Measure of damages recoverable for anticipatory repudiatory breach of sale contract

Glencore Energy UK Ltd v Transworld Oil Ltd [2010] EWHC 141 (Comm)

Background facts

G was the buyer and T the seller under a contract dated 6 March 2008 on fob terms for the sale of a cargo of Nigerian Ukpotiki crude oil. Under the contract, the delivery period was "during 25-29 March 2008". The laycan was subsequently narrowed to 26 to 28 March 2008.

The pricing provision in the contract stated that the price would be determined by the "average of five (5) consecutive quotations as published in Platts Crude oil marketwire for the mean of dated Brent" within a period around the narrowed laycan. The pricing provision further stated that the exact five day quotation period was in the buyer's option and was to be declared latest one working day prior to the first of the chosen days. Dated Brent is the price benchmark for crude oil in such transactions. In this case, the contract also provided for payment of a premium above the dated Brent price.

On 26 March 2008, G declared 27 March to 2 April 2008 as the pricing period for the relevant lifting. However, due to security concerns arising out of the kidnapping of the crew of one of the tugs that was due to assist the vessel to berth, the cargo was not loaded at Ukpotiki during the contractual period. On 3 April, T e-mailed G stating that it would not be possible to receive the vessel back at the terminal to offload the cargo within a reasonable time and that all parties involved were advised "to take whatever steps they deem appropriate in the circumstances".

On 8 April, there was a telephone conversation between the parties, which was followed by an e-mail on 9 April from G confirming *inter alia* "our commitment to load the cargo at the soonest possible time for all parties concerned at the agreed contractual pricing and our declaration dated 27th March 2008 remains unchanged". Discussions continued thereafter to fix a new loading period. G had hedged its market exposure in respect of this transaction and continued to maintain its hedges.

T subsequently proposed a lifting period between 20-30 June and sent an e-mail making a number of changes to the 6 March contract. These included the addition of a new clause headed "entire agreement" which stated that the parties' obligations under the 6 March contract were extinguished and replaced by their obligations under the new agreement. The new contract also contained a price clause requiring a new pricing declaration instead of the pricing period that G had already declared under the March contract. When T would not agree to apply the previously nominated pricing window to the contemplated June lifting, G bought back its hedges, cancelled the on-sale of the cargo and proceeded to accept what it considered to be T's repudiatory breach thereby bringing the contract to an end. G then commenced proceedings against T to recover its losses.

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Commercial Court decision

Liability

The judge agreed with T that under an fob contract, delivery has to take place during the time specified by the contract. Therefore, where the vessel sailed from Ukpotiki without having loaded the cargo, this would *prima facie* mean the contract expired unperformed. However, the judge was satisfied on the basis of the evidence before him that the parties in the present case had agreed to maintain the existing March contract. Although the parties continued to discuss new shipment dates, this did not prevent them from affirming the March contract on the basis of the March pricing declaration in the meantime. In the judge's view, the parties behaved as though the original contract continued to subsist. Consequently, the judge held that T was in repudiatory breach of contract in refusing to make the shipment and G was entitled to succeed on the liability issue.

Damages

As to the measure of damages, the judge held that G was entitled to claim the difference between the contract price and the value of the oil on the date when it ought to have been delivered. In the absence of an available market for the Ukpokiti crude, the judge said that the measure of damages would be the estimated loss directly and naturally resulting from the seller's breach of contract (section 51(2) of the Sale of Goods Act 1979). In the event of an anticipatory repudiatory breach such as in the present case, the relevant date was the due date for delivery, alternatively the date when the goods ought reasonably to have been delivered, not the date of the repudation or the buyer's acceptance of it.

He disagreed with T's argument that the value of the oil should be calculated at the time of the making of the contract rather than its performance because contracts for the delivery of Nigerian crude were typically negotiated some 15 to 45 days before delivery. Notwithstanding that the price of dated Brent was by its nature a price for future delivery, the judge said it provided a ready means to measure the market price of the oil in question at the time of non-delivery.

However, the judge did uphold T's contention that the damages recoverable by G should take into account the reduction in G's losses as a result of the closing out of its hedges. G had argued that the only step it could have taken in mitigation of its loss was to purchase a substitute cargo and that closing out its hedges did not constitute mitigation. Rather, G maintained that its hedges were independent transactions it had entered into prior to T's repudiatory breach and that these merely reduced its exposure to a paper loss. The judge disagreed and said that hedging was an integral part of the business by which G entered into this contract for the purchase of oil and since the closing out on early termination established a lower loss than would otherwise have been incurred, that had to be taken into account in calculating G's losses.

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