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16 March 2023

Commodities in Focus Weekly – issue 20

Glencore Energy UK Limited v NIS J.S.C. Novi Sad [2023] EWHC 370 (Comm)

On 23 February the High Court handed down its judgment in *Glencore Energy UK Limited v NIS J.S.C Novi Sad* [2023] EWHC 370 (Comm). Amongst other issues, consideration was given to the calculation of fees charged by the terminal operator for storing contaminated crude oil and the extent to which the seller was obliged to compensate the buyer for its liability in respect of those storage fees under the terms of a settlement agreement.

Facts

Glencore Energy UK Limited ("**Glencore**") agreed to sell and NIS J.S.C Novi Sad ("**NIS**") agreed to buy 1,100,000MT (+/-20%) of crude oil for delivery at Omisalj, Croatia. The crude oil was to be of standard export quality and within the limits of the Technical Terms and Conditions of the operator of the terminal at Omisalj, Janaf Nafteved jsc ("**Janaf**").

As required by the sale contract, Glencore procured a Performance Bond to be paid out on NIS's first written demand following receipt of written confirmation stating that Glencore had not performed its obligations under the sale contract.

Discharge took place at Omisalj between 31 December 2019 and 1 January 2020. After discharge into Janaf's tanks, it was discovered that the crude oil was contaminated with elevated levels of organic chlorides and therefore fell foul of Janaf's Technical Terms and Conditions.

Glencore and NIS entered into a Settlement Agreement on 19 March 2020 settling all claims between the parties arising out of the delivery of the contaminated crude oil save for specified Outstanding Claims. Clauses 34 and 35(b) of the Settlement Agreement included an Outstanding Claim by NIS against Glencore for any liability NIS incurred to Janaf for storage of the contaminated crude oil and it was agreed that Glencore would "*reimburse NIS for such liability to the extent that such liability accurately reflects (i) the actual loss suffered by Janaf and (ii) prevailing market rates for storage*" and that the parties would "*discuss in good faith with a view to agreeing the level of reimbursement*".

No agreement was reached in respect of the level of reimbursement for storage fees paid to Janaf and on 28 May 2020 NIS made a claim on the Performance Bond in the sum of USD2,094,000.

The Issue

It was not disputed that NIS would have to reimburse Glencore if and to the extent that its demand for USD2,094,000 exceeded the level of reimbursement to which it was entitled under the Settlement Agreement. The main issue for the Court to consider, therefore, was the extent to which Glencore was obliged to reimburse NIS for liability it incurred to Janaf for the storage of contaminated crude oil and to do so the Court needed to consider the factors which should be included in the calculation of such liability pursuant to clauses 34 and 35(b).

Decision

The Court did not agree with Glencore's submission that "*prevailing market rates for storage*" and "*actual loss suffered by Janaf*" represented two separate hurdles for NIS to clear to be entitled to reimbursement. Instead, the Court held that these terms should be interpretated as representing two ingredients in Janaf's storage rate.

Prevailing Market Rate

The Court set out what it considered to be the relevant components of "*prevailing market rate*" as follows:

- The quantity of goods actually stored (or, more precisely, the storage capacity actually used);
- The period for which the goods were stored; and
- The location at which the goods were stored.

In short, the "*prevailing market rate*" should replicate as closely as possible the actual storage conditions having first stripped out any features which are not compatible with the identification of a market rate. It was held that such incompatible features should be addressed by reference to the provision for "*actual loss*".

Actual Loss

The storage arrangement had features which distinguished it from "normal" storage (for which there would be a "*prevailing market rate*") and, as "*actual loss*" sits alongside the provision for "*prevailing market rate*", the Court found that clauses 34 and 35(b) clearly envisaged Janaf being compensated for loss other than lost income at the market rate (e.g. additional work around costs or delays due to the tanks containing contaminated crude oil becoming unexpectedly blocked). By showing that it has suffered actual loss because of features which were not compatible with a market rate, Janaf would be justified in claiming storage fees which exceed the prevailing market rate.

Two examples of features which are not compatible with a market rate are:

1. **Contamination** – Both the witnesses of fact and the experts agreed that there was no market for storing contaminated oil. Therefore, to the extent that Janaf incurred additional cost because the stored oil was contaminated it could legitimately allow for that expense in its storage fee as an uplift on the market rate.
2. **Emergency** – A market requires at least an element of decision making; a willing buyer and a willing seller must each decide that they are willing to enter into a transaction. In this case the parties' choice was removed because the contaminated crude oil was already in Janaf's tanks when storage fees were being negotiated. The Court considered this to be inconsistent with the operation of a market and a feature which was not accounted for in the "*prevailing market rate*".

Accordingly, Janaf could account for these features in its storage fee by way of an uplift to the market rate and pursuant to clauses 34 and 35(b) Glencore would be obliged to reimburse NIS for this uplift as an "*actual loss*" suffered by Janaf[1].

It is worth noting that the Court drew a clear distinction between what it termed "emergency storage" and "unplanned storage". The latter is described as storage which is arranged on relatively short notice and is often referred to as a "spot" basis. The Court found that there was a market for such storage because if the quoted price is too high a trader can decline the offer and go elsewhere. This contrasts with "emergency storage", as in the present case, where there is no scope for market negotiation of that kind.

Comments

While it must be borne in mind that this judgment is confined to its facts in so far as the Court was tasked with interpreting and applying specific terms of the Settlement Agreement, it does provide the following useful takeaways:

1. The Court provided a clear set of components which it considered appropriate for determining a market rate.
2. Features which are not "normal" for a particular type of arrangement (e.g. storage of contaminated material, arrangements made on an emergency basis) are unlikely to be included in a consideration of the market rate because if there is no market for a particular arrangement there will be no market rate.
3. More generally, the Court made clear that when presented with the task of interpreting settlement agreements, it will adopt an approach which tries to give effect to the parties' intention as construed by the words of the agreement. Specifically, the Court stated that it was not "*anxious to read a settlement agreement in a way which prevents it from narrowing the scope of the disputes between the parties, or serving any very useful purpose*".

[1] As it happens, NIS did not advance any case that Janaf suffered "*actual loss*" and therefore the Court's decision as to the level of reimbursement to which NIS was entitled was based solely on the value the Court held to be the "*prevailing market rate*".

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