Neutral Citation Number: [2014] EWCA Civ 1048

Case No: A3/2013/2175

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
COMMERCIAL COURT
The Hon. Mr Justice Burton
[2013] EWHC 1656 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/07/2014

Before :

LORD JUSTICE RIMER
LORD JUSTICE BEATSON
and
LADY JUSTICE GLOSTER

- -

Between :

(1) Heritage Oil and Gas Ltd **(2) Heritage Oil PLC**	**Appellants**
- and -	
Tullow Uganda Ltd	**Respondent**

- -
- -

Raymond Cox QC, Jonathan Brettler and Alexander Cook (instructed by **McCarthy Tetrault**) for the **Appellants**
David Wolfson QC and Richard Mott (instructed by **Ashurst LLP**) for the **Respondent**

Hearing dates : 7 and 8 May 2014

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Approved Judgment

Lord Justice Beatson :

I. Introduction

1. This appeal concerns a right to indemnity in a Sale and Purchase Agreement ("the SPA") dated 26 January 2010 between the first appellant, Heritage Oil and Gas Ltd ("Heritage"), now a Mauritian company, and the respondent, Tullow Uganda Ltd ("Tullow"), varied by a Supplemental Agreement dated 26 July 2010 ("the Supplemental Agreement"). Heritage agreed to sell its rights in two petroleum exploration areas in Uganda to Tullow. The question for decision is whether Article 7.2 of the SPA entitled Tullow to be indemnified by Heritage for a payment of US$313,447,500 it made to the Government of Uganda ("the Government") on 7 April 2011 in respect of what the Government contended was Heritage's tax liability from the transaction.

2. Article 7.2 of the SPA gives Tullow a right to an indemnity in respect of capital gains tax imposed on Heritage but charged to Tullow by the Government. Article 7.5(a) requires the "indemnified party" to give notice of the tax claim to the indemnifying party within 20 business days. Article 7.5(b) requires the indemnified party to take such action as the indemnifying party may reasonably request to dispute and defend the tax claim, including providing to the indemnifying party such records and information as are reasonably relevant and are reasonably requested by the indemnifying party. Article 7.6, however, provides that the indemnified party is not required to take any action requested unless it is properly indemnified against losses and costs, or where, in the indemnified party's reasonable opinion, the action is likely to affect adversely either its future liability or its business or financial interests. These provisions are set out in paragraph 4 of the Appendix to this judgment, which contains the material parts of the SPA and other contractual documents.[1]

3. Heritage pleaded nine defences to Tullow's claim for indemnity.[2] These fall into four broad categories which can be summarised as follows. First, the mechanism under which Tullow was made liable to make the payment to the Government was not within Article 7.2 because it was an "execution remedy". Secondly, in any event Tullow had not satisfied the notice requirement in Article 7.5(a) of the SPA, which Heritage maintained was a condition precedent to the rights of indemnity under Article 7.2. Thirdly, Heritage submitted that it was not liable to indemnify Tullow because Tullow was in breach of clause 3.1(a) of the Supplemental Agreement, which provided that Heritage was to have the right of conduct of the tax dispute with the Government which was to be "its sole responsibility". Fourthly, Heritage contended that, as a result of what it maintained was "collusion" between Tullow and the Uganda Revenue Authority ("the Revenue Authority"), Tullow was disentitled from recovery under the indemnity. It also contended that the indemnity is inapplicable where the party seeking to be indemnified has obtained benefits as part of a "package".[3]

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[1] The other contractual documents summarised are the Supplemental Agreement and the Memorandum of Understanding between the Uganda Revenue Authority and Tullow entered into on 15 March 2011.

[2] These are listed by the judge at [2013] EWHC 1656 (Comm) at [19].

[3] The reference to a "package" is to what Heritage maintained were benefits in relation to this and other disputes with the Government of Uganda secured by Tullow under the Memorandum of Understanding between Tullow and the Government: see the judge's ruling summarised at [17(6)] below.

4. Following a twelve day trial, on 14 June 2013 Burton J held that Tullow was entitled to be indemnified in respect of the US$313,447,500 it had paid: see [2013] EWHC 1656 (Comm). He ordered Heritage to pay that sum to Tullow. He also ordered it to pay Tullow a total of, in round figures, US$1.6 million pre and post judgment interest, and ordered the second appellant, Heritage Oil PLC ("Heritage PLC"), Heritage's ultimate parent company, to pay Tullow the same principal and interest payments as Heritage. The appellants invite this court to set aside Burton J's order.

II. The factual background

5. Heritage and Tullow each held a 50% interest in the licence of certain petroleum exploration areas in the area of Lake Albert, in west Uganda on the border with the Democratic Republic of Congo. The licence provided that the prior written consent of the Government through the relevant Minister was required for any assignment in whole or in part of their rights or obligations under the licence. A Joint Operating Agreement between Heritage and Tullow[4] provided that if Heritage agreed a sale of its interest to a third party, Tullow was to have a right to pre-empt the agreement on the same terms.

6. In December 2009, Heritage agreed to sell its rights in those exploration areas (known as Block 1 and Block 3A) to Eni International BV ("Eni"), a large Italian multinational oil and gas company, and entered into a sale agreement. That agreement triggered Tullow's right of pre-emption under the Joint Operating Agreement, and, on 17 January 2010 Tullow exercised its right. As a result, on 26 January 2010 Tullow and Heritage entered into the SPA on the same terms as those agreed between Heritage and Eni. Heritage agreed to sell its rights to Tullow for (a) a base price of US$1.35 billion, (b) an Adjustment Amount to be determined, and (c) a Contingent Amount set at US$150 million, but which could be reduced if certain circumstances applied ("the Contingent Amount"). Heritage PLC was Heritage's guarantor under the SPA. Completion was to be on 26 July 2010. Tullow believed that the Government was aware of the details of the transaction and had approved them. At the time of the SPA, Heritage was a Bahamas company. In about the middle of March 2010, after the SPA was made, it changed its corporate registration from the Bahamas to Mauritius.

7. The Revenue Authority considered that Heritage was liable to pay tax in respect of the profit it made on the disposal of its interests in Blocks 1 and 3A to Tullow. Heritage maintained that the transaction was not taxable in Uganda. Its claim not to be subject to Ugandan tax in respect of the transfer was in part (see judgment, [51]) based on a double tax treaty between Mauritius and Uganda. The Revenue Authority assessed Heritage's profit as approximately US$1.3 billion. It issued a tax assessment against Heritage in relation to the sale on 9 April 2010, but withdrew that assessment "without prejudice" on 22 April. In May 2010, the Permanent Secretary of the Ugandan Ministry of Energy and Mineral Development invited Heritage and Tullow to attend a meeting to discuss the mechanism by which Heritage's tax liability would be paid. Heritage considered that this was a matter for Heritage and not the business of any other company, and stated so in an email dated 25 May 2010.

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[4] The Joint Operating Agreement, dated 29 August 2002, was in fact between Heritage and Energy Africa Uganda Ltd, a company acquired by Tullow Oil PLC in August 2004, when its name was changed to Tullow Uganda Ltd.

8. On 6 July 2010, the Revenue Authority issued another tax assessment notice against Heritage in the sum of US$404,925,000. This sum was calculated by reference to the US$1.35 billion base price. As a result of the dispute about the tax, the Government imposed conditions on its consent to the SPA. A letter, also dated 6 July, was sent to Tullow and Heritage by the then Minister of Energy and Mineral Development, stating that the Government's consent to the transaction was given on the basis that Heritage pay all taxes accruing from the transaction as assessed by the Revenue Authority.

9. In a letter dated 16 July 2010, the Permanent Secretary of the Ministry of Energy and Mineral Development wrote to Heritage's lawyers stating that, upon Heritage depositing with the Revenue Authority 30% of the tax in the assessment and providing a bank guarantee acceptable to the Government to secure the remainder, unconditional approval of the sale would be given. In the light of this, shortly afterwards, on 23 July 2010 Tullow, Heritage and Standard Chartered Bank entered into an Escrow Agreement ("the Escrow Agreement") appointing the Bank as Escrow Agent in relation to an account in London to be held on Heritage's behalf, the purpose of which was to hold the consideration to be paid to Heritage by Tullow under the SPA. Tullow and Heritage also varied the terms of the SPA in the Supplemental Agreement to which I have referred and agreed the terms on which the SPA transaction would complete on 26 July.

10. The Supplemental Agreement provided that US$1,045,075,000 would be paid directly to Heritage. Broadly speaking, this sum formed part of the US$1.35 billion base price in the SPA and US$100 million which Tullow and Heritage had agreed was to be paid by way of Contingent Amount. This agreement also provided that US$121,477,500, the statutory 30% deposit required to contest a tax assessment, would be paid to the Government by Tullow on Heritage's behalf, and the balance of US$283,447,500 would be paid, pursuant to the Escrow Agreement, into an escrow account with Standard Chartered Bank in London. Clause 3 of the Supplemental Agreement (see Appendix, paragraph 12) provided that Heritage should have the right to conduct the tax dispute and that its conduct "shall be the sole responsibility of" Heritage. The payments specified in the agreement were paid. As a result of the agreement between Tullow and Heritage that US$100 million was to be paid by way of Contingent Amount, on 19 August 2010 a further tax assessment in the sum of US$30 million was issued.

11. The circumstances in which Tullow came to pay the Ugandan authorities US$313,477,500 in respect of Heritage's tax liability can be summarised as follows. Because Heritage, a non-resident company, disputed any liability to tax, at some stage, and in any event (see judgment below at [23]) by May 2010, the Government decided to place the burden of paying the tax on Tullow. The Government required the escrow sum to be held in Uganda, and therefore did not regard the arrangements made by Heritage and Tullow in the Supplemental Agreement as satisfactory. It informed Heritage and Tullow of this by a letter dated 3 August 2010 from the Minister of Energy and Mineral Development. The letter stated that, because no security had been provided which demonstrated to its satisfaction that the tax would be paid immediately on demand, the terms of the Government's conditional consent to the transfer had not been met and "accordingly…the transfer is of no effect".

12. The Revenue Authority also served notices, dated 27 July and 2 December 2010 ("the First and Second Agency Notices"), requiring Tullow to pay a total of US$313,477,500 from money held by it for or due to Heritage as tax payable by Heritage. The first, requiring payment of US$283,477,500 immediately, was pursuant to powers conferred by section 108 of the Uganda Income Tax Act ("the Act"). The heading to section 108 is "Recovery from Agent of Non-Resident". The section empowers the Revenue Authority to require a person "in possession of an asset including money" belonging to a non-resident taxpayer "to pay tax on behalf of the non-resident, up to the market value of the asset" and permitted it to designate Tullow as Heritage's statutory agent. The Second Agency Notice requiring payment of US$30,000,000 was pursuant to "section 108 and/or section 106" of the Act. Section 106 empowers the Revenue Authority to require any person owing, or who may owe money to the taxpayer, holding, or who may subsequently hold money for or on account of the taxpayer, to pay the money to the Commissioner, provided the tax payable is not the subject of a dispute.

13. A central issue in this case is whether the effect of Article 7.5(a) of the SPA meant that Tullow's failure to notify Heritage of the Revenue Authority's claim disentitled it to an indemnity against Heritage. At this stage it is relevant to make two observations. The first is that the Agency Notices stated that they had been copied to Heritage. The second is that Heritage clearly knew about them. In a letter dated 29 December 2010, Heritage's Ugandan lawyers wrote to Tullow stating that the Second Agency Notice was invalid under section 106 as Heritage's tax liability was the subject of a dispute, and that accordingly no further tax was due and payable by Heritage. Heritage did not at that stage take any steps to challenge or dispute the Second Agency Notice, and the letter neither requested Tullow to do so or to refrain from doing any particular act. It stated only that, in the light of Article 3.7 of the SPA, sums due to Heritage under the SPA should be paid without any set-off, withholding or deduction of any kind of taxes or claims, and that Heritage would not recognise any amounts remitted to the Revenue Authority pursuant to the invalid Second Agency Notice, and would still demand the sums from Tullow.

14. As the judge stated (at [24]), for a number of reasons quite apart from the service of the Agency Notices upon it, Tullow had a substantial commercial incentive to reach agreement with the Government and was under immense pressure to pay the tax assessed against Heritage. In particular, Tullow had paid the US$1.45 billion purchase price to or to the order of Heritage, which had received the bulk of the consideration. Tullow was, however, unable to receive and thus to operate the interest which it had purchased until the Government gave its consent. As well as stating in the letter dated 3 August 2010 that the transaction between Heritage and Tullow was of no effect, the Government was refusing to grant a petroleum production licence for the Kingfisher area in Exploration Area 3A and to extend the licence in respect of Exploration Area 1, which was due to expire on 30 June 2011.

15. As a result of the Government's position, Tullow entered into negotiations with the Government. Its original position (see judgment below at [26]), that the First Agency Notice was not valid, was revised in the light of later advice, in particular that on 18 November 2010 by Mr Kabatsi, a former Solicitor-General of Uganda and the senior partner at Kampala Associated Advocates ("KAA"), Tullow's Ugandan lawyers, and on 30 November 2010 by Mr Kabatsi and Justice Mulenga, a former Judge of the

Supreme Court of Uganda. As a result of the negotiations between Tullow and the Government, in a letter dated 2 December 2010 Tullow accepted the Government's position. It attached a proposed "Memorandum of Understanding" ("the MOU") and consent letter. The Government responded in an email dated 9 December 2010, and there were then negotiations about the terms of the MOU. At about this time, Tullow also took advice from English solicitors and counsel (judgment below, [44]) and, on 21 February 2011, lawyers at KAA provided a draft opinion essentially confirming Mr Kabatsi and Justice Mulenga's earlier advice: judgment below, [48]. Agreement on the terms of the MOU was reached between Tullow and the Revenue Authority, and the final version was signed on 15 March 2011. On the same day, the Revenue Authority demanded payment of US$313,447,500 under the two Agency Notices and gave Tullow a "letter of commitment".[5]

16. On 17 March 2011 Tullow gave Heritage notice that it had received a tax demand from the Revenue Authority. It stated it had agreed to pay the tax demand before 12 April 2011, and that it therefore claimed under the indemnity in Article 7.2 of the SPA. It noted the requirements under Article 7.5(b), but stated that there was no scope for Heritage to require it to take action under that provision in the light of Article 7.6 because Heritage could not provide adequate indemnification or security as required by Article 7.6(a), and Tullow reasonably believed that a challenge by it to the tax and the demand was likely to adversely affect its business or financial interests. On 6 April 2011, Tullow gave notice to Heritage under the guarantee in the SPA. The letter repeated the statement Tullow had made in its letter dated 17 March 2011 that there was no scope for Heritage to require it to take any action under Article 7.5(b) for the reasons given in the earlier letter. As I have stated, the payment demanded was made by Tullow to the Revenue Authority shortly after this, on 7 April 2011.

17. As to Heritage's liability to pay taxes, while Tullow and the Government were negotiating, on 18 August 2010 Heritage lodged an objection to the 6 July assessment. Heritage's submissions were considered by Uganda's Tax Tribunal which, in a decision given on 23 November 2011, rejected them and confirmed the tax assessment. This decision is now subject to an appeal by Heritage, which has not yet been determined. Heritage was also unsuccessful in seeking to arbitrate its dispute regarding the alleged tax liability with the Government. In an announcement dated 4 April 2013, it confirmed that a UNCITRAL arbitral tribunal had concluded that the tribunal did not have jurisdiction to hear arguments relating to the underlying substantive Ugandan tax matters.

18. At the trial, the judge found Tullow's General Counsel and Company Secretary, Mr Martin, and its Group Tax Manager, Mr Inch, "impressive and honourable witnesses" (see judgment, [51]). He rejected the submission that they were dishonest and that Mr Martin had deliberately disposed of documents: judgment, [51], [56] and [62]. He concluded (judgment, [74]) that, when Tullow paid the Government on 7 April 2011 notwithstanding the pressure applied by the Government, Tullow did so "in reliance on Ugandan legal advice and in the belief that the [Agency Notices] were valid." He concluded that Tullow's belief was not fanciful or absurd, or one to which no reasonable person in its position could come.

[5] See section C of the Appendix to this judgment for the material parts of the MOU, the demand and the letter of commitment.

19. The judge then analysed the evidence as to the validity under Ugandan law of the Agency Notices (judgment, [75ff]). He found (at [86]) that both Agency Notices were valid pursuant to section 108, even if the sum assessed was not payable by Heritage but was simply the subject of an assessment. It was not therefore necessary to reach a decision on the validity of the Second Agency Notice pursuant to section 106 (judgment, [96]), but the judge stated (judgment, [88]) that he would have decided that, insofar as 70% of the subject of the Second Agency Notice was the subject of a dispute, that proportion of the Second Agency Notice fell within the limitation to the section and would be invalid, but that the Ugandan courts would find it valid in relation to the unpaid 30% deposit.

III. Findings of law

20. The judge's findings can be summarised as follows:

(1) It is "plain" that compliance by Tullow with the notice requirement in Article 7.5(a) of the SPA is not a condition precedent to Heritage's liability to indemnify Tullow: judgment, [99]. He gave four reasons:

> "(i) Article 7.4…is in terms constituted as a condition precedent. In a commercial agreement it would be expected that if there is to be a condition precedent it would be in clear terms, and here there is the very fact that another clause, but not this one, was so drafted.
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> (ii) Given the drastic nature of the alleged condition precedent, on a true and proper construction of this commercial agreement, it is most unlikely that any minor breach of the Notice Requirement would disentitle [Tullow], and there is no room for any construction so as to differentiate between major and minor breaches, or indeed, as here, to allow for whether in the event notice was received from some other source even if not given by [Tullow].
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> (iii) Article 7.5 is not limited to sub-paragraph (a) but contains other provisions…which are plainly inapposite as part of a condition precedent, not to speak of Article 7.6(b), which can disapply any operation of the rest of Article 7.5.
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> (iv) [Tullow] refers if necessary to Article 15.7…which provides for the indemnity to survive a breach of duty (plainly including a contractual duty) by the Indemnified Party."

(2) On the basis that Article 7.5(a) is not a condition precedent (see judgment, [100]), Tullow's failure itself to give notice in breach of Article 7.5(a) would have led to no loss and its right pursuant to Article 7.6(b) "would have continued and did continue": judgment, [102].

(a) In determining the consequences of the breach by Tullow of the notice requirement in Article 7.5(a), it is (see judgment, [100]) "significant…to take into account [Heritage's] actions after they had knowledge of the Notices, and certainly in relation to the Second Agency Notice, the content of that Notice."

(b) When Heritage knew of the Agency Notices and the demand dated 15 March 2011, they took no steps pursuant to Article 7.5(b) of the

SPA. The only step they took was to write the letter dated 29 December 2010, as to which see [13] above, and "significantly", Heritage took no steps after receipt of the 15 March demand and prior to the payment by Tullow on 7 April 2011.

(c) The judge stated (judgment, [100(ii)]) that he had "no doubt at all" that, in the light of the pressure which was being put on Tullow by the Government in the light of the substantial unpaid tax assessment, and the real risk there was to the future of Tullow's future investment and business in Uganda, Tullow "would have formed, indeed did form, the reasonable opinion that any action that might have been reasonably requested by [Heritage] pursuant to Article 7.5(b) could not be required of [Tullow] by reference to Article 7.6(b)." He had found (judgment, [74], summarised at [18] above) that Tullow made the payment in reliance on Ugandan legal advice and that it believed on reasonable grounds that the Agency Notices were valid.

(3) Clause 3.1(a) of the Supplemental Agreement did not "replace, amend or substitute for the provisions of Article 7.5(b) and 7.6, but … the rights which are expressly reflected and confirmed in clause 3.1(a) must, if in conflict with the Articles in question, prevail over them so far as concerns the period after 26 July 2010": judgment, [101]. Leaving aside the impact of Article 15.7 of the SPA, which survived, while the agreement records that Heritage "has the right to conduct the Dispute", it was plain that the express terms of Article 7.6(b) of the SPA would not be overridden or prevailed over by anything other than the express terms of clause 3.1(a) of the Supplemental Agreement, and it was not possible to spell any implied term to this effect in clause 3.1(a). Tullow's breach of Article 7.5(a) of the SPA in failing itself to give notice in respect of the Agency Notices would therefore (judgment, [102]) have led to no loss, its right pursuant to Article 7.6(b) continued, and there was no breach of clause 3.1(a).

(4) Tullow was not disentitled to an indemnity on the ground that the mechanism under the Agency Notices was an "execution remedy" and not within Article 7.2: judgment, [103]. The claims were claims for tax within the definition in Article 1.1 which included sums "chargeable directly or primarily against or attributable directly or primarily to the relevant person or any other person and whether any amount of them is recoverable from any other person", and because the liability was a personal liability on Tullow "up to the market value of the asset".

(5) Tullow was not disentitled from recovery under the indemnity because of "collusion" with the Revenue Authority: judgment, [104] – [108]. Notwithstanding the pressure on Tullow, it sought to persuade the Government not to insist on the payment, and the SPA itself foresaw that there would be circumstances in which Tullow was required to act in its own interest and not in the interests of Heritage.

(6) Tullow was not disentitled to an indemnity under Article 7.2 of the SPA because it obtained valuable benefits when it made its payment to the Government because the Government agreed to back off from the

economic pressure of refusing approval to the SPA and the other licences, and because the other disputes between it and the Government were resolved.

21. Tullow also made an alternative claim for restitution based on Heritage's unjust enrichment. The parties agreed that the judge should decide the case on the contractual matters without resolving the restitutionary claim, which would only fall for consideration if Tullow did not succeed in contract. As the judge rejected all Heritage's defences to the contractual claim, he stated (judgment, [113] – [115]) it was not necessary for him to consider the restitution claim, although he stated that one element of its defence, that the claim offended the principle that the English courts would not indirectly enforce a foreign revenue law, would not have availed Heritage.

IV. The scope of this appeal

22. Eleven grounds of appeal were filed with Heritage's notice of appeal, but its supplemental skeleton argument filed about two weeks before the hearing narrowed the matters in issue to three points. These are that the judge erred in holding:

    (1) The requirement for notice in Article 7.5(a) of the SPA was not a condition precedent to a claim for an indemnity under Article 7.2, and the failure to give notice in time did not bar Tullow's claim for an indemnity (grounds 1 and 2);

    (2) The provision in clause 3.1(a) of the Supplemental Agreement that Heritage had the exclusive right to conduct the dispute in relation to the tax claim was not a condition precedent to, or limitation on, the scope of the right to an indemnity under Article 7.2, and Tullow's conduct of the dispute with the Ugandan authorities to the exclusion of Heritage did not bar its claim for an indemnity (ground 3); and

    (3) In the absence of a finding that Tullow owed Heritage US$30 million, the sum required from Tullow in the Second Agency Notice, or that Tullow considered it was so indebted for the purpose of section 108 of the Income Tax Act, finding that Tullow had established a claim to be indemnified in respect of the US$30 million (grounds 4 and 5).

23. In its Respondent's notice, Tullow maintained that if, as it contended, the judge correctly held that neither Article 7.5(a) nor Article 7.5(b) were conditions precedent to the existence of an indemnity claim under Article 7.2, in the absence of a counterclaim by Heritage for damages for breach of those Articles and where it had not been suggested that they had any relevance to the case other than as alleged conditions precedent, the issues of whether those Articles had been breached and the consequences of any such breach were irrelevant. It was submitted that, properly understood, [100] – [102] of the judgment considered the question of breach for completeness, on the footing that it would only be relevant if Article 7.5(a) or Article 7.5(b) was a condition precedent.

V. Discussion

(a) Grounds 1 and 2: Is the requirement for notice in Article 7.5(a) of the SPA a condition precedent to a claim for an indemnity?

24. I shall first consider this without regard to what Heritage described (skeleton argument, paragraph 42) as its primary case, that Article 7.5(b) of the SPA was superseded by clause 3.1(a) of the Supplemental Agreement. Putting that aside, it was submitted by Mr Cox QC on behalf of Heritage (who did not appear below) that the judge was wrong to hold that Article 7.5(a) was not a condition precedent for the following reasons.

25. First, the judge failed to consider Article 7.3 and in particular its concluding words that it "is subject to the following provisions of this Article 7". Mr Cox submitted that the use of the term "subject to" indicated that Article 7.5(a) is a condition precedent because, if it is not to be considered a condition precedent, there would be no need for the final sentence of Article 7.3, the provision which governs the question of payment in relation to claims made under Article 7.2 of the SPA.

26. Secondly, the judge erred in relying on the contractual time-bar provision in Article 7.4 because the application of a seven year longstop period for a written notice given by the indemnified party of its claim does not indicate that an indemnity claim is not also subject to compliance with Article 7.5(a). The former relates to the indemnified party's notice of its indemnity claim but the latter concerns written notice of a tax claim of which the indemnified party has become aware.

27. Thirdly, it was submitted that the commercial purpose of Article 7.5(a) would be undermined if, notwithstanding a failure to comply with it, questions of causation, the impact of a breach and damage caused by a lost opportunity to challenge the claim had to be investigated. Construing it as a condition precedent provided certainty.

28. Fourthly, Mr Cox relied on Article 7.7, which empowers the indemnified party to be free to satisfy or settle the relevant tax liability on such terms as it may think fit if the indemnifying party has not requested it to take appropriate action within 28 days of notice. That provision, it was contended, makes it clear that the ability of the indemnified party to make payment and to claim indemnity is subject to its compliance with the provisions of Article 7, including the 20 business days period in Article 7.5(a) and such action as the indemnifying party may request within Article 7.5(b).

29. Fifthly, the express language of Article 7.3 and the cumulative effect of the first four submissions show that notice in accordance with Article 7.5(a) is a precondition of an indemnity claim and the judge erred in finding that the relevant notice may be given by any person other than the indemnified party, here Tullow.

30. The remaining alleged errors concerned Article 7.5(b). The judge was said to have erred in considering that the ability of the indemnifying party (Heritage) to make reasonable requests to the indemnified party (Tullow) to dispute, resist, appeal or defend the tax claim was not a condition precedent to the right of indemnity. Moreover, the judge's indication at [99(iii)] (set out at [20] above) that the provisions in Article 7.5(b) and Article 7.6 referring to what is "reasonable" are inapposite as

part of a condition precedent erred because questions of reasonableness can feature in conditions precedent.

31. The second aspect of the complaint about the approach of the judge to Article 7.5(b) is based on the words "subject to" in Article 7.3 and the contention that Article 7.7 makes it clear that a party is not able to make payment and claim indemnity in response to a tax claim unless it has complied with the terms of Article 7.5(a) and (b) or invoked the proviso in Article 7.6. This, it was submitted, is because Article 7.7 makes it clear that such compliance is necessary before the indemnified party is "free to satisfy or settle" the claim. It was argued by Mr Cox that it is clear from, for example, *Aspen Insurance UK Ltd v Pectel Ltd* [2008] EWHC 2804 (Comm), reported at [2009] 2 All ER (Comm) 873 at [71], that it is not necessary for a clause to use the term "condition precedent" and what is necessary is the substance. Accordingly, even where there is a list of items in a single paragraph, some may be conditions precedent and some may not. For that reason, even if Article 7.5(b) is not, when truly construed, a condition precedent, he maintained that it does not follow that Article 7.5(a) is also not to be construed as such.

32. In summary, Mr Cox's submissions are that the notice provision in Article 7.5(a) is to be seen in the context of a balanced system of interlocking rights set up by Article 7. Those rights, he argued, depend on there being a notice under Article 7.5(a), and consequently, compliance with the notice requirement is a condition precedent to the right of indemnity. He did not pursue the contention (ground 11 in the notice of appeal) that, even if the judge was correct in finding that Article 7.5(a) and/or (b) are not conditions precedent, he erred in concluding that the breach of Article 7.5(a) had no impact on Heritage and that there was no breach of Article 7.5(b).

33. The starting-point of my analysis of this issue is the general appreciation by courts for over half a century that, while classifying a term as a condition precedent or as a condition may provide certainty, it can also have the effect of depriving a party to a contract of a right because of a trivial breach which has little or no prejudicial effect on the other and causes that other little or no loss. It was for that reason that, in the context of international sale and carriage contracts, the courts became more reluctant to classify terms as conditions precedent and conditions. This reluctance led to the identification and growth of the category of "intermediate" terms and to require that clear words be used if a term is to be construed as a condition precedent or a condition. The classic examples of this approach are *Hong Kong Fir Shipping Co Ltd v Kawasaki Kissen Kaisha Ltd* [1962] 2 QB 26, especially Upjohn LJ at 62, and *Cehave NV v Bremer Handelsgesellschaft mbH* [1976] QB 44 at 61 and 70 – 71. In *Bunge Corp v Tradax International SA* [1981] 1 WLR 711, Lord Roskill stated (at 727):

> "…the basic principles of construction for determining whether or not a particular term is a condition remain as before, always bearing in mind on the one hand the need for certainty and on the other the desirability of not, when legitimate, allowing rescission where the breach complained of is highly technical and where damages would clearly be an adequate remedy."

The reluctance of the courts is particularly illustrated by what may be the high-water mark of this approach in *Schuler (LG) AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, in which even the use of the term "condition" in a contract did not suffice.

34. In the context of insurance contracts, this appreciation is reflected by some reluctance to classify notification of loss provisions as conditions precedent: see, for example, Colman J in *Alfred McAlpine PLC v BAI (Run Off) Ltd* [1998] 2 Lloyd's Rep 694 at 699 – 700. In such contracts it has been stated that what has to be found is a "conditional link" between the assured's obligation to give notice and the underwriters' obligation to pay the claim: see *Friends Provident Life and Pensions Ltd v Sirius International Insurance Corp* [2005] EWCA Civ 601, reported at [2006] Lloyd's Rep IR 45 at [31] *per* Mance LJ (as he then was).

35. The words "condition precedent" are often expressly used in notification of claims clauses. But it is clear that other words can have the same effect, so long as the clause is apt to make that effect the "clear intention of the parties": see *George Hunt Cranes v Scottish Border and General Insurance* [2001] EWCA Civ 1964, reported at [2002] Lloyd's Rep IR 178 at [11] *per* Potter LJ and *Eagle Star Insurance v Cresswell* [2004] EWCA Civ 602, reported at [2004] Lloyd's Rep IR 537 at [20] *per* Longmore LJ. The general approach was usefully summarised in the context of a claims notification clause in a sale and purchase agreement by Teare J in *Aspen Insurance UK Ltd v Pectel Ltd* [2008] EWHC 2804 (Comm) at [62], reported at [2009] 2 All ER (Comm) 873 at 888.

36. With that introduction, I turn to Article 7 of the SPA. I accept the submissions of Mr Wolfson QC on behalf of Tullow. The words "condition precedent" are not used in Articles 7.1 and 7.2 or in Article 7.5. In my judgment, looking at Article 7 as a whole, Article 7.5(a)'s requirement of notice and Article 7.5(b)'s provisions about the steps the indemnifying party can request the indemnified party to take are not conditions precedent to the latter's rights of indemnity in Articles 7.1 and 7.2. First, the draftsman of Article 7 used words that are appropriate to create a condition precedent in Article 7.4, but not in Article 7.5. Article 7.4 expressly states that the indemnities in Articles 7.1 and 7.2 "shall not apply unless notice of the indemnified party's claim or demand … is given to the indemnifying party … in writing within 7 (seven) years of the Closing Date". There are other examples of clear conditions precedent in other Articles of the SPA. See, for example, Article 2.2, Article 8.1 and Article 11.3 (the last two of which are set out in paragraphs 5 and 7 of the Appendix to this judgment.) The contrast with the wording of Article 7.5, where no such wording was used, is marked and of particular significance.

37. Secondly, the fact that both parties have a potential entitlement to indemnity is of relevance. The seller's potential entitlement under Article 7.1 is to be indemnified in respect of transfer taxes and the buyer's potential entitlement under Article 7.2 is to be indemnified in respect of "non-transfer taxes". Both parties thus had an interest in ensuring that the legal consequences of a breach of the notification provisions related to recoverable loss and did not involve the automatic loss of a valuable right regardless of whether there was prejudice or loss. This is because, if Article 7.5 is a condition precedent, an indemnified party, the buyer in the case of non-transfer taxes and the seller in the case of transfer taxes, could be deprived of its indemnity due to a minor or technical breach such as service of notice a day later than stipulated by Article 7.5(a) or failing to provide a document of limited relevance which is nevertheless sought by the other pursuant to Article 7.5(b)(ii). The fact that they did not use language such as that used in Article 7.4 suggests that they did not intend such consequences.

38. Quite apart from the fact that both parties have a potential entitlement to indemnity under Article 7 of the SPA, the fact that the effects of a breach of the notice requirement in Article 7.5(a) might either be serious or might be minor is also, in the light of the authorities to which I have referred, a reason for not finding it to be a condition precedent in the absence of clear language. Mr Cox submitted that one reason for regarding it as a condition precedent is that a breach might result in a loss that is not quantifiable. This argument, however, cuts the other way. If a breach might cause no loss or no obvious financial loss, that would be a good reason why the parties would not have agreed that any breach of Article 7.5, however minor, should lead to the loss of a valuable indemnity right.

39. The structure of Article 7.5 also provides important assistance. This is because Article 7.5(a) is one of two sub-Articles of Article 7.5. The word "shall" in the introductory words before the sub-Articles applies to both Article 7.5(a) and 7.5(b). It follows that it cannot be the case that compliance with one of the sub-articles of Article 7.5 is a condition precedent but compliance with the other sub-article is not. Whatever the theoretical position in relation to clauses requiring "reasonable" action, requests for records and information and whether action and documents were requested were "reasonable", such requirements and the inquiries which would be necessary to ascertain whether they were satisfied are strong indications that Article 7.5(b) is not a condition precedent, and I do not consider that it is.

40. That conclusion is reinforced by the proviso to Article 7.5(b) in Article 7.6. Article 7.6 states that the indemnified party (here Tullow) shall not be required to take any action pursuant to Article 7.5(b) unless it is promptly indemnified and secured to its reasonable satisfaction, or where, in its reasonable opinion, the action pursuant to Article 7.5(b) is likely to affect adversely either its future liability or its business or financial interests. Mr Cox relied on *Aspen Insurance UK Ltd v Pectel Ltd* [2008] EWHC 2804 (Comm) for the proposition that the fact that one part of a contractual provision is not a condition precedent does not prevent another part of the same provision from being one. I consider that he gets only marginal assistance from that case. Although the provision under consideration in *Aspen v Pectel* was a notification of claims clause, it differed from Article 7.5 in an important respect. The relevant provisions of the clause in that case were separate and free-standing ones which had been grouped together thematically under a condition, condition 4, which dealt with "claims procedure". In the present case, Articles 7.5(a) and 7.5(b) are both introduced by the same sentence and are the continuation of that sentence. In that sentence, the same word, "shall", governs each of the two limbs.

41. The above reasons also explain why I reject Mr Cox's submission that what he described as a careful and balanced system of interlocking rights in Article 7 shows that Article 7.5(a) is a condition precedent. Regarding Article 7 as a balanced system of interlocking rights can in fact cut both ways. First, there is the point, already made, that the draftsman showed in Article 7.4 that he or she was able to express the concept of a condition precedent clearly and with appropriate and suitable wording.

42. Secondly, Mr Cox's point based on the words "subject to" in Article 7.3 (see [24] above) would make each and every individual provision in Article 7 a condition precedent, an unlikely and commercially unrealistic construction. Moreover, it also fails to explain why these words are in Article 7.3, which provides only for the date on which the indemnifying party must pay the indemnified party, and not in Article

7.2, which creates the obligation to indemnify. I accept Mr Wolfson's submission that the sentence providing that Article 7.3 "is subject to the following provisions of this Article 7" is designed to make it clear that the default date of payment may be accelerated or deferred pursuant to subsequent provisions. It would, in any event, be very odd for a sentence starting "for the avoidance of doubt", as the last sentence of Article 7.3 does, to be what turns otherwise unclear words into a condition precedent. Finally, the wording of Article 7.7 does not assist Heritage. That provision makes it clear that, if the indemnifying party (Heritage) does not request the indemnified party (Tullow) to take any appropriate action within the specified 28 day period of notice and no action is required by virtue of Article 7.6, the indemnified party is to be free to satisfy or settle the claim on such terms as it may, in its discretion, think fit. It goes no further than that.

(b) Ground 3: Is clause 3.1(a) of the Supplemental Agreement a condition precedent that prevails over Articles 7.5 – 7.7 of the SPA, and was Tullow in breach of it?

43. During the hearing, Mr Cox stated that, if his submission that the notice provision in Article 7.5(a) was a condition precedent was rejected, he did not pursue ground 3. My conclusions on the status of Article 7.5(a) mean that it is not necessary to deal with this ground. I will, however, briefly summarise Mr Cox's case and my reasons for concluding that, had it been necessary to decide this point, I would have decided that clause 3.1(a) of the Supplemental Agreement is not a condition precedent that varied or prevailed over Articles 7.5 and 7.7 of the SPA, and the judge was correct in concluding that Tullow was not in breach of it.

44. Heritage submitted that the judge erred in finding that clause 3.1(a) did not apply to Tullow's response to the Agency Notices, and did not impact on Article 7.6(b) of the SPA. Its case was that clause 3.1(a) replaced Heritage's qualified right under Article 7.6(b) to require Tullow to respond to the tax claims by taking such action as Heritage reasonably requested with an unqualified right to conduct all proceedings relating to the dispute and to have sole responsibility for the dispute and its resolution. Mr Cox submitted that the provisions in clause 2 of the Supplemental Agreement for the escrow account and the fact that Heritage paid over US$283 million into it plainly concerned the dispute about the tax claim. The Agency Notices, he maintained, were an aspect of or a step taken (by the Government) in relation to the tax dispute. He submitted that the judge did not consider key words in clause 3.1(a), in particular the opening words "notwithstanding any provision of the [SPA]" which, on the judge's construction, were deprived of any practical effect. He also maintained that the judge did not consider the words "the dispute and any and all proceedings relating thereto", which clearly showed that the Agency Notices and any proceedings responding to them were "proceedings relating" to the dispute. The combination of clauses 2 and 3.1(a) of the Supplemental Agreement showed that any payment in respect of the dispute was to be made pursuant to the clause 2 mechanism following a resolution controlled exclusively by Heritage in accordance with clause 3.1(a). As to whether Tullow had breached clause 3.1(a), Mr Cox submitted that its payment to the Revenue Authority on 7 April 2011 was inconsistent with Heritage's right to have sole conduct of the dispute, including any "settlement" or "compromise".

45. Mr Cox also submitted that Article 15.7, on which the judge relied (see [17(3)] above), did not assist Tullow because the indemnity under Article 7.2 did not, if properly construed, apply where the person seeking indemnity has deliberately

violated the other party's rights or deliberately engaged in conduct inviting a claim, and that Article 15.7 itself does not apply to deliberate conduct as opposed to negligence and breach of duty. Mr Cox relied on the well-known approach to the construction of contracts of indemnity (e.g. in *Smith v South Wales Switchgear* [1978] 1 WLR 165), *viz* that they are to be construed strictly in favour of the indemnifier, and argued that without clear words providing that the indemnity is to apply despite deliberate conduct, it will not do so.

46. I would have rejected these submissions for the following reasons. First, in the light of Article 15.7 of the SPA, in which the parties agreed that the indemnities given to each other applied "irrespective of…the negligence or breach of duty…of the indemnified party", it is unlikely that a subsequent agreement would disentitle a party from the right to indemnity absent express words. There are no express words in clause 3.1(a) which make Tullow's right to an indemnity under Article 7.2 dependent on compliance with the provisions in clause 3.1(a).

47. Similarly, in the absence of express wording, I reject the submission that the Supplemental Agreement did away with the detailed "conduct of claims" machinery in Articles 7.5 – 7.7 of the SPA. The words "notwithstanding any provision of the [SPA]" in clause 3.1(a) are insufficient, particularly when contrasted with the express language used in clause 6 of the Supplemental Agreement, which provides that the SPA was to be amended by the deletion of the words "available funds" in Article 8.2(d).

48. In summary, ground 3 depends on a conclusion that Article 7.5(a) and/or Article 7.5(b) is a condition precedent, but I have concluded that neither is. It follows that, as Heritage accept, this ground is not maintainable. However, for the reasons I have given, in any event clause 3.1(a) of the Supplemental Agreement is not a condition precedent to Tullow's right to an indemnity under Article 7.2 of the SPA, so that any alleged breach of it is irrelevant.

49. As to whether Tullow in fact breached clause 3.1(a), I incline to the view that it did not. The judge was entitled on the evidence, including the Government's active attempts to involve Tullow in tripartite discussion of Heritage's tax liability, to conclude that clause 3.1(a) was concerned with bilateral negotiations between Heritage and the Government about that tax liability, and was designed to prevent Tullow from participating in those negotiations. Heritage continued to pursue its claim that it was not liable to tax in respect of the transfer in the Ugandan courts, where an appeal remains pending.

(c) Grounds 4 and 5: Had Tullow established an indemnity claim for the US$30 million in the Second Agency Notice?

50. Heritage maintained that the judge erred in holding that Tullow had established an indemnity claim against it for the full amount (US$30 million) in the Second Agency Notice. This, Mr Cox argued, was because Tullow's evidence only showed that it owed Heritage US$27,426,286.30, so that, for the purposes of section 108, it was only that sum which was to be treated as "an asset including money" belonging to Heritage of which Tullow had possession. Tullow's response was that it was not open to Heritage to raise the point but that, in any event the judge made the findings he needed to make at [74] and [75] of his judgment, and they justified his conclusion that

the Second Agency Notice was valid in its entirety. The parties' submissions on this involved detailed analysis of the way the case had been pleaded and developed during the hearing. The court was referred to the pleadings, the evidence given, and the written and oral closing submissions. Awesome forensic microscopes were applied to a point the resolution of which causes an appellate court similar difficulties to those it faces when it is asked to reverse a trial judge's evaluation of the facts and where the amount in dispute is, in the context of the total sums in dispute in this case, a relatively small sum.

51. At the core of Heritage's case on this ground was the submission that the judge could not determine whether Tullow believed that the Second Agency Notice obliged it to pay US$30 million to the Revenue Authority unless he made a finding that Tullow owed Heritage that sum, or that Tullow believed that this sum was owed to Heritage, and that he did not do so. Mr Cox submitted that the evidence did not show this. Tullow's calculation of the US$30 million included a sum of just over US$10 million in round figures reflecting a withholding tax claim by the Revenue Authority against the operating company. The remainder of the US$30 million was made up of five cash calls in July and August 2010, in the total sum of US$8,068,500, "service charges" which Tullow was liable to pay to Heritage between July 2010 and April 2011, in the total sum of US$1,447,703.14, and an "adjusted purchase price" agreed between Tullow and Heritage in March 2011, in the total sum of US$13,636,043.16.

52. In January 2011 the withholding tax claim was settled in a substantially lower sum by a consent judgment between the Revenue Authority and Heritage, of which Tullow's share, which it paid, was US$4,310,040. Giving evidence on behalf of Tullow, Mr Inch was unable to confirm the figure owed, and his evidence was to the effect that he did not know what the figures were. Mr Cox submitted that because Heritage's evidence, given by Mr Atherton, that the relevant figure Tullow owed it was the US$4,310,040 was not challenged and, in the light of the consent judgment quantifying the withholding tax liability before Tullow made payment to the Revenue Authority, had the judge considered Tullow's liability to Heritage in relation to the Second Agency Notice, it would not have been open to him to proceed on the basis that the withholding tax liability was the US$10 million. The only finding open to him on the evidence was that the withholding tax liability amounted to US$4,310,040. There was no evidential basis, he maintained, for a finding that Tullow owed a greater sum or made payment in April 2011 on the basis that it owed a greater sum, or believed that some different sum was relevant. He submitted that the result of this analysis was that the sum which can be recovered from Heritage in respect of the US$30 million claimed by the Revenue Authority under the Second Agency Notice should be reduced by US$2,538,713.70 to US$27,461,286.30.

53. Mr Wolfson submitted that there had been two ways in which Tullow's claim for an indemnity in respect of the US$30 million in the Second Agency Notice could succeed. The first was by establishing that the demand was valid on its face so as to be a charge to tax, and then by resisting Heritage's case that Tullow knew that the demand was invalid. The second was by establishing that the notice was valid as a matter of Ugandan law. The questions concerning the actual amount Tullow owed Heritage were only of relevance to the second.

54. Mr Wolfson argued that Heritage did not challenge Tullow's case that it believed the Second Agency Notice was valid, but focused on the question of whether it was in

fact valid, maintaining that it was not. He pointed to the fact that Messrs Inch and Martin, Tullow's witnesses, were not cross-examined as to their understanding of the liability for, or *quantum* of, any particular debt, and that in its closing submissions Tullow had stated that it assumed that their evidence was accepted. He also submitted that, although the withholding tax point was raised in the evidence, during the course of the trial Heritage decided to defend the claim on an "all or nothing" basis and to abandon its challenge to Tullow's case that it held assets totalling US$30 million within section 108, and only sought to resurrect it as a *quantum* point in its closing submissions. He could not point to an express abandonment of the withholding tax point, but relied on inferences from the scope of cross-examination and the focus of the trial.

55. So, in summary, Mr Wolfson's submission was that the evidence on the withholding tax point was, in reality, deployed as part of the "all or nothing" basis of Heritage's defence, that is in relation to the validity on its face of the Second Agency Notice, and not as a *quantum* point based on Ugandan law. On that basis, he argued that there was no need for the judge to resolve the issue of Ugandan law underlying the withholding tax point. Accordingly, he submitted that the judge's approach (judgment, [96(i)]), in which he stated "I have resolved the question of the enforceability of the indemnity by reference to the claimant's belief in its validity, irrespective of its actual validity", was correct, and his finding that Tullow had established the indemnity claim against Heritage for the US$30 million was one he was entitled to make.

56. Mr Wolfson accepted that there were two ways in which Heritage had pleaded the defence to the indemnity claim. He accepted that the withholding tax point was pleaded and there was evidence about it. It may be understandable that the point was overshadowed by the wider "validity" point during the course of the hearing, particularly because of the overlaps between the two. However, having considered all the material to which we were directed, I do not consider that Heritage abandoned the point. It raised the point in closing (see judgment, [68]), according to Mr Wolfson (skeleton argument, paragraph 94(e)) "upon some prompting by the judge". Its oral closing submissions took the point that Tullow's reliance on the figure of US$10,124,536 in respect of the withholding tax had not been put to Mr Atherton and was inconsistent with the consent judgment. The judge stated that the matter should be dealt with after judgment, but made findings about the impact of the Second Agency Notice without making a finding about the sum due from Tullow to Heritage. He then rejected Heritage's application to consider the matter further at the post-judgment hearing dealing with consequential matters.

57. It is understandable, given the focus on the "validity" point during the hearing, that, when giving judgment, the judge also focused on it. But once it was clear that the withholding tax point remained a live point at the end of the trial, I consider that it was incumbent on the judge to make a finding on it. Accordingly, notwithstanding Mr Wolfson's careful and detailed submissions, I have concluded that they must be rejected and I would allow the appeal on this point. In the absence of such a finding, the sum which can be claimed under the Second Agency Notice should be reduced to US$27,461,286.30.

(i) Summary of Conclusions

58. For the reasons given in [50] – [57] above, I would allow the appeal on the ground that the learned judge was wrong to hold that Tullow had established an indemnity claim against Heritage for the full amount (US$30 million) in the Second Agency Notice.

59. For the reasons given in [36] – [42] above, I would dismiss the appeal on the ground that the judge was wrong in finding that the requirement for notice in Article 7.5(a) of the SPA was not a condition precedent to Tullow's right to claim an indemnity under Article 7.2. That conclusion means that it is not necessary to deal with ground 3, that the learned judge was wrong in relation to clause 3.1(a) of the Supplemental Agreement. I, however, indicated that, for the reasons given in [46] – [49] above, had it been necessary to decide this point, I would have decided that clause 3.1(a) is not a condition precedent which prevails over Articles 7.5 – 7.7 of the SPA, and that Tullow was not in breach of it.

60. Accordingly, to the limited extent stated at [58] above, I would allow this appeal.

Lady Justice Gloster:

61. I agree.

Lord Justice Rimer:

62. I also agree.

APPENDIX

THE CONTRACTUAL DOCUMENTS

A. The sale and purchase agreement between Heritage and Tullow made on 26 January 2010:

1. Recital "E" to this agreement states:

> "On 18 December 2009, the seller [Heritage Oil & Gas Ltd] notified the buyer [Tullow Uganda Ltd] in writing, in accordance with Article 12.1(G)(1) of the [Joint Operating Agreement], that it had negotiated and agreed the final terms and conditions of a direct transfer to Eni International B.V. of the Assigned Interest (such terms and conditions being attached to such notice in a sale and purchase agreement entered into among the Seller, the Seller Guarantor [Heritage Oil PLC] and Eni International B.V., dated 18 December 2009) and the Buyer has, within 30 days of such notice, delivered to the seller a counter-notification that it accepts such agreed upon terms and conditions without reservations or conditions."

2. Taxation is dealt with in section 7 of the SPA. A distinction is made between 'Transfer Taxes' arising in respect of the transfer or sale of the assigned interests or of the shares to Tullow which (pursuant to Article 7.1) are to be borne by Tullow, and 'Non-Transfer Taxes' arising in respect of the transaction, including any capital gains tax, which (pursuant to Article 7.2) are to be borne by Heritage.

3. Article 1.1 of the SPA defines 'Transfer Taxes' and 'Non-Transfer Taxes'. It states that the former "means stamp duty payable under the laws of the Republic of Uganda". It states that 'Non-Transfer Taxes' means any Taxes other than Transfer Taxes. Article 1.1 defines 'Tax' or 'Taxes' as:

> "…all forms of taxes, duties, imposts, charges, withholdings and levies in the nature of taxes, wheresoever imposed including but not limited to income tax (including amounts equivalent to or in respect of income tax required to be deducted or withheld from or accounted for in respect of any payment), corporation tax, capital gains tax, any tax imposed pursuant to or referred to in the Block 1 PSA and Block 3A PSA and any applicable legislation (including any Profits Tax), inheritance tax, value added tax, customs and other import or export duties, excise duties, stamp duty, social security or other similar contributions and any interest, penalty, surchargeor fine relatint thereto which have been or are assessed or imposed by any Government Entity or statutory body (including fines, additional taxes, interest or penalties) and regardless of whether such taxes, duties, imposts, levies, charges, withholdings, penalties and interest are chargeable directly or primarily against or attributable directly or primarily to the relevant person or any other person and of whether any amount of them is recoverable from any other person."

4. The material parts of section 7 of the SPA provide:

> "7.2 Any Non-Transfer Taxes arising in respect of the Transaction, including any capital gains tax, shall be borne by the Seller. The Seller shall be solely responsible for the determination of, timely filing for, and prompt payment of, any such Non-Transfer Taxes imposed upon, or attributable to, the Seller or any of its Affiliates. In the event that any Non-Transfer Tax is charged at any time to the Buyer and/or any of the Buyer's Affiliates and/or (following any exercise of the Call Option by the Buyer) Heritage (U) in connection with the Transaction, the Seller shall in each case pay to the Buyer an amount equal to such Tax.
>
> 7.3 The Indemnifying Party shall pay to the Indemnified Party any amount claimed under the indemnities in Articles 7.1 and 7.2 on or before the date that is the latest of (1) 10 (ten) Business Days after demand is made therefore by the Indemnified Party, (2) 10 (ten) Business

Days prior to the latest date on which the Tax in question can be paid to the relevant Tax Authority in order to avoid a liability to interest or penalties accruing and, (3) in circumstances where the Tax in question is not payable in advance of the date on which the amount of Tax is finally and conclusively determined, within 15 (fifteen) Business Days of such date. For this purpose, an amount of Tax shall be deemed to be finally determined when (i) the Indemnified Party makes a binding agreement with the Indemnifying Party as to the amount payable in respect of such Tax under the indemnities in Articles 7.1 and 7.2, as appropriate, (ii) the Indemnified Party makes a binding agreement with the relevant Tax Authority in respect of the amount of such Tax or, (iii) a decision of a court or tribunal of competent jurisdiction is given or any other binding agreement or determination is made in respect of the amount of such Tax from which either no appeal lies or in respect of which no appeal is made within the prescribed time limit. For the avoidance of doubt, this Article 7.3 is subject to the following provisions of this Article 7.

7.4 The indemnities in Articles 7.1 and 7.2 shall not apply unless notice of the Indemnified Party's claim or demand by the Indemnified Party against the Indemnifying Party with respect thereto is given to the Indemnifying Party by the Indemnified Party in writing within 7 (seven) years of the Closing Date.

7.5 Upon the Indemnified Party becoming aware of any Tax Claim being made to which the indernnities in Articles 7.1 or 7.2 (as applicable) may apply, that Indemnified Party shall;

(a) within 20 (twenty) Business Days, give notice in writing of the Tax Claim to the Indemnifying Party; and

(b) (subject to Articles 7.6 and 7.7) take (or, in the case of a Tax Claim to which the indemnity in Article 7.2 may apply, procure that the relevant Buyer's Affiliate shall take) such action as the Indemnifying Party may reasonably request to dispute, resist, appeal, compromise or defend such Tax Claim and any adjudication in respect thereof, including:

(i) agreeing to any reasonable settlement, compromise or discharge of such Tax Claim as the Indemnifying Party may recommend; and

(ii) (upon the Indemnifying Party's reasonable request) providing to the Indemnifying Party such records and information as are reasonably relevant to such Tax Claim and making employees available on a mutually convenient basis to provide additional information or explanation of any material provided or to testify at proceedings related to such Tax Claim.

7.6 The Indemnified Party shall not be required to take any action pursuant to Article 7.5(b):

(a) unless the Indemnified Party (and, in the case of a Tax Claim to which the indemnity in Article 7.2 may apply, any relevant Buyer's Affiliate) is each promptly indemnified and secured to the Indemnified Party's reasonable satisfaction by the Indemnifying Party against all losses, costs, damages and expenses that are or may be thereby incurred; or

(b) if, in the Indemnified Party's reasonable opinion. the action is likely to affect adversely either the future liability of the Indemnified Party (or, in the case of a Tax Claim to which the indemnity in Article 7.2 may apply, any relevant Buyer's Affiliate) to Tax or the business or financial interests of any of them or of any person connected with any of them.

7.7 If the Indemnifying Party does not request the Indemnified Party to take any appropriate action within 28 (twenty-eight) days of notice to the Indemnifying Party, or no action is required to be taken by virtue of any of the provisions of Article 7.6, the Indemnified Party shall be free to satisfy or settle (or, in the case of a Tax Claim to which the indemnity in Article 7.2 may apply, to allow the Buyer's Affiliate concerned to satisfy or settle) the relevant Tax liability on such terms as it may in its absolute discretion think fit."

5. Section 8 of the SPA concerns "Closing". The material part provides:

> "8.1 Closing shall take place in Amsterdam, the Netherlands on the 5th (fifth) Business Day after the notice of fulfilment of the last of the Conditions Precedent provided under Article 2.2 (or waiver in writing by the relevant Party or Parties of those Conditions Precedent which are capable of waiver in accordance with Article 2.7) or such later date as the Parties may agree (the "Closing Date").
>
> …"

6. Section 10 of the SPA concerns "Notices". Article 10.1 provides:

> "Any notice or other document to be served under this agreement shall be in writing and may be delivered by hand or sent by post or fax to the party to be served at its address appearing in Article 10.3 of this agreement…"

7. Section 11 of the SPA deals with "Post-Closing Obligations". For the purposes of this appeal, it is only necessary to set out Articles 11.3 and 11.4. They are:

> "11.3 To address any concerns the Government may have in relation to the identity of the entity acquiring the Assigned Interest and the Operatorship and to minimise the delay in obtaining the Assignment Approvals required to satisfy the Condition Precedent set forth in Article 2.2(a), the Buyer covenants with the Seller, for a period of 2 (two) years starting from the Closing Date, the Buyer shall not transfer, or enter into any negotiations to transfer, all or a portion of the Assigned Interest whether directly or indirectly by assignment, merger, consolidation or sale of stock, or other conveyance, other than with or to an affiliate…of the Buyer. …
>
> 11.4 In the event that the Buyer breaches the covenant contained in Article 11.3 and at the time of the breach payment of the Contingent Amount has not been made by the Buyer to the Seller, the Parties agree that the Contingent Amount shall become immediately payable by the Buyer to the Seller. …"

8. The heading of section 15 of the SPA is "Miscellaneous". Article 15.7 provides:

> "15.7 The indemnities provided in this Agreement shall apply irrespective of cause and notwithstanding the negligence or breach of duty (whether statutory or otherwise) of the indemnified Party and shall apply irrespective of whether any claim is in tort, under contract, or otherwise at law provided, for the avoidance of doubt, that nothing in this Article 15.7 shall reduce the Seller's liability under the Warranties."

9. Section 16 of the SPA contains "entire agreement" provisions. Its material parts provide:

"16.1 This Agreement and the documents referred to in it contain the whole agreement between the Parties relating to the transactions contemplated by this Agreement and supersede all previous agreements between the Parties relating to these transactions.

16.2 If any term or provision of this Agreement is determined to be invalid, illegal or unenforceable, then all other terms and provisions or unaffected parts thereof or any other part thereof shall remain va1id and enforceable so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner adverse to any Party. Upon such determination that any term or other provision or part thereof is invalid, illegal or unenforceable, the Parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in an acceptable manner to the end that transactions contemplated hereby are fulfilled to the extent possible."

B. Supplemental agreement between Heritage and Tullow dated 26 July 2010:

10. Under the heading "Background" there are a number of recitals. The material ones are:

> "(A) The Seller, the Seller Guarantor and the Buyer entered into a sale and purchase agreement dated 26 January, 2010 (the "**Sale and Purchase Agreement**") in respect of the transfer of the Assigned Interest (the "**Transfer"**).
>
> (B) On 6 July, the Minister, Ministry ofEnergy and Mineral Development (the "**Minister**") issued Assignment Approvals to the Seller that were conditional upon the Seller paying all taxes accruing from the Transfer as shall be assessed by the Commissioner, Uganda Revenue Authority (the "**Conditional Assignment Approvals**").
>
> (C) On 6 July the Commissioner, Uganda Revenue Authority delivered to the Seller an Income Tax Assessment assessing taxes in relation to the Transfer in the amount of $404,925,000 (the "**Assessment**"). The Seller disputes with the Government and the Uganda Revenue Authority (the "**URA**") that any tax is payable on or in relation to the Transfer, that either the Government or the URA has the right to issue the Assessment or any other assessment of tax levied on or in relation to the Transfer and the content of the Assessment (the "**Dispute**").
>
> …"

11. Clause 2 of the Supplementary Agreement concerns the operation of an Escrow Agreement between Tullow, Heritage and Standard Chartered Bank (the "Escrow Agent"). It provides:

> "In connection with the operation of the escrow agreement…the Buyer and Seller agree in relation to the amount of two hundred and eighty-three million, four hundred and forty seven thousand five hundred Dollars ($283,447,500) deposited or to be deposited with the Escrow Agent pursuant to this Agreement, the Sale and Purchase Agreement and the Escrow Agreement (the "**Secured Amount**") that on the Business Day following notification by the Seller to the Buyer of written confirmation signed by the Seller and, the Government that the Dispute has been finally settled or determined or an agreement has been reached on an arbitration process in respect of the Dispute, including confirmation as to the amount(s) to be paid out of the Secured Amount and the recipient(s) thereof, ("**Written Confirmation**"), the Buyer and the Seller shall direct the Escrow Agent to release all of the Secured Amount in accordance with the Written Confirmation, by way of the despatch to the Escrow Agent of one or more Transfer Instructions (as defined in the Escrow Agreement) ("**Transfer Instructions**") duly completed and executed in accordance with the provisions of the Escrow Agreement."

12. Clause 3 concerns buyer's covenants. Its material parts provide:

> "3.1 The buyer agrees that:
>
> > (a) notwithstanding any provision of the Sale and Purchase Agreement, any of the Interest Documents or any other instrument, the Seller has the right to conduct the Dispute and any and all proceedings relating thereto, whether by arbitration, court proceedings or otherwise, and that such conduct of the Dispute and its resolution, whether by settlement, compromise or award of an arbitral tribunal shall be the sole responsibility of the Seller;
> >
> > …
> >
> > (c) it will, in consideration of the agreement relating to the Contingent Amount set out in clause 4.2 below, on or before the Closing Date pay to the Escrow Agent the amount of one hundred million Dollars ($100,000,000) (the "**Settlement Amount**").

…".

13. Clause 4 is headed "Base Purchase Price and Contingent Amount". Clause 4.1 provides:

> "4.1 The parties agree that the payment of the Base Purchase Price to the Escrow Agent and the payments to be made at Closing under Article 8.2(d) of the Sale and Purchase Agreement, as amended pursuant to clause 6 below (the "**Payment Amendments**"), will fully satisfy and discharge the Buyer's obligations in relation to the Base Purchase Price under the Sale and Purchase Agreement, including pursuant to Articles 3.2 and 8.2(d), notwithstanding that under the Payment Amendments the Escrow Agent will following Closing hold the amount of $183,447,500 (one hundred and eighty-three million, four hundred and forty-seven thousand and five hundred Dollars) on the terms of the Escrow Agreement pending further instructions from the Buyer and the Seller, which sum, but for the Payment Amendments, would have been paid to the Seller at Closing."

14. Clause 5 deals with closing. It provides:

> "The parties agree that the Condition Precedent set out in Article 2.2(a) of the Sale and Purchase Agreement shall be satisfied or deemed to be satisfied upon the due execution of this Agreement by each of the parties hereto and that Closing shall take place on 26 July 2010 or such later date as the parties may agree."

15. Clause 6 is headed "Amendments to Sale and Purchase Agreement". It provides that the SPA was to be amended by the deletion of the words "available funds" in Article 8.2(d), which sets out the obligations of the Seller and the Seller Guarantor, i.e. Heritage Oil & Gas Ltd and Heritage Oil PLC, at Closing and requiring the insertion of specific sums, US$1,045,075,000 to Heritage Oil & Gas Ltd's account and US$121,477,500 to a designated bank account of the Government of Uganda.

C. The 15 March 2011Memorandum of Understanding between the Government of Uganda and Tullow and the side-letters:

16. The MOU set out the agreement between the Government, the Revenue Authority and Tullow in respect of the resolution of the issues concerning the tax payable by Heritage on the disposal of its interests in Exploration Areas 1 and 3A and the transfer by Tullow of a proportion of its interests in Exploration Areas 1, 2, 3A and the Kingfisher Discovery Area to the China National Offshore Oil Corporation and Total.

> "**Payment by [Tullow] as agent in respect of tax payable by [Heritage] on the Heritage Sale**
>
> In accordance with the terms of the Agency Notice served on [Tullow] by the URA, [Tullow] shall pay unencumbered US$313,447,500 to URA (being equivalent to part of the tax assessed to be payable by [Heritage] to the URA in relation to the Heritage Sale."

17. As part of the agreement between the Revenue Authority and Tullow, the Revenue Authority provided it with two side-letters, also dated 15 March 2011. One was a demand stating that objections by Heritage to the tax assessments had been rejected and that Tullow was required to pay the balance due in respect of the assessments on or before 12 April 2011. The second was a letter of commitment to Tullow signed by Mrs Kagina, the Commissioner-General. It stated:

"Reference is made to the Memorandum of Understanding between the . . . [GOU] . . . URA and [Tullow] in which . . . [Tullow] agreed to pay USD 313,447,500 on the strength of the Agency Notice issued by URA under s108 of the ITA, being equivalent to the tax assessed to be payable by [Heritage] in relation to the assignment of [Heritage's] 50% participating interests in [Blocks] 1 and 3A to [Tullow].

This letter serves to give URA's commitment that;

1. Upon payment of the USD 313,447,500 being equivalent to the tax assessed and payable by [Heritage] in relation to the Heritage Sale, URA shall issue a receipt to [Tullow] acknowledging receipt of taxes paid by [Tullow] on account of [Heritage] in accordance with S. 108 of ITA.

2. In the event that [Heritage] pursues an appeal against the assessment, in the Uganda courts or Tax Appeals Tribunal and the Tax Appeals Tribunal / Uganda courts affirm the assessment, consequent upon which the money in escrow account is paid to the [GOU], URA undertakes to refund [Tullow] and not [Heritage].

3. In the event that [Tullow] is required to pursue a claim against [Heritage], the URA will on a strictly good faith basis but without prejudice, give all evidence necessary to enable recovery of the said amount from [Heritage] or its escrow agent."