IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT (QBD)

No. HT-2019-000123

[2020] EWHC 401 (TCC)

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 17 January 2020

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

DBE ENERGY LIMITED — Claimant

- and -

BIOGAS PRODUCTS LIMITED — Defendant

MR M. CHEUNG (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Claimant.

MS N. ATKINS (instructed by Mills & Reeve LLP) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE WAKSMAN:

1. Given the time of day, I will give a brief judgment. Before I deal with the individual categories of expert evidence served by the defendants to which objection is taken by the claimant, I make two general observations.

2. First, it is relevant that this is a trial set down within the shorter trial scheme where there is only three days of trial time and where, as it is at the moment, both technical experts (M&E engineers) on the question of pressure are expected to be cross-examined on their fairly lengthy reports in about half a day. The court has to be astute in ensuring that trials under the shorter trial scheme serve their purpose as being a proportionate and speedy way of dealing with disputes with the parties' consent.

3. The second preliminary observation is that lists of issues and issues for experts expressed in orders or in the parties' lists have got to be read in context. The immediate context is the statements of case, as, indeed, the list of issues expressly says. The fact that one party puts the other party to proof as to causation or that there is a general allegation or issue as to whether the losses claimed were as a result of the alleged negligence does not give either party, or its expert, *carte blanche* to introduce, at any stage, hitherto unseen and reasonably unseen, arguments going to the question of causation. By causation, I include mitigation of loss. A proper and realistic look at what the true issues are has to inform what the experts are meant to address.

4. On that footing, I then turn to the different categories. The claimant's core claim is that the defendants, who are said to have designed and supplied two constituent parts of an anaerobic digester system ie (a) the pasteuriser tanks which take the initial slurry before it is fed into the digester tanks and (b) the tank heaters of an immersive nature which are to be inserted into the digester tanks, failed to comply with certain applicable regulations and were, in any event, negligent or in breach of contract.

5. The reason why that is said is first, because when the entire system was commissioned, the inner walls of the heater jackets surrounding the pasteuriser tanks imploded as a result of water pressure, which led to the failure of the entire unit. Secondly, in relation to the tank heaters for the digester tanks, they similarly failed as a result of water pressure. The claimants say that the pressure to which they were subjected was entirely normal and to be expected and a non-defective installation would not have failed; whereas the defendant's case is that the pressures to which they tested the components before being sent to the claimant were sufficient in all the circumstances, in particular having regard to what they said was their knowledge and what they should have known about the overall system in which they played a part. Accordingly the water pressure in fact experienced on site was excessive and the component failures were not their fault.

6. That is the main dispute between the parties. But there are also pleaded some matters at paragraph 31 of the defence relating entirely in relation to loss and damage, They arise because the claimants claim not only the cost of replacing both tanks (the second one was tested after the knowledge of what had happened in the first and it failed too), but also loss of profit over the delay period which was caused, firstly, by an inability to commission the other elements of the system and, secondly, getting the new pieces of equipment. As to that, the defendants pleaded that it would have been possible hydraulically to isolate the tank heaters and the pressurised pasteurisation tanks by having a heat exchanger. It is common ground that this relates essentially affects the question of pressure in the pasteurising tanks. Alternatively, it was said for the tank heaters they could have simply installed stiffeners. It then went on to say that:

> "32. [They] proceeded to destroy the second Pasteurising Tank and procure unnecessarily expensive replacement tanks, instead of implementing the process of hydraulic separation set out above...
> 33.3 It was not necessary to replace the Tank Heaters in the Pasteurisation Tanks for the reasons set out above… The missing hydraulic separation could have been implemented easily and at minimal cost to limit pressure to the second Pasteurisation Tank, thus avoiding any delay in operation."

7. Against that background, I go to the five categories of expert evidence in Mr Marshall's report to which objection is taken. I can deal with some of them quickly. At paragraph 15.5 of the claimant's note, it is said that there are allegations about new remedial schemes, in other words, what you could do to replace the pasteurising tanks going forward instead of what they did do in terms of replacement. That is at section 6.22 and, indeed, it is headed "Other methods to provide heater jacket functionality". In my judgment, none of those matters have been properly raised, or raised at all, before the submission of this expert report in December of last year.

8. The only alternative remedial scheme pleaded is that, going forward, they could have avoided the pressure problem by the method of hydraulic separation which could have been put into place immediately, or in a short space of time as far as the second pasteurising tank is concerned, at least in order to get commission going at an earlier stage; and, secondly, that, in any event (and I read this from paragraph 32):

> "They could have gone forward and purchased new equipment, but with the safeguard of the hydraulic separation and the heat exchangers"

and this has been addressed in the claimant's Reply."

9. What that means is that I consider that paragraphs 6.22 to 6.25 should come out.

10. Then, in paragraphs 6.26 to 6.31, there is a separate allegation which to the effect that, in any event, going forwards it was unnecessary to have more than one tank anyway. That suggestion seems completely absent from any pleaded case.

11. The only aspect of the "one tank" argument which seems to me is permissible is that made at paragraph 33.3, which is:

> "The missing hydraulic separation could have been implemented easily and at minimal cost to limit pressure to the second Pasteurisation Tank, thus avoiding any delay in operation."

12. In other words, the defendant's case can include the allegation that, at least for temporary purposes and getting commissioning underway, they can to say that, following on from the fact that they should not have tested the second pasteurisation tank at all because it was bound to fail, what they should have done then was to put a safeguard in place namely, the hydraulic separation. As a result they would then be able to successfully commission the pasteurising tank and, at least for overall commissioning purposes, that would be sufficient - and for those commissioning purposes one pasteurising tank would do. And to the extent that this point needs expert evidence they can have it.

13. What they are not allowed to do is to make the general point in terms of damages that you only ever needed one tank, the implication being that they did not need to buy two replacements tanks.

14. The same sort of objection, in my judgment, applies to the category 4 objection where there is the opinion by Mr Marshall that in any event, heat jackets were unnecessary or

only needed in exceptional circumstances. That clearly should have been pleaded or brought out at an earlier stage, because the effect of that is then to found the suggestion first since they did not need the heating jackets anyway, the problems within the heating jackets which emerged was not the fault of the defendant (even though the defendant agreed to supply them). And second, the suggestion that "Actually, since you never needed heated jackets at all, you could have done something much simpler." These points cannot be pursued and, to the extent that the expert report then opines on that point, that is also inadmissible. It is interesting to note that paragraphs 6.18 to 6.21 of Mr Marshall's report (not objected to) which concern the hydraulic isolation solution, have a diagram shows the pasteurising tank with the heater jackets in place. That is the basis on which the parties have been proceeding, in my view. So that is category 4.

15. Let me then turn to category 1. There is a section in the report at paragraphs 4.17 to 4.19 which is really a critique of the claimant's project management system, or lack of it, for the entire project. This expert, who is in fact, a mechanical engineer and not a project management engineer, gives opinions as to why he says that the claimant's system was chaotic and failed to conform to basic management principles. However, as to that, (a) I do not accept, notwithstanding his experience, set out at length, that he is an expert on those matters and (b) in my judgment, these points do not flow from the existing allegations. There is an allegation that there was a design responsibility on the part of the defendants. Where that really goes is what they knew, or should have known, about intended operating pressures. I do not see that has got anything to do with a general critique of the claimant's project management here. Ms Atkins said that that part of the expert's report is used as a foundation for saying that it must follow that the defendants did not have, or should not have had to obtain, the relevant information. That does not follow at all. In fact, it does not appear from the report. There are later very brief sections, which, looking at some of documents, say therefore that information was not before the defendants. But those parts of the report are not objected to and, in any event, are pure questions of fact.

16. Ms Atkins's second point was that, even if it did not go to the question of whether there was a design obligation, this point goes to mitigation of loss; this is on the basis that if the whole project had been managed better, then all sorts of things would have been done differently and, effectively, the whole project would have been done in a different way, designed differently, and these things would never have occurred. That is a very large and substantial allegation of failure to mitigate, or contributory negligence, which is wholly absent from the pleadings or any kind of precursor to the expert's report. I am afraid it is not good enough to say that they are entitled to raise this matter now, which, in my judgment, would require very substantial further evidence, in relation to something, simply because they have put the claimant to proof of loss. So, category 1 goes as well.

17. That then leaves categories 2 and 3. The basic point here is the argument that if you had commissioned the second pasteuriser tank in the method described above, that would cut down the amount of delay and that would reduce the claimant's loss of revenue claim. As I have already indicated, I consider that is a legitimate argument and, to that extent, as I say, the notion of one pasteuriser tank is something which can be the subject of the expert evidence. That is one part of it and I have dealt with 6.28 to 6.31.

18. However, going to category 3, I need to look at the individual paragraphs here. Paragraph 5.9 is an observation about the fact that there may be or there would be some increase in pressure where the pasteurising tanks were above the ground while the fermentation tanks were below the ground. It is not clear whether that goes anywhere in

terms of an attribution of a cause of the failure of these elements which is not the fault of the defendants. If there is not such an attribution, then the defendants cannot start to make it now.

19. So far as background, it seems to me, it is unexceptional and I very much suspect that the claimant's expert would agree with it. But if the expert does not, then the claimant's expert, in a further report to which I shall advert, is entitled to say what he wants about 5.9, because I am leaving 5.9 in.

20. The same applies for 5.17. That is, again, a background matter and I would be very surprised if there is any disagreement. But if the claimant wants to say something about it, then the claimant is entitled to do so.

21. Paragraph 6.24 is dealt with already because that is all part of this alternative remedial scheme case which I have said cannot be run, and the same is 6.27.

22. So I concluding with what has to be done in the light of this judgment, which I hope is a sufficient steer to the parties going forward. The claimant is entitled to adduce supplemental factual and/or expert evidence on, effectively, the single matter out of all of these that I have allowed to go forward from Mr Marshall's report; this is the claim that the claimants could and should have installed the hydraulic separation, so far as the second pasteuriser was concerned, with the effect that it could then be successfully commissioned and any beneficial savings in time as a result, which would then affect the damages claim. That is the only thing it goes to, in my judgment.

23. Also, because I am not entirely clear as to the position in relation to 5.9 and 5.17, because it is not always easy to see the flow of Mr Marshall's report, I am going to order that the defendants should state by 4.00 p.m. on Wednesday, 22 January whether it is alleged, as a result of the matters referred to in paragraph 5.9 and 5.17, that those matters were in any way responsible for the failure of the units or any of the claimant's losses. If they say they are not, then that is the end of the matter. If they say they do, then the claimants may deal with that, because they are both very short points, in my judgment.

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