Judgment handed down in Contract Natural Gas Ltd v Zog Energy Ltd – Gideon Shirazi

On 21 January 2025, the Chancery Division of the High Court handed down judgment in the case of Contract Natural Gas Limited (in liquidation) v ZOG Energy Limited (in liquidation) [2025] EWHC 86 (Ch), in which Gideon Shirazi of 4 Pump Court was instructed by Prettys Solicitors LLP on behalf of ZOG Energy Limited.

Contract Natural Gas Limited ("**CNG**") was a gas trading company that purchased gas wholesale then sold it on to gas operators, while ZOG Energy Limited ("**ZOG**") was a retail energy utility company supplying gas and electricity to end customers, and purchased gas from CNG. CNG and ZOG were party to an agreement dated 24 May 2013 known as the Master Sales Agreement ("**MSA**"), which set out a framework for gas transactions ("**Transactions**") governed by separate contracts.

As a result of rising gas prices towards the end of 2021, CNG exited the UK energy market on 30 November 2021, and ZOG promptly entered administration on 9 December 2021, shortly followed by CNG on 17 December 2021.

The hearing concerned two preliminary issues by the two parties, each of which was both an applicant and a respondent in the hearing, disputing each other's proofs of debts in their respective administrations.

The judgment of Andrew Twigger KC (sitting as a deputy judge of the High Court) addresses two matters of significant interest to commercial practitioners: one on a point of contractual interpretation about the limitation of liability in a framework agreement, and one on the question of whether time stops running for limitation purposes at the making of an administration order.

First, the limitation cap in the MSA provided a *global* cap, not a cap per transaction.

ZOG submitted a proof of debt in CNG's administration on 10 August 2023, alleging that when CNG exited the market, there were many ongoing transactions that had not been performed, and this was a breach of contract. CNG's liquidators argued that CNG's liability was limited by Clause 13.3 of the MSA to £250,000, which provided *"Subject to clause 13.9 the total liability of each party to the other and in respect of all claims arising under the matters set out in clause 13.1 shall not exceed the sum of £250,000."* ZOG argued that this represented a cap per Transaction, rather than a global cap.

At the outset, the judge rejected ZOG's contention that the MSA was incorporated in its entirety into each Transaction *"as if it were simply a set of standard terms"* [43]. Although it was a *"source of rights and obligations in respect of each Transaction",* it did not follow that *"every term of the MSA itself [became] a term of the Transaction"* [44].

Instead, the judge held that *"the language of clause 13 most naturally refers to a global cap being intended, regardless of the number of Transactions"* [51]. In particular, the judge highlighted that the use of the use of the words *"entire financial liability"* in Clause 13.1 alongside *"total liability … in respect of all claims arising under the matters set out in clause 13.1"* suggested that the cap applied *"across the board, rather than only to an individual Transaction". "The reasonable reader,"* he continued, would *"understand those words as contemplating one simple cap for all claims … regardless of how many Transactions had been entered into."* [51-52]

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Moreover, while the court began from an assumption that, in the absence of clear words, parties do not intend to give up valuable rights and remedies, these words were clear; they applied to both parties and *"forms part of a sophisticated regime of limitations and exclusions negotiated between experienced businesses with the benefit of legal advice."* [53]

The judge considered that the global cap of £250,000 could be superficially produce an uncommercial result [54], he had no evidence to enable him to make findings about what a reasonable reader would have understood about the potential liabilities that might have been incurred at the time the MSA was entered into, and ZOG had failed to discharge the burden of proof that the cap was not commercially realistic [55]. In reality, he said, *"this is a point which risks invoking commercial common sense retrospectively to escape a limitation which, with hindsight"* – and particularly in the context of rising gas prices – *"appears unfavourable to ZOG."* [54-55].

Second, administration does not stop the limitation clock, but liquidation does.

CNG submitted a proof of debt in ZOG's administration on 14 February 2022, but ZOG's liquidators rejected that proof on the basis that CNG's claim was time-barred by Clause 13.5 of the MSA, which provided that a non-defaulting party was only entitled to bring a claim if it *"issues legal proceedings against CNG within the period of 12 months commencing on the date upon which ZOG ENERGY ought reasonably to have known of its entitlement to bring such a claim."* CNG argued this did not apply to its claim, because time stops running on claims when a company enters administration or liquidation.

To begin with, the judge felt (agreeing with ZOG) that something had *"plainly gone wrong with the language of clause 13.5."* A literal reading would only allow CNG to bring a claim against ZOG if it issued proceedings against itself: *"That is obvious nonsense,"* said the judge, as was the notion that CNG's limitation period should run from the date of ZOG's knowledge [74]. The judge held that it was clear that the parties intended that references to CNG and ZOG be read as *"the defaulting party"* and *"the non-defaulting party"* respectively, meaning that the caluse applied to claims brought by either party [75]. There was no commercial reason for ZOG's claims to be limited while CNG's were subject only to the statutory limitation period [77-78].

The judge went on to discuss the question of whether time stops running when a company enters administration. He recounted the Rolling Stock principle that when a company enters compulsory liquidation, time ceases to run from the making of the winding-up order [88-91]. This was derived from the principle that the effect of a winding-up order creates a trust of the company's property for the benefit of its creditors, so each creditor became entitled to claim as a beneficiary. The same was true of a contractual bar like the one in this case as with a statutory bar: the difference in the legal basis for the limitation period did not affect the creditor's rights [91-92].

Prior to the Enterprise Act 2002 (the "**2002 Act**"), it was clear that time did not cease running at the granting of an administration order, because the critical factor was *"the imposition on the assets of a scheme of rateable distribution amongst the creditors",* which took place at the moment of the winding up order, not the administration order [93-96]. The question for the court was then whether the Enterprise Act 2002, by introducing the new process of administration in Schedule B1 of the Insolvency Act 1986, changed the law.

The judge reviewed the cases and textbooks, noting that none of the cases since the 2002 Act had actually answered the question of whether the differences in the pre- and post-2002 Act administrations had changed the limitation position [98-112]. In particular [116]:

> *… the critical question is whether any of those differences has resulted in all the assets of a company in a post-Enterprise Act administration being required to be used or disposed of for the benefit of persons other than the company itself … Put another way …, if the duty of the administrator is to collect the assets and divide them amongst the creditors, such that the company itself (as opposed to its members) can never be entitled to any part of the proceeds, then a statutory trust will have arisen.*

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The judge noted that before the 2002 Act, administration required a court order, but now an administrator can be appointed out of court by holders of a floating charge, the company, or its directors [117-118]. He also referred to the three sequential objectives of administration in paragraph 3(1) of Schedule B1 [118-120], and identified that administrators could now make distributions as well as exit by liquidation, which was not possible before the 2002 Act [122-123]. While the judge accepted that a statutory trust could arise as and when an administrator gives notice of intention to make a distribution [126], that was of no assistance to CNG: no notice of intention to distribute was given in ZOG's administration, so CNG the relevant date to be the time the *administration* order was made [127].

CNG argued instead that if an administration order was sought on the basis that rescuing the company was unlikely but a better result for creditors than winding-up was reasonably likely, the administration was a *"distributive process"* from the outset, and so time stopped running from the date of the order [128].

This went too far for the judge. The fact that administrators *may* now make distributions does not mean that they necessarily will: there is no duty to divide the assets, *"and that suggests that a statutory trust does not arise."* [130] It is not possible to ignore the sequential objectives of administration, rescues do (albeit rarely) sometimes become unexpectedly possible where none was expected to begin with, and *"[t]he mere possibility of an outcome in which the company survives (no matter how unlikely) precludes a statutory trust, in my judgment"* [131], and similar principles would apply where a rescue was thought to be possible but was not [132].

Moreover, it seemed unlikely that Parliament should have intended that some administrations should result in a statutory trust and some should not, with the effect that creditors running up against a limitation period *"would need to work out the effect of the administration order in their particular case"* [129]. Parliament, held the judge, *"is unlikely to have intended to introduce such uncertainty into the question of whether and when time stops running for limitation purposes."* [132]

Consequently, no statutory trust arises, and *"Schedule B1 cannot be read as contemplating that the property of the company ceases to belong beneficially to the company at any time before notice of intention to make a distribution is given",* so the making of an administration order does not stop the running of time in relation to limitation. If there is a gap in the law, it is a matter for Parliament, not the courts [138-139].

However, the judge confirmed that time does stop upon the company's entry into creditors' voluntary liquidation (because a statutory trust arises at that point), and ultimately allowed part of CNG's claim on that basis [142-144].

Gideon Shirazi of 4 Pump Court, instructed by Prettys Solicitors LLP, acted for ZOG Energy Limited. Andrew Brown of Radcliffe Chambers, instructed by Addleshaw Goddard LLP, acted for Contract Natural Gas Ltd.

You can read the full judgment here.

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