



**NEUTRAL CITATION NUMBER : [2020] EWHC 633 (Ch)**

**IN THE HIGH COURT OF JUSTICE**

**No. HC-2016-001872**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**BUSINESS LIST (ChD)**

**7 Rolls Building**  
**Fetter Lane**  
**London, EC4A 1NL**

**Tuesday, 18 February 2020**

Before:

**MR JUSTICE ZACAROLI**

**Between**

- (1) BLUE POWER GROUP SARL
- (2) BLUE WAVE CO SA
- (3) BLUE MGMT LTD

**Claimants/Respondents**

- and -

- (1) VÅR ENERGI AS (formerly known as ENI NORGE SA)
- (2) ENI S.p.A
- (3) ENIPROGETTI S.p.A

(formerly known as TECNOMARE S.p.A)

**Defendants/Applicants**

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**MR ANDREW TWIGGER QC and MR JONATHAN ALLCOCK (instructed by Stephenson Harwood LLP) appeared on behalf of the Claimants/Respondents.**

**MR TOM ADAM QC and MR RICHARD ESCHWEGE (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Defendants/Applicants.**

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**APPROVED JUDGMENT**

**MR JUSTICE ZACAROLI:**

- 1 Notwithstanding the well-crafted submissions of Mr Twigger on behalf of the claimants, I am not persuaded that I should deny the defendants the opportunity to adduce expert evidence in the combined fields of CNG Technology and Offshore Oil and Project Management as previously ordered by Mr Edward Murray (as he then was) sitting as a Deputy Judge of the Chancery Division.
- 2 I will state my reasons very briefly with no disrespect to the lengthier and more careful submissions from both parties.
- 3 The relevant parts of the claim to which the evidence relates is the claim that the defendants breached an obligation to use their best endeavours to persuade Statoil, the defendants' partner in the Goliat oilfield, to consent to the use of the claimants' CNG Technology. The expert evidence is primarily said to be relevant to the content of the duty to use best endeavours and the question of causation. It is common ground that the legal test when considering whether it is appropriate to permit expert evidence is as stated by Warren J. in *British Airways v Spencer* [2015] EWHC 2477 (Ch) at para.68:.

“But that is not the correct approach to the admissibility of the evidence. Instead, it is necessary to look at the pleaded issues and, unless and until a particular issue is excluded from consideration under CPR 3.1(2)(k), the court must ask itself the following important questions:

(a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.

(b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it (just as in *Mitchell* the court would have been able to resolve even the central issue without the expert evidence).

(c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. In that case, the sort of questions I have identified in paragraph 63 above will fall to be taken into account. In addition, in the present case, there is the complication that a particular piece of expert evidence may go to more than one pleaded issue, or evidence necessary for one issue may need only slight expansion to cover another issue where it would be of assistance but not necessary.”

- 4 The content of a duty to use best endeavours is likely to vary significantly from case to case, therefore it is necessary to start from the pleadings to see what is put in issue. The pleadings are lengthy, extending to over 380 pages including crossings out of struck-out matters, but it is necessary for this purpose to refer only to a few paragraphs.
- 5 In para.38L of the re-re-re-amended points of claim reference is made to three concerns that Statoil had about the claimants' CNG option. First, the immaturity of the technology; second, new uncertainties relating to gas containment systems; and, third, an anticipated substantial delay between first production and the likely start date of the CNG export solution.
- 6 At para.38M the claimants plead that these concerns were not justified and that Statoil's views were wrong. Further particulars about the concern as to delay are provided over the next two pages of the pleading, including further allegations as to specific apparent conclusions reached by Statoil being wrong.
- 7 The defendants put in issue each of these allegations. They assert that the claimants' CNG Technology was immature, that there were uncertainties surrounding the process, timing, costs and outcome of any certification process. They then set out a page and a half of particulars of the anticipated delays.
- 8 The claimants plead in various subparagraphs of para.65 that the defendants failed to do all they reasonably could to persuade Statoil that the CNG Technology was sufficiently mature; that there were no or no significant uncertainties; that the CNG option would be ready by the time oil production started or soon thereafter; and to present to Statoil "accurately" the benefits of the CNG option. Finally, the claimants plead that had the defendants used their best endeavours Statoil would have consented. The defendants deny this and counter, among other things, by asserting that the claimants' CNG solution was in fact not the best of the options available; in particular, gas reinjection was better.
- 9 I leave aside for the moment other paragraphs of the pleading, for example, para.63 where the claimants say that although apparently couched in objective terms everything in that paragraph raises allegations solely as to the defendants' own position at the time. I do not need to decide whether that is correct. On the basis of the paragraphs I have already referred to, I consider Mr Adam is correct in his contention that the pleadings identify questions of fact as to the objective characteristics of the CNG Technology and its utility for the Goliat field, the resolution of which will, at the very least, be assisted by expert evidence. These issues involve specialist knowledge, for example, as to the uncertainties that existed in the technology, the delay in its implementation and the respective merits of the different technologies on which the Court would otherwise have only the views of the self-interested parties.

10 I accept, as Mr Twigger for the claimants contends, that the objective position as to the best of the available technologies and as to the perceived problems with the claimants' CNG solution is not determinative of whether Statoil would or would not have consented. Statoil might, for example, have acted unreasonably. But, first, the claimants have themselves chosen to plead and put in issue that Statoil's views were objectively wrong and, second, I think the Court would be assisted in deciding the likelihood of Statoil's actions, in the hypothetical circumstance that the defendants had done more to persuade them, by independent evidence as to the extent, if at all, to which there were problems with the claimants' CNG solution and the broader merits of its technology compared with other options.

11 To give a concrete example, if, as the defendants' contend, Statoil's views and concerns were objectively justified, then not only is it rendered much less likely that the defendants could by doing more have persuaded Statoil to consent, this also feeds back into the content of the duties: a reasonable person would not have done more to dissuade Statoil of views held by it if those views were objectively correct. On the other hand, if Statoil's views and concerns were shown to be wrong, then this would itself suggest steps which a reasonable person, subject to the best endeavours obligation, would have taken to seek to persuade Statoil. It would also provide strong ammunition for an argument that had these steps been taken Statoil would have changed its mind. As this demonstrates, there is, as Mr Adam submitted, a close connection within the content of the duty to use best endeavours and the issue of causation. See in this respect the comment of Rose J in *Minerva (Wandsworth) Ltd. v Greenland Ram (London Ltd.)* [2017] EWHC 1457 (Ch) at para.255:

“In considering what steps were reasonable, the court has also to consider whether any steps would have been successful.”

12 The claimants place considerable reliance on the fact the defendants themselves held a positive view of the claimants' CNG solution at the time. I do not accept, however, that because the defendants had such a view that renders expert evidence unnecessary. First, the critical question relates to the position of Statoil not the defendants, i.e. whether Statoil's view could and would have been changed by further efforts on the defendants' part.

13 The defendants' contemporaneous enthusiasm for the technology might explain why they were content to enter into a best endeavours obligation to get Statoil's consent but it does not seem to me to provide much, if any, assistance in determining what is the scope of the duty to use best endeavours or as to whether had further steps been taken Statoil would have consented. Secondly, as Mr Adam says, the interests of the defendants and those of Statoil may well have diverged, given that Statoil was interested only in the Goliat field but the defendants were interested in developing the technology for use more broadly. Accordingly, persuading Statoil might well have required substantially more than explaining why the defendants themselves thought it was such a good idea.

- 14 Mr Twigger also relied on the defendants' prior positive views as to the claimants' technology as a reason why they should not be permitted to adduce expert evidence without first explaining why they say their prior views were wrong. I do not think this is right in the circumstances of this case. At least some detail was provided in para.116B of the defence, and no further particulars were sought directly of the defendants' plea that Statoil's concerns were correct.
- 15 For these reasons I will make an order broadly in the terms of para.3(1) of the draft provided with the proviso that para.2 be redrafted to make it clear that it is intended to relate to the comparative commercial benefits of, on the one hand, the claimants' CNG Technology and, on the other hand, the other options then under consideration.

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Official Court Reporters and Audio Transcribers  
5 New Street Square, London, EC4A 3BF  
Tel: 020 7831 5627 Fax: 020 7831 7737  
civil@opus2.digital*

**This transcript has been approved by the Judge**