Altera Voyageur Production Limited v Premier Oil E&P UK Ltd [2020] EWHC 1891 (Comm)

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Synopsis

The High Court considered the contractual status of worked examples in a contract where the wording of the contract did not correspond with the worked examples. Altera Voyageur Production Limited ('Altera') claimed for an increased daily hire rate for a vessel on the basis of the worked examples. Premier Oil E&P UK Ltd ('Premier') counterclaimed that the worked examples did not reflect the commercial intention of the parties and that the wording of the contract should be preferred. The court held in favour of Altera finding that the worked examples showed the intention of the parties and that these could not be rewritten by the court.

Abstract

Premier, an oil exploration company, had chartered a vessel from Altera for the purposes of developing and producing oil reserves in the North Sea. Altera claimed the sum of USD 12,108,072.50 plus contractual interest by way of adjusted hire for the vessel under a charterparty contract. Premier disputed the claim and counterclaimed for the sum of USD 3,837,580.91. The dispute was solely focused on the interpretation of a hire adjustment formula applicable to the daily base hire rate for the vessel (the 'Hire Adjustment Formula'). The parties agreed upon the financial consequences of their rival interpretations of the Hire Adjustment Formula as reflected in the claim amounts.

The Hire Adjustment Formula consisted of a narrative and two worked examples. The narrative did not match the two worked examples, as the examples contained two additional steps not set out in the narrative. While it was common ground that one of the additional steps (a weighting factor) must be taken to have been intended by the parties, the effect of the other additional step, 'Step 6', was to change the 'pivot point' at which there would be an upward adjustment to the daily base rate and to move it downwards:

(a) without Step 6, the formula required an upward adjustment in daily base hire if the 'Actual Availability' was above the 'Target Availability' of 95%;

(b) with Step 6, an upward adjustment in daily base hire would be required if Actual Availability was above the lower figure of 90%.

The point of contention between the parties was whether Step 6 was something they had intended.

Premier argued that to apply the formula as set out in the worked examples would produce a result inconsistent with the preceding narrative and commercial common sense. It was submitted by Premier that on the basis of the wording in the charterparty contract, there was only to be an adjustment to the daily base rate where 'Actual Availability' exceeded or was below 'Target Availability' (95%). If Step 6 was included, the daily base rate would be increased despite the Actual Availability being below the Target Availability of 95%, which it was argued would be inconsistent with the wording of the charterparty contract.

Furthermore, Premier argued that the effect of the worked examples was illogical. Firstly, it would provide Altera with an upward adjustment in the daily base hire rate during a force majeure (as during a force majeure it was provided that the 'Actual Availability' would be deemed to be 95%). Secondly, as the contract provided for negative consequences where Altera continuously failed to achieve the 'Target Availability' (e.g. Premier could suspend payment of the daily base hire rate where the time-based availability of the vessel fell below 95%), it was submitted that it would be illogical to simultaneously reward and penalise a failure to achieve a 'Target Availability'.

Altera contended that the formula should be applied as set out in the worked examples. It submitted that there was no need to go behind what had been expressly agreed: the parties set out, not once but twice, how they intend the adjustments to the daily base hire rate to be calculated. It was submitted that there were no inconsistencies between the wording of the contract and Appendix M: the contract stated that the daily base hire rate should be reduced or adjusted 'as provided for in Appendix M'. Altera argued that the figures in the two worked examples were a 'matter for negotiation and agreement' and that there was nothing inherently uncommercial in having a 'pivot point' below the level set for 'Target Availability'. It was submitted that the court would be a making a new agreement if it sought

to reinterpret the worked examples in the Hire Adjustment Formula.

Held

Richard Salter QC, sitting as a Deputy Judge of the High Court, considered the drafting of the relevant provisions. It was noted that the drafting was deficient in places and as such the court should look at the provisions in their commercial context.

The Deputy Judge was of the view that there was force in Premier's submissions that the 'pivot point' for adjustment should be the 'Target Availability' figure of 95%, as that would make more overall commercial sense in the context of the force majeure provision and the provisions on continuous failure to meet 'Target Availability'. It was noted that the charterparty contract, if read in isolation, did appear to contemplate a 'pivot point' at the level of 'Target Availability'. However, the hire adjustment as contemplated by Appendix M did not have a simple 'pivot point' due to the added complexity of a weighting factor being applied in the worked examples, which was a necessary additional step that Premier did not contend. The Deputy Judge noted that the contract specifically provided for the adjustment to the daily hire rate to be made in accordance with Appendix M, meaning there was no obvious conflict between the contract and Appendix M, despite the contract suggesting 'Target Availability' as the 'pivot point'.

The Deputy Judge was of the view that the worked examples did not appear 'to be mere optional extras, but rather to be integral parts of the contract terms…'. In his view, to disregard Step 6 would be to rewrite the contract the parties made. The Deputy Judge did note the commercial illogicalities arising from the inclusion of Step 6, in particular during a force majeure. However, this was not sufficient to persuade the Deputy Judge that the worked examples could be characterised as 'arbitrary and irrational' or as an 'obvious nonsense' such that they would be effectively rewritten by a court.

The Deputy Judge considered the only previous judgment on interpreting a worked example which did not correspond to the text it was supposed to be illustrating given by Blair J in *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 1311 (Comm). The Deputy Judge noted Blair J's view in *Starbev* that '… in the context of lengthy contracts … illustrations or examples [may] deserve particular attention as something to which the parties particularly turned their minds …'. The Deputy Judge agreed with the principle stated by Blair J, noting that it seemed to him 'inherently more probable that the parties' true bargain is that to be found in the [worked examples]'. It was held the inclusion of 'Step 6' in each of the worked examples therefore 'strongly suggested' its inclusion was a 'deliberate choice', and it was not possible to say that the worked examples 'do not represent what a reasonable person with all the relevant knowledge would say that the parties intended should happen'.

The Deputy Judge therefore found in favour of Altera.

Commentary

The case is important for practitioners in highlighting the importance of worked examples in contracts. Even though the court he accepted the existence of commercial illogicality in certain circumstances, this was not sufficient to persuade the judge that it was 'clear' that worked examples had gone wrong. Indeed, the judge noted that the whole purpose of the worked examples was to demonstrate with clarity the consequences of the narrative formula. Practitioners should therefore pay particular attention to the accuracy of worked examples given the importance that may be attributed to them in considering the intentions of contracting parties.