force Majeure

The term “force majeure” does not have a recognised meaning under English law. The courts will look at the precise wording of the relevant contractual clause agreed by the parties to determine its effect. In this case the contractual clause specified that an event of force majeure would only excuse a party from a failure to perform if: (1) it delayed or temporarily prevented the affected party from fulfilling the terms of the contract; (2) it was beyond the control of the party relying on it; and (3) the affected party used its reasonable endeavours to mitigate or avoid its effect. Where the party affected was Tullow and it was prevented from fulfilling a term of the contract due to such an event for 60 consecutive days, it had a right to terminate. Among the defined force majeure events was a “*drilling moratorium imposed by the government.*” The judge found that the ITLOS Order, coupled with a subsequent letter from the Government of Ghana to Tullow inviting it to comply with the order, constituted a drilling moratorium.

Issues for the Judge to Determine in Respect of Force Majeure

Having determined that there was a drilling moratorium, the judge next had to consider *inter alia* (1) when the drilling moratorium took effect?; (2) whether Tullow had been prevented from performing any of its contractual obligations?; (3) if so, whether this had been caused by the drilling moratorium?; and (4) whether the drilling moratorium had to be the sole effective cause in order for Tullow to claim force majeure?

When Did the Drilling Moratorium Take Effect?

It was Tullow’s case that although the relevant event giving rise to the drilling moratorium – the ITLOS order – occurred in early 2015, it was not until October 2016 that the moratorium actually

became a force majeure event because that was, according to Tullow, when its effects were felt by it. As such, Tullow claimed that the drilling moratorium was the only “*legal cause*” of its inability to perform its obligations.

This argument was not accepted by the judge who found that the moratorium occurred in May 2015 when the Government invited Tullow to comply with the ITLOS Order. Nothing that occurred in October 2016 served to change the position in respect of that Order, nor were there any fresh instructions from the Government.

Was the Drilling Moratorium an Effective Cause of Tullow Being Unable to Perform?

The judge had difficulty with Tullow’s argument that they were prevented from performing their obligations under the contract, namely to provide a drilling programme to Seadrill, but proceeded on the assumption that they were so prevented in order to consider the important issue of causation *i.e.* what was the cause of Tullow being unable to issue drilling programmes under the Contract?

It is well established law that there must be a clear line of causation between the relevant force majeure event and the failure to comply with the contractual obligation. The judge made reference to existing authorities on this subject and reiterated that the issue is “*sensitive to the legal context in which the question arises*” and should be “*resolved by reference to common sense.*”

Looking at the position in October 2016, the judge concluded that there were “*two effective causes*” of Tullow being unable provide Seadrill with a drilling programme. He accepted that the drilling moratorium was at least in part responsible for Tullow being unable to continue drilling, however, there was a further cause which was Tullow’s failure to secure permission from the Government to drill additional wells in the Jubilee Field (its “*flagship asset*”) pursuant to the so-called Greater Jubilee Full Field Development Plan (the “*GJFFDP*”). It was common ground that ITLOS Order did not affect the Jubilee Field and that the failure to secure approval for the GJFFDP was not a drilling moratorium.

This therefore led the judge to consider whether, where the inability to perform had two causes, one being force majeure, and the other not, a party could rely on its rights under the force majeure clause? The judge held that this was a matter of construction of the relevant clause and the underlying factual matrix. The judge concluded that “*Tullow is unable to rely upon the force majeure clause notwithstanding that a force majeure event prevented it from using West Leo to complete EN10 [a particular well] in TEN. Any other conclusion would mean that Tullow could terminate the contract pursuant to clause 27 where the effective cause of its failure to perform was not a force majeure event within the meaning of the clause.*”

Did Tullow Use Reasonable Endeavours to Overcome the Force Majeure?

Nevertheless, the judge went on to consider the second issue of whether or not, if the relevant event was force majeure, Tullow exercised “*reasonable endeavours*” to remedy or avoid it. In determining this, the judge clarified that account should be taken “*of all matters which bear upon the question whether it is reasonable to expect a party to take certain steps to avoid or circumvent a force majeure.*” Whether these matters are determinative would “*depend upon the contractual context,*” and it was not strictly speaking an objective or a subjective test, but would depend upon an analysis of the specific factual and contractual details of the case. The burden of proof was on Tullow to demonstrate that it had exercised its reasonable endeavours to avoid or circumvent the force majeure. Greater expense or an increased risk of an unprofitable outcome did not render an action that could be taken unreasonable.

Furthermore, the judge also found that consideration should be given to the commercial interests of the other party. It was therefore “reasonable”, in the context of this case, for Tullow to consider Seadrill’s interest in having “*instructions for West Leo to drill at a well not affected by the moratorium.*” There was significant factual dispute as to whether or not such work was a realistic option at the relevant time and two experts gave evidence on the matter. Ultimately, the judge decided that relevant work was available in four wells – TW-01 (in the TEN Field) and J-13, J-15 and J-36 (in the Jubilee field). In some cases these wells had been proposed by Tullow to its partners a few months prior to termination as available and valuable work. On that basis, Tullow had failed to exercise its reasonable endeavours to overcome the force majeure event (if there had been one in the first place).

Requirement for “True and Correct” Invoices

The judgment also considered whether a requirement for invoices to be “*true and correct*” was breached when VAT was charged that was not due and there was a failure to deduct withholding tax. The judge held it would be “*absurd*” to conclude that “*because VAT had been charged nothing at all was due in respect of the invoice*” and that, as a matter of fact, it was for it was for Tullow to comply with the relevant laws and deduct the withholding tax, not Seadrill. As such, the invoices were true and correct in the meaning of the contract. This demonstrates again the court’s reluctance to allow purely technical defences to avoid the commercial reality of the contract.

Risky Business

In the opening line of his judgment, the judge indicated that “*Drilling for oil is a risky business.*” In the body of his judgment, he found that the circumstances which Tullow say prevented them from performing their contractual obligations arose in respect of matters where the risks were properly borne by Tullow. In concluding therefore the judge found in favour of Seadrill by holding that the contract had been terminated for Tullow’s convenience rather than force majeure. Tullow were ordered to pay Seadrill an amount of USD 273 million representing the agreed early termination fee and standby charges (plus interest and legal expenses).

Haynes Boone CDG, LLP Partner [Glenn Kangisser](#) acted as the lead lawyer for Seadrill Ghana Operations Ltd, and was assisted by Associates [Amanda Larrington](#) and Maren Strandevold.

For more details about the case, read the press release [here](#).

¹ [2018] EWHC 1640 (Comm)

² Tullow alternatively terminated the contract for their convenience in accordance with the contract terms.