Pump Court

Galtrade Ltd v BP Oil International Limited [2021] EWHC 1796 (Comm)

The recent decision of Adrian Beltrami KC (sitting as a Deputy Judge of the High Court) provides useful guidance on the classification of the term that fuel oil must comply with contractual specifications, and addresses novel issues surrounding the calculation of damages for reliance loss and the use of counterfactuals where mitigating steps are taken before the date of breach in preparation for an expected breach.

The facts

The Parties were both involved in the business of fuel oil trading. The Defendant agreed to sell to the Claimant four parcels of straight run fuel oil (SRFO), which the Claimant planned to blend with other fuel oils for onward sale. The contract was governed by BP's widely used General Terms and Conditions for Sales and Purchases of Crude Oil Petroleum Products. In the usual way, the contract specified various maximum/ minimum tolerances for the SRFO, including a maximum sulphur content.

The first two parcels of SRFO supplied by the Defendant did not comply with the contractual specification, but the Parties reached agreements about what to do with these (the first subject to a price reduction and the second delivered back to the Defendant). After being loaded onto the Claimant's vessel, the third parcel was also found to be off specification, having a sulphur content of 1.53% against a specified maximum of 1.3%. The Claimant informed the Defendant that it was rejecting the cargo for being "drastically different" from what was bargained for. The Defendant took back the third parcel of SRFO, but under protest, saying that the Claimant had no right to reject.

The Defendant admitted breach in relation to supplying off-specification SRFO; the case turned on the consequences of that breach. The Claimant argued that it was entitled to reject the cargo because the requirement to supply on-specification SRFO was a condition of the contract, or because the breach deprived it of substantially the whole benefit under the contract, and claimed damages for wasted expenditure. The Defendant argued that the relevant term was an innominate term, breach of which did not entitle the Claimant to reject the cargo, and that the Claimant's wrongful rejection repudiated the contract.

Classification of the relevant term

The Judge held that the obligation to supply on-specification SRFO was an innominate term and that the breach did not give rise to a right to reject. The Judgment confirms the general tendency of the English Court to construe terms as innominate terms, save where a term is specified by the contract or statute as a condition. The Judge did not see the min/max specifications as equivalent to a "description" of the SRFO.

This is still a significant decision for market players because many in the industry believed that min/max specifications of this kind, as opposed to "Typical" values, represented hard limits, breach of which would entitle a buyer to reject a cargo. It will be interesting to see whether standard terms and conditions used in the industry are changed as a result of this decision.

The calculation of reliance loss

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Another interesting feature of the judgment involved when the Claimant could recover damages for wasted expenditure incurred in dealing with and transporting the off-specification SRFO.

The Claimant argued that such losses were caused by the Defendant's breach in delivering off-specification SRFO cargo, because that breach meant that the SRFO could not be used profitably and the money which the Claimant spent transporting it etc. could not be recouped and hence was wasted.

The Judge held that the effective cause of the Claimant's loss was its own repudiatory breach in rejecting the SRFO. Put another way, the Claimant's rejection of the SRFO was considered an unreasonable step which was deemed not to have occurred for the purposes of analysing its loss. While it is obvious that rejecting the SRFO made it inevitable that the transportation cost would be wasted, it is less clear whether it was being said that the transportation cost etc. could have been recovered if the Claimant had retained the non-compliant cargo. The "reliance loss" measure often seems to throw up difficulties of this kind.

Are steps taken in reasonable mitigation in advance of an expected breach relevant to an assessment of damages?

A novel issue which arose in the context of the Claimant's reliance loss claim involved the appropriate counterfactual to be used to calculate damages where the innocent party took steps to prepare for an anticipated breach **before** that breach had in fact occurred. This appears to be the first decision directly addressing this point, although the issue was not determinative because the Judge held that the Claimant was not entitled to damages for wasted expenditure in any event (see above).

Having received two off-specification parcels of SRFO, and expecting that the third parcel would also be off-specification, the Claimant did not make arrangements for the onwards sale of the third parcel before its delivery. The Claimant's case was that doing so would have caused it greater losses (in the form of exposure to sub-buyers), such that the Claimant had effectively mitigated in advance by waiting to see what the actual specification would be before investigating what could be done with the SRFO.

The Defendant argued that damages are calculated to put a Claimant in the position it would have been in "but for the breach", and therefore the relevant counterfactual must start at the date of the breach. On that logic, the Defendant's case was that the Claimant was not entitled to damages for wasted expenditure; even if the Defendant had delivered on-specification SRFO, the Claimant would have made a heavy loss, because it had made no arrangements for any onward sale and would have been in the position of a "distressed seller".

The Judge held that the relevant counterfactual in these circumstances was what would have happened if the Defendant had delivered on-specification SRFO *and* the Claimant had been able to plan for compliant delivery in advance. In other words, he treated the "pre-breach" actions taken by the Claimant as causally linked to the breach.

You can read the full judgment here.

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