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# Consent Provisions in Long-Term Relational Contracts

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**Case Commented On:** *Apache North Sea Ltd v Ineos FPS Ltd*, [2020] EWHC 2081 (Comm)

The drafters of long-term relational contracts often have to deal with the uncertainties of future developments. One technique for doing so is to accord one party to the contract (A) a power to propose some development or other while affording to the other party (B) a power to withhold its consent to the development, but disciplining the consent power by stipulating that B cannot unreasonably withhold its consent. Such provisions have long been common in the landlord and tenant context but they are also common in other commercial contracts, including oil and gas contracts. For a recent Canadian example see *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 (CanLII) and my post on that decision here.

This particular case involved an agreement (2003) for the transportation and processing of hydrocarbons (TPA) produced from Apache's interests in the Forties Field in the North Sea and transported through the Forties Pipeline System (FPS) owned and operated by INEOS. INEOS was the successor by means of a novation agreement to BP Exploration Operating Company Limited (BPEOC), Apache's original counterparty to the TPA. Apache first acquired an interest in the Forties Field in 2003; but, having acquired additional fields, entered into further TPAs with BPEOC in 2012 and 2013. An umbrella agreement between BPEOC and Apache (2013) made all of these agreements subject to the same terms as the original Forties TPA.

The TPA contemplated that Apache would nominate a Firm Maximum Quantity (FMQ) on a quarterly basis as well as an Estimated Maximum Quantity (EMQ) on an annual basis. A production profile was recorded in Attachment F to the TPA. The parties agreed on a revised Attachment F to the contract (as well as revised and increased tariff) for the period between 2012 and 2020. That amendment specifically provided (at para 13) that:

> For periods after 1 January 2021, Apache shall be entitled to request (a) extensions to Attachment F, (b) FMQs and (c) Additional Quantities and Spot Quantities pursuant to Clauses 5.05 and 5.06 of the TPA.

The current proceedings were triggered by Apache's efforts to address the arrangements that would apply post 2020. In particular, Apache sought to amend Attachment F and to ship increased quantities on the FPS. Clause 5.05 of the TPA contemplated that in either instance "BP shall not unreasonably withhold its consent" subject to their being uncommitted capacity. INEOS took the position that it was entitled to withhold its consent to Apache's request unless Apache agreed to a revised tariff.

The present proceedings were confined to two preliminary issues framed as follows:

> [First Preliminary Issue]
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> On the basis of:
>
> > a. the agreed facts set out in Appendix 1; and
> >
> > b. the assumption that the facts alleged by the Defendant which are set out in Appendix 2 are proven at trial,
>
> is INEOS acting unreasonably and/or non-contractually by withholding consent under clause 5.05(a) of the Apache Forties TPA to an amendment to Attachment F unless Apache agrees to increase the base tariff payable?
>
> […]
>
> [Second Preliminary Issue]
>
> Are (a) the terms (including as to price) on which INEOS FPS acquired the FPS from BPEOC, and/or (b) INEOS' knowledge at the time it agreed to purchase the FPS from BPEOC, relevant to the assessment of whether INEOS FPS has unreasonably refused consent under clause 5.05(a).
>
> (at paras 3-5; emphasis in original)

Justice Foxton concluded that, on a proper construction of the TPA, INEOS could not insist upon an increased tariff as a condition for granting its consent to the proposed amendments. As to the second, Justice Foxton concluded that the terms on which INEOC might have acquired its interest from BPEOC were not relevant to the reasonableness of any withholding of consent.

While these conclusions are obviously very fact specific a few observations are in order. First, the judgment contains an excellent review of what might be referred to as contractual consent cases - both in the landlord and tenant context and in the broader commercial context. This review will be useful for anybody considering cases dealing with the exercise of consent (and similar) powers in other commercial contexts.

Second, in settling on what was effectively a narrow definition of reasonableness, Justice Foxton's judgment was informed by a highly contextualized analysis of the entire contract. In his analysis, he emphasised that the TPA did not have a certain duration but was effectively tied to the lives of the fields; that the contractual tariff provisions did provide for escalation according to certain indices; that the TPA did provide a number of grounds on which either party might terminate the arrangement; and, perhaps most importantly, that BPEOC was ultimately able to protect itself from operating the FPS on non-commercial terms by opting to move from a contract-based tariff to a tariff based on operating costs plus a mark-up. Under these circumstances (at para 76(iv)), "it would render the TPA a particularly one-sided bargain if

Apache had either to accept any rational conditions sought by INEOS as the price of amending Attachment F, or risk being unable to transport its production ashore."

Third, and with respect to the second preliminary issue, Justice Foxton concluded that any reference to the terms under which INEOS acquired its interest from BPEOC could not be relevant to the reasonableness of any withholding of consent because they were "collateral to [INEOS'] relationship with Apache under the TPA." This was reinforced by the terms of the novation agreement pursuant to which INEOS acquired its interest which (at para 83) "were intended to achieve a seamless transfer under which INEOS would stand in BPEOC's shoes going forward. Paragraph 5(a)(1) of the Novation Deed dated 31 October 2017 provided that INEOS would be bound by the TPA 'as if [INEOS] had at all times been a party to the [TPA] in place of [BPEOC]'."

And finally, a Canadian reader of this decision will be surprised to learn that there is no substantive discussion of a duty of good faith. Had the case been argued in Canada I suspect that both the parties and the court would have had to consider the applicability of *Bhasin v Hrynew and Can-Am*, 2014 SCC 71 (CanLII). (And in this context see my discussion of the High Court decision in *TAQA Bratani Ltd et al v RockRose UKCS8 LLC*, [2020] EWHC 58 (Comm) here.) A Canadian reader of this decision might also be struck by the time frame for rendering this decision. The hearing on the two matters was set down for July 15 and 16, there were supplementary submissions at the request of Justice Foxton on July 20 and Justice Foxton handed down his written decision with comprehensive reasons on July 27. Impressive.

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