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Case No: CL-2023-000202

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2023

Before:

Mr. Nigel Cooper KC
sitting as a Judge of the High Court

- -

Between:

PREMIER OIL UK LIMITED — **Claimant**

- and -

SHELL INTERNATIONAL TRADING AND SHIPPING COMPANY LIMITED

(for and on behalf of SHELL TRADING INTERNATIONAL LIMITED) — **Defendant**

- -

DAVID ALLEN KC and JASON ROBINSON (instructed by **Bracewell (UK) LLP**) for the Claimant
MICHAEL FEALY KC and MICHAEL WATKINS (instructed by **Norton Rose Fulbright LLP**)

Hearing date: 09 October 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Wednesday 20th December 2023.

Mr. Nigel Cooper KC sitting as a High Court Judge:

Introduction

1. In this action, the Claimant ("Premier") and the Defendant ("Shell") seek to determine a dispute concerning the jurisdiction of a referee under two contracts.

2. The two contracts are for the sale of crude oil by Premier to Shell. One contract relates to the sale of crude oil from the Schiehallion oilfield, a deepwater oilfield approximately 110 miles west of the Shetland Islands in the North Atlantic Ocean ("the Schiehallion Contract"). The other contract relates to the sale of crude oil from the Clair oilfield located nearly 50 miles west of the Shetland Islands ("the Clair Contract"). The contracts are both dated 30 September 2019 and were originally entered into between Shell and Chrysaor Limited but were novated to Premier on 01 July 2021 in respect of the Schiehallion Contract and 17 August 2021 in respect of the Clair Contract.

3. As set out further below, the underlying dispute between the parties relates to changes to the detailed pricing structure under each contract. For the purposes of resolving that dispute, the parties have identified and appointed a referee in accordance with the dispute resolution provisions in each contract. The present Part 8 claim concerns the instructions to be given to the referee for the purposes of enabling him to exercise his decision-making powers. In brief, each of the parties is concerned that the other is looking to unduly influence the referee in exercising his powers under the contracts. Premier is concerned that Shell wishes to give guidance to the referee which will lead him to adopt a more restricted approach to the exercise of his contractual powers than the parties originally intended. In

contrast, Shell is concerned that Premier is seeking to persuade the referee to undertake a more wide-ranging pricing review than the parties originally intended. As a consequence, the parties have been unable to agree terms of reference for the referee and now seek the assistance of the court.

Common Ground

4. Both contracts contain a detailed pricing structure fixing the price to be paid under the contracts for the duration (for example at clause 8.1 of the Schiehallion Contract and clause 8.1 of the Clair Contract).

5. The price to be paid under both contracts is calculated, among other things, by reference to *"the average of the high and low daily quotations for Urals Rotterdam versus Med Dated Brent Strip as published in Platts (AAGXJ00)"* (the "Urals Assessment"). AAGXJ00 is the code or designation given by Platts to this index, namely the Urals Rotterdam v Med Dated Brent Strip.

6. Urals crude is the most common export grade of crude oil from Russia. The Urals Assessment is a price differential benchmark for Urals crude oil delivered CIF (Cost Insurance & Freight) into Northwest Europe and is published by Platts. In broad terms:

   i) The Urals Rotterdam element of the Urals Assessment reflects the daily average price of Urals crude oil loading from Russian ports for delivery CIF into North West Europe (Rotterdam/Netherlands); and

   ii) The Med Dated Brent Strip element reflects a market related assessment of the future ("forward") price for a Dated Brent Cargo ("Dated Brent"

being the North Sea crude oil pricing benchmark) but which is 13 – 28 days forward from a Dated Brent cargo on the publication date.

iii) The Two figures are then compared to give the differential which is added together with the other elements in the contract price calculation to give the contract price.

7. In the event of a material change by Platts to the heading or contents of its reports relevant to the calculation of Assessments used within the pricing structures (such as the Urals Assessment), both contracts provide a mechanism by which a referee is to determine an alternative source of price information.

8. Platts made a material change to the methodology used to calculate the Urals Assessment, which took effect from 01 November 2022 (the "Revised Urals Assessment").

9. The material change to the methodology used by Platts to calculate the Urals Assessment was made in reaction to the European sanctions on Russia. A Platts decision note dated 18 October 2022 stated that the sanctions package *"imposes a complete import ban on all seaborne Russian crude oil to the European Union from 5 December 2022"*, as well as imposing *"a ban on EU operators insuring and financing the shipping of oil from Russia to third countries"*. Consequently, CIF Rotterdam prices are no longer available and the methodology change was that Platts now use prices for Free on Board ("FOB") deliveries from Russian ports and adds a freight cost to Rotterdam.

10. Premier and Shell were unable to agree on an alternative source of price information within the ten-day period stipulated by the contracts. Accordingly,

both parties accept that it is now for a referee to determine an alternative source of price information pursuant to the contracts.

11. The ambit of the referee's decision-making powers is prescribed and circumscribed by clause 8.4 of the Schiehallion Contract and clause 8.2 of the Clair Contract.

12. The parties are also agreed that the referee's power was limited to determining an alternative source of price information for the Urals Assessment.

The Issues

13. The parties have described the issues as being:

i) Is Premier entitled to a declaration that no further explanation to or instruction of the referee is required before the referee is to perform his function under the contractual referee procedure?

ii) If not:

a) Is the referee permitted to assess an alternative source of price information for a Schiehallion crude offtake under the Schiehallion Contract or a Clair crude offtake under the Clair Contract?

b) Is the referee permitted to assess whether the Urals Assessment reflects the market value or market price of a Schiehallion crude offtake under the Schiehallion Contract or a Clair crude offtake under the Clair Contract?

c) Is the reference to *"market price"* in the Schiehallion Contract (clause 8.4) and the Clair Contract (clause 8.2) a reference to the market price resulting from the Urals Assessment?

d) Is the reference to an *"alternative source of price information"* in the Schiehallion Contract (clause 8.4) and the Clair Contract (clause 8.2) a reference to a single published source of price information.

e) Can the *"alternative source of price information"* referred to in the Schielhallion Contract (clause 8.4) and the Clair Contract (clause 8.2) include the Revised Urals Assessment that took effect from 01 November 2022?

14. The issues above can be further simplified to two key issues:

i) Is it appropriate for this court to express a view as to ambit of the referee's decision-making powers before the referee has exercised his powers; and

ii) If so, what guidance, if any, should be given to the referee in relation to the matters identified in sub-paragraph 13(ii) above.

The relevant contractual provisions

15. Although I was referred to various provisions in both contracts for the purposes of the parties' submissions, it is not necessary for me to refer in detail to any provisions other than clauses 8.3 and 8.4 of the Schiehallion Contract and clause 8.2 of the Clair Contract.

16. Clauses 8.3 and 8.4 of the Schielhallion Contract provide:

"8.3 In the event that Platts ceases publication or materially changes the heading or contents of its reports relevant to the calculation of Assessments in accordance with Clause 8, the Buyer and the Seller shall meet as soon as possible to agree an alternative source of price information to be used for the purposes of this Clause 8.

8.4 If the parties fail to agree such an alternative source of price information within ten days of the first date notified by one to the other, in writing, for such a meeting then, unless the parties otherwise agree, the matter shall be referred for a decision to a referee nominated by agreement between the parties within twenty-one days of the first written nomination by either Party to the other, or in default of such agreement, by the President for the time being of the Energy Institute. The referee shall determine an alternative source of price information which in the opinion of such referee most accurately reflects the market price to be applied in calculating Assessments for Schiehallion Crude Oil."

17. Clause 8.2 of the Clair Contract provides:

"8.2 ... In the event that Platts ceases publication or materially changes the heading or contents of its reports relevant to the calculation of Dated Brent Assessments or Urals Assessments in accordance with this Clause 8, the Buyer and the Seller shall meet as soon as possible to agree an alternative source of price information to be used for the purposes of this Clause 8.

If the parties fail to agree such an alternative source of price information within ten (10) days of the first date notified by one to the other for such a meeting then, unless the parties otherwise agree, the matter shall be referred for a decision to a referee nominated by agreement between the parties within twenty one days (21) of the first nomination by either Party to the other, or in default of such agreement, by the President for the time being of the Energy Institute. The referee shall determine an alternative source of price information which in the opinion of such referee most accurately reflects the market price resulting from the Dated Brent Assessments and/or the Urals Assessments for calculating the price of Clair Crude Oil."

18. There are differences in wording between clause 8.4 of the Schiehallion Contract and clause 8.2 of the Clair Contract, but neither party suggested that the differences were material for the purposes of the questions I have to decide.

19. Both clauses refer to the President of the Energy Institute as being the appointing authority in default of agreement between the parties. However, the President is no longer willing to act as an appointing authority. Accordingly, the

parties agreed in an exchange of e-mails dated 11 and 13 January 2023 that the LCIA should appoint the referee in default of the parties' agreement.

20. Although I was not asked to consider the provisions in detail, Schedule 7 of the Schiehallion Contract and Schedule 5 of the Clair Contract contain detailed provisions which are to apply in circumstances where an expert (as opposed to a referee) is required to be appointed under the terms of the contract. Those detailed provisions set out not only the mechanism for appointment but also the procedure to be followed by the expert in reaching their decision. They do not apply to the exercise by the referee of his powers under clauses 8.4 and 8.2.

The Law

21. There was no disagreement between the parties as to the principles to be applied generally to the process of construing both contracts. I was, however, referred to a number of authorities concerning (i) the approach the courts should take to construing expert determination clauses and (ii) the extent to which the courts should or can supervise a process of expert determination even if the relevant clause provides for the determination to be final and binding. Although I am concerned with provisions for the appointment of a referee, the parties were agreed that the principles I should apply to construing those provisions are the same as would apply in relation to the appointment of an expert.

22. First in time of the authorities is Norwich Union Life Insurance Society v P & O Property Holdings Ltd [1993] 1 EGLR 164 in which the plaintiff sought an injunction to restrain an expert from proceeding with determination of a dispute pending a decision of the court on questions of construction arising under the relevant contract. The application arose in the context of the development of a

shopping centre being carried out by the first to third defendants where a dispute had arisen as to the date for completion under the funding agreement and as to whether the work conformed to the design drawings. The fourth defendant was nominated as an expert to determine these issues.

23. The application for an injunction was dismissed at first instance and on appeal. At first instance, Sir Donald Nicholls V-C rejected the application for an injunction holding that, as a matter of principle, the issue on which a determination by the court is being sought is either within the matters remitted for his decision or it is not. If it is, then the court will not intervene either before or after the expert's decision, unless there has been fraud or collusion. In the course of his judgment at p.6, the Vice-Chancellor said this:

"I am unable to accept these submissions on the proper construction of this agreement. Under clause 6(9) the parties have, in short, agreed that a third party (the nominated arbiter) shall determine whether the completion date has arrived. Parties to a contract such as this enter into a clause such as clause 6(9) with the object of obtaining a speedy and conclusive determination on the matter in dispute by the tribunal they have chosen. They are not readily to be taken to have intended that any necessary prerequisite to that determination, which raises a question of law, is to be outside the matter so remitted. On the contrary, they are unlikely to have intended that fine and nice distinctions were to be drawn between factual matters which fall within the expert's remit and questions of law or questions of mixed law and fact which do not."

24. The Court of Appeal dismissed the appeal, finding that when the development had been completed must depend on the facts and not on any clear-cut issue of law. The nominated arbiter will have to consider in what respects it is said that the development has not been completed. That, and the identification of the design documents, were matters pre-eminently for the decision of the nominated arbiter and not for the court to consider in anticipation of the arbiter reaching his decision. The court did not have discretion whether or not to grant a

declaration in an advance of an expert's determination. The function of the expert is to make the decision and it is not the function of the court where the decision has been entrusted to the expert. The Court of Appeal expressly approved the passage from the judgment of the Vice-Chancellor set out above. The Court of Appeal also stated:

> *"We were referred also to a decision of Hoffmann J in a case of Royal Trust International Ltd v Nordbanken decided on October 13 1989, but unreported. At p6F of the transcript, he said:*
>
> > *I do not think that it is right that the court has no jurisdiction to make declarations in advance of an expert's determination except with the consent of the parties.*
>
> *He considered that the court had a discretion whether or not to grant such declarations and to stay the proceedings, if necessary, pending the making of such declarations.*
>
> *But with all respect I do not agree. The function of the expert is to make the decision and that is not the function of the court where the decision has been entrusted to the expert. It is otherwise if both parties agree – as they often do – to get a ruling from the court to determine the basis on which an expert is to proceed, and if it is practical to assist the court will do so. But here there is no such agreement."*

25. Shell referred me to the dissenting judgment of Hoffmann LJ (as he then was) and the decision of the House of Lords in Mercury Communications Ltd v Director General of Telecommunications & Anor [1994] C.L.C. 1125 and [1996] 1 WLR 48. The case concerned a challenge by Mercury to a determination by the Director-General as to the terms and conditions of a licensing agreement by which BT was to grant third-party operators access to the telecommunications network. The Director-General made an initial determination in October 1985. In June 1992, BT and Mercury sought a determination from the Director-General as to revised charges payable under the 1986 Agreement and the Director-General made his determination in December 1993 which identified a material change in circumstances and

required alterations to the pricing of calls. Mercury sought to negotiate further changes to the agreement but neither BT nor the Director-General accepted a need for change. Mercury did not challenge the Director-General's determination but sought declarations from the Commercial Court as to the meaning of the certain provisions of the licensing agreement on the basis that the Director-General had erred in law in his interpretation of the agreement. BT and the Director-General applied to strike out the proceedings but their application was rejected at first instance.

26. The Court of Appeal, by a majority, allowed the Director-General's and BT's appeal and struck out the proceedings as an abuse of process. Before the Court of Appeal, both Saville and Hoffmann LJJ held that the court had jurisdiction to entertain the matter because the difference between the parties as to the true construction and effect of the relevant parts of BT's licence constituted a real rather than a hypothetical issue relating directly to their respective private law rights and obligations under the inter-connection agreement. Both Dillon and Saville LJJ held, however, that the originating summons should be struck out as an abuse of the process of the court. Saville LJ held, inter alia, that the parties should be held to the method of resolving differences laid down in the agreement and only in exceptional circumstances, which were not present, would the court substitute itself, in whole or in part, as the decision-maker.

27. Hoffmann LJ in his dissenting judgment held that the issues between the parties concerned construction of parts of condition 13, which was not a question for the Director-General but a point of law. The question then arose as to whether it was procedurally convenient to entertain the applications for declarations at

that stage. Since the Director-General's construction of the relevant condition was already known, no realistic negotiations could take place in the context of the Director-General agreeing in advance with the position taken by BT rather than Mercury. It followed that it was appropriate for the court to determine the construction of the relevant condition at the present stage. The judge's decision not to strike out the proceedings ought not to be disturbed.

28. In the course of his judgment, Hoffmann LJ stated as follows:

> *"So in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision. This is because the court's views about the right answer to the question are irrelevant. On the other hand, the court will intervene if the decision-maker has gone outside the limits of his decision-making authority.*
>
> *One must be careful about what is meant by 'the decision-making authority'. By 'decision-making authority' I mean the power to make the wrong decision, in the sense of a decision different from that which the court would have made. Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to 'decide' what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority. Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the decision-maker the question of whether given facts fall within the specified criterion. The distinction is clearly made by Lord Mustill in R v Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd [1993] 1 WLR 23 at p.32.*
>
> *…*
>
> *These are the principles upon which a court will decline as a matter of substantive law from intervening in a matter which the parties have agreed to submit to the decision of a third party. It does not follow, however, that because a court will intervene to correct a decision-maker who has gone outside his authority, it will declare in advance what the limits of that authority are. The reason for this reluctance is not one of substantive law but procedural convenience. It is because in advance of the decision, the true meaning of the principles upon which he has to decide is usually a hypothetical question. It is hypothetical because it will only become a live issue if one of the parties thinks*

that the decision maker has got it wrong. It is always possible that he may get it right and therefore wasteful and premature to come to the court until he has made his decision. The practice of the courts is not to decide hypothetical questions; see Re Barnato [1994] Ch. 258.

There is a further factor which plays a part in the court's reluctance to make a preemptive ruling on the construction of the principles according to which the decision-maker is required to decide. A party may be attempting to secure a ruling in advance because he fears that if the decision-maker departs from what he considers to be the correct meaning of those principles he may have evidential difficulties in proving that he has done so. The terms of the valuation or award may not provide enough material to enable the court to say that the decision-maker has gone outside his authority. But this is not usually a legitimate reason for seeking a preemptive ruling. The party has agreed to submit to a particular form of decision-making with whatever evidential difficulties that might entail.

…

… But the overriding principle is that whether to grant such a declaration or not is a matter for the discretion of the judge according to what is just and convenient and in accordance with the agreement of the parties as to how the decision should be made.

…"

29. The House of Lords allowed the plaintiff's appeal against the striking out of their originating summons for reasons consistent with the reasoning of Hoffmann LJ in his dissenting judgment; see [1996] 1 WLR 48. Giving the decision of their Lordships, Lord Slynn said the following his speech (at p.58G - :

"What has to be done in the present case under condition 13 as incorporated in clause 29 of this agreement depends upon the proper interpretation of the words "fully allocated costs" which the defendants agree raises a question of construction and therefore of law, and "relevant overheads" which may raise analogous questions. If the Director misinterprets these phrases and makes a determination on the basis of an incorrect interpretation, he does not do what he was asked to do. If he interprets the word correctly then the application of those words to the facts may in the absence of fraud be beyond challenge. … In my opinion, subject to the other points raised, the issues of construction are ones which are not removed from the court's jurisdiction by the agreement of the parties.

…

Then it is contended that even if this is right the present declarations which are sought relate to future, academic and hypothetical questions. The defendants under this head are entitled to say that the court will not give a ruling as to the meaning of words to be applied by another decision-maker before he has a chance to express his own views about it and that the court will not answer questions which are wholly academic and hypothetical. ...

The present case, however, in my view does not raise questions which are academic or hypothetical or wholly in the future in the sense that they may or may not arise. The Director in the 1993 determination has given his interpretation and he has made it clear in the present proceedings that he adheres to that. It is unreal to proceed on the assumption that he will or may change his mind. Longmore J. was right to regard the case as exceptional in this respect. ..."

30. The effect of the dissenting judgment of Hoffman LJ. in Mercury was helpfully summarised by Moore-Bick LJ. in Thorne v. Courtier [2011] EWCA Civ 460 at [15]:

"It was common ground that the principles governing the respective roles of the court and an expert appointed to conduct a valuation are correctly set out in the dissenting judgment of Hoffmann LJ in Mercury Communications Ltd v. Director General of Telecommunications ... He pointed out that two separate questions are involved. If the parties have not established the principles which the expert is to apply when making his valuation, the court will not intervene to decide how he should carry out his task. That is a matter which the parties have left to the expert and they are bound by his decision. If, on the other hand, the parties have agreed on the principles, the expert is to apply, the court can and will intervene to set aside a valuation made contrary to those principles, because in failing to apply them the expert has acted outside his authority. However, the court will not usually intervene before the valuer has completed his task, even if one or other party fears that he may go wrong, because, unless there are strong grounds for thinking that he is likely to do so, such intervention is likely to result in a waste of time and the incurring of unnecessary costs. However, whether to intervene at an early stage is ultimately a matter for the discretion of the judge."

31. The Court of Appeal returned to the question of the court's jurisdiction in relation to expert determination clauses in Barclays Bank plc v. Nylon Capital LLP [2012] Bus LR 542. This case concerned the question whether a decision as to the expert's jurisdiction should first be made by the expert, even if one of the parties seeks a determination by the court. The case concerned a partnership agreement for a hedge fund investment manager, which included an expert

determination clause providing for an accountant to determine any dispute concerning, inter alia, the amount of any allocation of partnership profits based on the partnership accounts. The claimant gave notice to withdraw its investment in the hedge funds and a dispute arose as to the amount owed by it under the partnership agreement. The claimant brought proceedings for a declaration that it was under no obligation to pay to the defendant profits on its initial capital investments in the fund. The defendant sought to stay the proceedings on the basis that the expert determination clause applied to the dispute and that, although ultimately the issue of the expert's jurisdiction was for the court to determine, in the first instance it should be decided by the expert. The judge held that the dispute did not fall within the expert determination clause since it concerned the making of the allocation, whereas the expert determination clause only applied to disputes once an allocation had been made. The Court of Appeal dismissed the defendant's appeal. The Court of Appeal held that:

i) In contrast to arbitration clauses, expert determination clauses generally presupposed that the parties intended certain types of dispute to be resolved by the expert and other types by the court and the question was one of construction with no presumption either way.

ii) Unlike a determination of a matter within his jurisdiction, an expert's decision as to his jurisdiction could always be challenged in court even if the expert determination clause purported to provide otherwise.

iii) That where the court was required to determine the issue of the court's jurisdiction first, the considerations were very different from those

where the dispute related to the expert's mandate but the parties accepted that it was within the expert's jurisdiction.

iv) That it did not assist to describe the circumstances in which the court would intervene as 'exceptional', rather the court would determine the matter in issue if it was real, rather than hypothetical, and if it was in the interests of justice and convenience for the court to do so.

v) It is difficult to understand why, save in relation to narrow questions of interpretation relating to the process of allocation, it would have been contemplated by rational and sensible businessmen that general issues of interpretation of the agreement in its contractual matrix would fall to be determined by an expert accountant relying on the advice of a lawyer rather than by a judge to whom the opposing arguments would be put briefly and a decision obtained within the well-understood procedures of the Chancery Division or the Commercial Court as the courts chosen by the parties.

vi) That under the agreement in relation to the agreement before it, the question of jurisdiction was a short one of construction, namely whether the making of an allocation is a condition precedent to the expert's jurisdiction to make a determination.

vii) It was in the interests of justice and convenience on the facts before the court, that the court should determine the issue of jurisdiction. It was neither just nor convenient to defer that decision until after the expert has determined whether he has jurisdiction.

32. The final decision to which I need to refer is Apache North Sea Ltd v. Neo Energy Central North Sea Limited [2023] EWHC 1345 (Comm), in which three of the counsel before me also appeared. The issue before the Court concerned the proper interpretation of expert determination provisions in a decommissioning security agreement. The agreement contained detailed provisions governing the calculation of the amount of security to be provided by the claimant under the agreement, the construction of which was at the heart of the dispute between the parties as to the amount of security to be provided by the claimants under the agreement. A dispute about the amount of security was to be referred to an expert appointed by the parties. However, such a dispute having arisen, the claimants sought declaratory relief from the court as to the construction of the relevant contractual provisions. The claimants sought to argue that the expert was precluded by the terms of the expert determination provisions from resolving issues of construction. HHJ Pelling KC rejected this argument and held that the effect of the expert determination provisions was to allow the expert to proceed with their determination on the basis of their understanding of the agreement but subject to the court being the ultimate arbiter of issues of construction. In the course of his judgment, the judge stated as follows:

> *… The effect of clause 11.10 is simply to make clear that the Expert's determination of the issues referred to in the third sentence of clause 11.10 are not binding but are ones that it has been agreed will ultimately be determined by the court, if and to the extent there is a disagreement. This is an entirely proportionate and commercial approach because the issue may not in the event have a material impact on the ultimate outcome. It eliminates the risk that a court will be required to determine academic points or points other than in relation to material facts and enables disputes to be resolved in a manner that is relatively inexpensive and speedy.*

33. The judge did determine a number of issues of construction, which the parties had put before him but he also asked himself the question whether he should have done so before the expert had proceeded to their determination. He concluded that he should but on the basis that neither party had requested him not to determine the issues and because there was no doubt that in relation to most if not all of the issues there was a dispute between the parties that was real rather than hypothetical.

34. From the above cases, I draw the following principles:

   i) The court will apply the ordinary principles of contractual construction to determine the effect of the words used by the parties to express the terms of their agreement that relevant disputes should be referred to expert determination.

   ii) If the issue for determination is within the matters remitted to the expert, then the court should not interfere with the determination unless the determination is tainted by fraud or collusion.

   iii) If the parties have agreed the principles or procedures pursuant to which an expert is to make their determination, the court does have jurisdiction to decide whether the expert has correctly applied those principles or procedures and can and will set aside a determination made contrary to the agreed principles or procedures, because the expert has acted outside the scope of their authority.

   iv) The fact that the issue which the expert is required to determine requires the expert to reach conclusions on the proper construction of the contract

does not prevent the expert from reaching those conclusions but, subject to the wording of the contract, the expert's conclusions are open to review by the court even if the contract otherwise provides that the expert's decision is to be final and binding on the parties.

v) The court will not usually intervene before an expert has completed their task even if one or other party fears that the expert may go wrong because, unless there are strong grounds for thinking that the expert is likely to go wrong, the court's intervention is likely to result in a waste of time and the incurring of unnecessary costs.

vi) The decision as to whether to intervene before the expert has made their determination is ordinarily one for the discretion of the court. There do not need to be exceptional circumstances to justify the court reaching its conclusions on the issues of construction first and the court may well do so if the issue in dispute is real, rather than hypothetical, and if it is in the interests of justice and convenience for the court to do so.

vii) The fact that one party may face evidential difficulties in establishing that an expert has gone outside their authority is not usually a legitimate reason for the court to give a pre-emptive ruling. The parties have agreed to submit to a particular form of decision-making with whatever evidential difficulties that might entail.

viii) The court should be careful not to re-write the terms of the dispute resolution mechanism even if one party may no longer regard that regime to be satisfactory.

35. The above summary of the principles to be applied is consistent with the summary provided by Miles J. in General Electric Company v. AI Alpine US Bidco Inc & Ors. [2021] EWHC 45 at [31].

The Parties Submissions

36. Premier's position is that the task for the referee is clear and simple and stipulated in terms by clause 8.4 of the Schiehallion Contract and clause 8.2 of the Clair Contract. Premier says:

    i) The parties have already agreed in terms the scope of the referee's mandate, namely to determine an alternative source of price information in consequence of the material change to the Urals Assessment.

    ii) There is no lack of clarity in either clause and that there is nothing more that the referee needs to be asked to do or not do.

    iii) There is no requirement for further explanation or guidance to be given to the referee.

    iv) The parties have entered into two very detailed and heavily negotiated contracts, each of which incorporates by reference the Shell GT & Cs and each of which has a detailed pricing structure in clause 8 with an agreed mechanism for a third-party referee to determine an alternative source of price information in the event of a material change.

    v) Accordingly, there is no need or legal basis for either party to seek to re-frame or re-characterise the nature of the expert's task under the contracts.

vi) If the parties had wished to provide for the referee to be appointed in a particular way or for their mandate to be circumscribed in some way, they could have done so; see by way of example Schedule 7 of the Schiehallion Contract and Schedule 5 of the Clair Contract.

vii) There is nothing in the language of clauses 8.4 and 8.2 which justifies the guidance which Shell seeks to include in the instructions to the referee.

viii) It is neither commercial nor expedient for businesses in the position of Shell and Premier to have to detail the things that a referee can and cannot take into account when performing the determination in question.

ix) Premier accepts that the referee, once appointed, may encourage the assistance of the parties or require certain questions to be answered as to the scope of his mandate.

37. Premier takes issue with each of the specific forms of declaratory relief sought by Shell on the basis that they are either unnecessary, extra-contractual or improperly seek to restrict the referee in his decision-making exercise.

38. Premier also submitted that the reason that Shell was seeking to impose guidance on the referee in the terms put forward was to seek to corral the referee into giving a determination that Shell believes will most favour it.

39. Premier accepted during the hearing that paragraph 3 of the draft order it had put before the court potentially imposed limitations on the referee which went beyond confirming that the ambit of the referee's decision-making powers was to be found in clauses 8.4 and 8.2 respectively and was therefore inconsistent

with Premier's case. Premier accordingly no longer asks the court to include paragraph 3 in any draft order.

40. In contrast, Shell submits that:

i) There is a real issue between Shell and Premier as to the instructions to the referee and the proper construction of the relevant clauses in the two contracts.

ii) The parties fundamentally disagree about the proper interpretation of the terms which confer jurisdiction on the referee.

iii) The meaning of the relevant provisions is a question of law for the court.

iv) The wording of clauses 8.4 and 8.2 are not sufficiently clear to instruct the referee without further explanation or guidance in the terms found in the draft order proposed by Shell.

v) The plain meaning of the words used in the contracts is that the referee's jurisdiction is limited to identifying a like-for-like replacement for the price assessment that has changed, thereby ensuring that the contract price is calculated on the same basis as before.

vi) The referee cannot re-write the parties' bargain for them, for example by selecting a different reference commodity altogether or otherwise changing the essential structure of the price clause.

vii) Contrary to Premier's submissions, the present case is not a case about the procedure to appoint the referee but is a case about the proper

interpretation of the sentence in each contract that confers jurisdiction on the referee.

viii) Premier is inviting the referee to undertake a broader exercise by way of price review than is contemplated by the contracts.

ix) The court should take the opportunity now to provide the referee with guidance on the matters identified by Shell (and set out in paragraph 13(ii) above) given that the parties are now before the court and it is clear from both the pre-action correspondence and the draft orders and list of issues exchanged between the parties that there are differences between the parties as to the construction of the relevant contractual provisions and the exercise which the referee is entitled to undertake.

x) Premier cannot complain if the court does provide guidance now because it is Premier which sought the court's assistance by seeking declaratory relief.

Discussion

41. There was no dispute between the parties that I do have jurisdiction to construe the provisions in clauses 8.4 and 8.2 governing the scope of the referee's jurisdiction and the limits on his decision-making powers. Nor is there is any dispute that I can in an appropriate case exercise that jurisdiction in advance of the referee's determination. The question is whether this is an appropriate case.

42. In deciding whether this is an appropriate case for me to provide advance guidance to the referee on the scope of his jurisdiction, I accept that there do not have to be exceptional circumstances, rather there has to be a real (as opposed

to a hypothetical) dispute. If there is, then I have to consider whether it is in the interests of justice for me to decide the issues now or whether I should allow the referee to reach his determination first.

43. There is certainly a dispute between the parties in the present case as evidenced by the failure of the parties to be able to agree terms of reference for the referee so far and by the differences between the parties as to the guidance to be given to the referee. However, on the evidence before me, it is a dispute which is born out of the parties' fears as to the motives of the other party in not agreeing the terms of reference for the referee and as to what the referee might do without guidance as to the proper meaning of clauses 8.4 and 8.2. There is no evidence that the referee will fail to properly understand the exercise he is required to undertake pursuant to clauses 8.4 and 8.2. In this sense, the dispute is hypothetical because, while it would seem likely if not inevitable that the referee will reach a decision that one party will not like, there is no evidence to suggest that his decision will be one, which is or is likely to be outside the scope of his jurisdiction. The present case contrasts with, for example, the situation in the Mercury case where the views of the Director-General were already known because of his previous determination.

44. In any event, I do not consider this to be a case where it would be just and convenient for me to decide the scope of the referee's jurisdiction before the referee reaches his determination. This is for the reasons discussed below.

    i) The parties are both experienced and sophisticated commercial operators.

ii) They have contracted on the basis that the determination of an alternative source of price information should be made by a referee rather than by the courts, at least in the first instance.

iii) At the time of contracting, the parties were satisfied that clauses 8.2 and 8.4 were sufficiently clear to provide the referee with the information he needed as to the task he was required to undertake.

iv) There is no evidence to suggest that the referee will not be able to properly apply clauses 8.4 and 8.2 for the purposes of making his determination or that the referee will seek to construe his task too widely or too narrowly.

v) This is particularly the case where there is agreement between the parties that (i) the task for the referee is to determine an alternative source of price information for the Urals Assessment and that (ii) this is information which will be provided to the referee in his instructions.

vi) The parties could have chosen at the time of contracting to provide the referee with more detailed guidance as to the scope of his powers and the procedure to be followed but chose not to. This contrasts with the detailed provisions for expert determination found in Schedules 7 and 5 of the contracts.

vii) This is a case where if there are questions of construction which need to be answered by the court, the court will be in a better position to do so having the benefit of the referee's determination and an understanding of why the referee has reached the decision he has. This is because (i)

the court will then have the benefit of the referee's knowledge and expertise and (ii) the court will be able to test the referee's determination against the wording of clauses 8.4 and 8.2 and understand on what basis the referee has concluded that his determination falls within the scope of his powers.

viii) This does seem to me to be a case where there is a danger that if I give guidance now as to the effect of clauses 8.4 and 8.2, I may inadvertently restrict the referee's determination in a way, which is not intended by the contracts. An example of this is Shell's suggested declaration that 'an alternative source of price information means a single, published source of price information'. Whether Shell is correct that as a matter of contractual interpretation, an alternative source of price information means a 'single, published source of price information' and if so, what constitutes such a single source are questions which are best answered once the referee has issued his determination and the court has the benefit of his expertise.

ix) Although the authorities recognise that there are circumstances where the court can answer questions of construction in advance of a referee carrying out their role, they also make clear that ordinarily a Court should be reluctant to make a pre-emptive ruling.

45. There is force to Shell's argument that Premier has invoked the court's power to make declaratory relief by issuing its Part 8 claim form and seeking declaratory relief itself. However, this is not a sufficient reason to justify making declarations as to the proper meaning of clauses 8.4 and 8.2 in circumstances

where I consider that it is not otherwise just and convenient to do so. It is clear from the correspondence that the parties were at an impasse as to the instructions to be provided to the referee and, while there may have been other routes available to break that impasse, Premier's choice of issuing a Part 8 claim is not itself a good reason for me to grant declaratory relief if I was not otherwise going to do so.

46. There is also some force to Shell's argument that the parties have come to court prepared to answer the questions of construction raised by the differences between the parties as to the information to be provided to the referee and that it would be a waste of time and cost for the parties to have to return to court after the referee's determination for the court to interpret the same contractual provisions. Again, however, this is not a sufficient reason to go behind the parties' original agreement that their dispute as to an alternative source of pricing information should be resolved (at least in the first instance) by a referee. Nor does it outweigh the advantage to the court in having the referee's determination available before resolving any questions of construction which might arise from the determination. Of course, it is not a given that the parties will return to court after the referee has reached his determination. With the benefit of the determination, the parties may conclude that they do not have grounds on which to challenge the referee's decision.

47. In deciding that I should not grant declaratory relief as sought by Shell, I have considered each of the proposed declarations individually to determine whether I should make any of the declarations. In particular, I did consider whether I should make a declaration in the terms set out in paragraph 2(a) of Shell's draft

order, namely that the referee is only permitted to determine an alternative source of price information for the Urals Assessment. However, it is not necessary for me to do so in circumstances where, as recorded elsewhere in this judgment, it is a matter of common ground between the parties that the referee's task is to determine an alternative source of price information for the Urals Assessment and that this is information which should be provided to the referee in his instructions.

Conclusion

48. Accordingly, I conclude that I should not make any declaratory relief which provides specific guidance to the referee as to the meaning and effect of clauses 8.4 and 8.2. In other words, the only declaratory relief I should give is that found in paragraphs 1 and 2 of the draft order proposed by Premier, namely:

    i) That the ambit of the referee's decision-making powers in respect of the Schiehallion Contract is prescribed and circumscribed by clause 8.4 thereof.

    ii) That the ambit of the referee's decision-making powers in respect of the Clair Contract is prescribed and circumscribed by clause 8.2 thereof.

49. I would be grateful for the assistance of counsel in drawing up an appropriate form of order to reflect my conclusions above and any consequential matters arising.