WELL CONNECTED

STEPHENSON HARWOOD

SPECIAL EDITION

WELL CONNECTED

Stephenson Harwood's legal bulletin for clients engaged in floating production

November 2020

Introduction

Welcome to this special edition of Well Connected, our specialist publication for those involved in floating production.

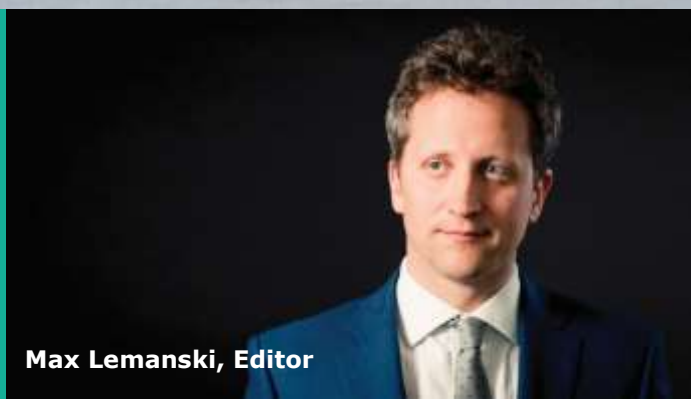
Many of our clients' disputes are resolved in arbitration – but not all. In this edition we take a deep dive into the High Court judgment in *Altera Voyageur Production Ltd v Premier Oil E&P UK Ltd* [2020] EWHC 1891 (Comm), in which we acted for the successful Claimant. It's a fascinating judgment and provides useful guidance as to the Court's approach to worked examples used in floating production contracts. They are intended to explain how production targets are compared to availability – do they help or hinder?

It's also an excellent advertisement for the English Commercial Court, which dealt with the entire claim, including an attempt to appeal in approximately one year. The Claim Form was issued in 25 October 2019. The first instance hearing was heard on 8 July 2020 and judgment handed down on 17 July 2020. The Defendant applied for permission to appeal shortly afterwards, and this was refused on 13 November 2020. And, of course, much of this took place during the topsy-turvy, pandemic dominated year that is 2020.

Crucial to the successful outcome was of course a thorough understanding of performance of floating production operations – the main theme of our Well Connected series.

Stephenson Harwood is a stand out firm; they are very active and are experts.

Chambers UK 2021



Max Lemanski, Editor

STEPHENSON HARWOOD

Altera Voyageur Production Limited v Premier Oil E&P UK Ltd

Introduction

In *Altera Voyageur Production Limited v Premier Oil E&P UK Ltd*, the English High Court held that sums due under a contract should be calculated in accordance with two worked examples in the contract, which indicated the contractor was entitled to a bonus of 95% or more if target production was achieved, even though target production was set at 95% of availability.

Background to the dispute

Premier Oil, an oil exploration company, bareboat chartered an FPSO, *Voyageur Spirit* (the "**Vessel**"), from Altera (for whom Stephenson Harwood acted) for the purpose of developing and producing the Huntington Field oil reserves in the North Sea.

Under the terms of the contract, Premier was to pay Altera "daily base hire" in the first instance, which was then subject to later adjustment on an annual basis. The parties disagreed as to how this adjustment was to be effected. The dispute turned on two worked examples contained in Appendix M of the contract (which governed the hire adjustment process).

In a number of places in the contract, there was a reference to a "target availability" of 95%, although in some parts of the contract this 95% was in respect of time (i.e. days in a year), and in others by reference to a production target (i.e. barrels of oil).

The two worked examples in Appendix M (set out below) contained a detailed formula which took into account the availability of two of the FPSO's systems (oil/gas process and water injection), applied a different adjustment formula if the availability was less than or greater than 95%, and applied a weighting factor to the results of the two systems, resulting in an "annual hire adjustment formula" ("**AHAF**").

The two worked examples then took the further step of dividing the AHAF by 95 (the "**95 Division**"), to result in the final hire adjustment (in the first worked example this resulted in a bonus payment to Altera, in the second it resulted in a refund to Premier).

Altera's position was that the worked examples should be followed as set out in the charterparty, and the 95 Division applied to the AHAF to produce the final hire adjustment.

Premier argued that the AHAF itself should be the final hire adjustment, and that the 95 Division should be disregarded because it (a) was not mentioned in the narrative section of Appendix M (b) produced a result which was inconsistent with the narrative section and other terms of the charterparty, and (c) was contrary to commercial common sense.

On Altera's interpretation of the adjustment mechanism, some USD 12 million further hire was due to Altera in bonus payments. On Premier's

interpretation, some USD 3.8 million was due to be refunded to Premier.

The sole question for the Judge to decide was whether or not the worked examples should be followed, and the 95 Division applied.

Held

The Judge found in Altera's favour, ruling that the 95 Division should be applied.

The Judge considered that it was "*inherently more probable that the parties' true bargain is that to be found in the 'Worked Examples'*", adopting the view that the whole point of worked examples was to demonstrate, with clarity, the consequences of the parties' agreement. He noted that it was clear that the suite of charterparty documents was the product of extensive negotiation, during which changes were made but not always followed through with rigorous consistency. However, the worked examples were not '*optional extras*' but rather integral parts of the contract terms which explained how the adjustment was to be calculated. He also pointed to the fact that there was not just one, but two Worked Examples.

Premier had argued that because the charterparty contained an 'inconsistency clause', which provided for what should happen in the event of any conflict between different parts of the contractual documents, those parts should prevail over the worked examples. The Judge found that the 'inconsistency clause' was not engaged, as there was no real inconsistency between the worked examples and the other parts of the charterparty. For example, the charter stated that hire adjustment would be as per Appendix M, and Appendix M contained the worked examples.

Premier had also argued that the 95 Division made no commercial sense, because the effect of it was to set the "pivot point" (at which Altera would receive a bonus payment) at 90.25% availability, rather than 95% availability. The Judge acknowledged that there was force in this argument, but that "*while it is tempting to accede to [Premier's] further submission that I should accordingly disregard [the 95 Division] … and interpret Section 5 of Appendix M as if it stopped before the 'worked examples' … I cannot ignore the fact that that is not the agreement that the parties have actually made…*

To disregard the [Worked Examples] would… be to rewrite the contract the parties have made".

He went on to say, *'The court can… do just that where it is 'clear' that something has gone wrong in the language which the parties have used. However, although I accept that is undoubtedly possible that something has gone wrong here… it is not by any means clear to me that it has in fact done so.*'

Appeal

The Judge declined to grant Premier leave to appeal. Premier then applied to the Court of Appeal for permission to appeal.

On 13 November 2020 the Court of Appeal refused Premier permission to appeal. In its decision, the Court of Appeal stated that:

(1) there was no distinction between the narrative and worked examples sections of Appendix M, which had to be read as a whole;

(2) There is no firm rule about how worked examples should be construed – each case will turn on the contract terms;

(3) It was more likely that the parties intended hire adjustment to be as per the worked examples than it was that they intended one of the steps in the worked examples (the 95 Division) to be disregarded; and

(4) The Judge was right to conclude that there was no sound basis on which to say that the 95 Division was included in error. It was included in both worked examples and did not produce a result that was either uncommercial or impossible.

Conclusion

This case turned, of course, on a bespoke set of provisions. However, it does provide helpful general guidance as to how the Court is likely to approach the use of worked examples in contracts. It is unlikely that they can simply be disregarded, as Premier Oil had contended.

For those drafting such contracts the takeaway is clear - care needs to be taken that such worked examples accord with their commercial intentions. Indeed, as Blair J put it in another case as quoted in this judgment, '*in the context of lengthy contracts… illustrations or examples 'may' deserve particular attention as something to which the parties particularly turned their minds…*'

This may sound obvious – but the reality is that during the hard (and often time-pressured) process of commercial negotiations, parts of contracts are often added or removed, creating the potential for inconsistencies, which make the parties' intentions hard to fathom. This decision helps the parties to a floating production contract understand how apparent inconsistencies may be resolved.

Max Lemanski
Partner
T: +44 20 7809 2224
E: max.lemanski.shlegal.com

A well-known energy and shipping specialist, Max has broad experience representing clients in the offshore sector and works with many of the firm's oil and gas clients, with a particular focus on offshore contractors and international shipowners.

Max is the co-head of our market leading FPSO team and Max's cases include a number of complex, high-value FPSO disputes involving detailed technical analysis, quantum issues and delay and prolongation claims. He is also an expert in the LNG/FLNG field.

"He is astute, savvy and dynamic."
Chambers UK 2021

Alex McCue
Senior associate
T:+44 20 7809 2512
E: alex.mccue@shlegal.com

Alex has extensive experience in all aspects of charterparty disputes, and has gained closer industry knowledge through secondments with shipowning/FPSO clients and a P&I Club.

In recent years Alex has increasingly worked on offshore issues, providing advice in relation to offshore charterparty disputes and being heavily involved in high-value and complex FPSO disputes.

"Noteworthy, bright and very capable."
Legal 500 UK 2020

Max Lemanski and Alex McCue of Stephenson Harwood LLP were instructed by Altera Infrastructure, instructing Sean O'Sullivan QC of 4 Pump Court as counsel.

STEPHENSON HARWOOD

Staying in touch

Stephenson Harwood has a leading team of specialist lawyers with true strength in depth in all aspects of oil and gas floating production, including negotiating contracts for new projects, and resolving disputes, headquartered in London working seamlessly with our team members in key locations including Singapore, our hub for oil and gas activities in Asia-Pacific.

The team have been running workshops for FPSO clients, although we are obviously not in the position to hold these at present in person. We will let you know when these are back up and running in London and Singapore.

In the meantime, if there is anything arising from our newsletter, we are very happy to set up a zoom call symposium to discuss.

Well Spoken

Hosted by members of Stephenson Harwood's leading oil and gas team, our podcast series, Well Spoken, provides an overview of key legal developments and topical issues facing the industry.

Information contained in these podcasts should not be applied to any set of facts without seeking legal advice.

Subscribe to our podcast series on iTunes.

Principal members of the team include:

Max Lemanski
Partner, London
T: +44 20 7809 2224
E: max.lemanski@shlegal.com

Stuart Beadnall
Partner, London
T: +44 20 7809 2936
E: stuart.beadnall@shlegal.com

Simon Moore
Partner, London
T: +44 20 7809 2164
E: simon.moore@shlegal.com

Tom Adams
Partner, London
T: +44 20 7809 2628
E: tom.adams@shlegal.com

Tony Concagh
Partner, London
T: +44 20 7809 2626
E: tony.concagh@shlegal.com

John Simpson
Partner, Singapore
T: +65 6622 9565
E: john.simpson@shlegal.com

Martin Brown
Partner, Singapore
T: +65 6622 6232
E: martin.brown@shlegal.com

Awards and accolades

"They are clever and constantly trying to achieve the best for clients. They are committed and really good tacticians."

Chambers 2021

They are a standout firm; they are very active and are experts."

Chambers 2021

"The team we work with has a very strong knowledge of shipping in the oil and gas industry – they offer practical solutions and pragmatic approach."

Legal 500 2021

"The team is analytical and has a high level of appreciation for the key issues."

Chambers 2021

"They are very proactive and supportive."

Chambers 2020

STEPHENSON HARWOOD

Disclaimer