Neutral Citation Number: [2013] EWHC 1656 (Comm)

Case No: 2011 Folio 471

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2013

Before :

MR JUSTICE BURTON

- -

Between :

Tullow Uganda Ltd

Claimant

- and -

(1) Heritage Oil and Gas Ltd
(2) Heritage Oil Plc

Defendants

- -
- -

Mr David Wolfson QC and **Mr Richard Mott** (instructed by **Ashurst LLP**) for the **Claimant**
Mr Khawar Qureshi QC, **Mr Jonathan Brettler** and **Mr Alexander Cook** (instructed by **McCarthy Tétrault**) for the **Defendants**

Hearing dates: 12, 13, 14, 18, 19, 20, 21, 25, 26, 27, 28 March and 26 April 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BURTON

Mr Justice Burton :

1. Prior to January 2010 the Claimant, Tullow Uganda Ltd, and the First Defendant (whom I shall call the Defendant), Heritage Oil and Gas Ltd, each held a 50% interest in the licence of certain petroleum exploration areas in Uganda, known as Blocks 1 and 3A; in addition the Claimant held 100% of the interest in Block 2. These were very significant oil fields in Uganda, where oil was only relatively recently discovered, and their development was of great significance to the Government of Uganda ("GOU"). The Claimant's parent company and the Second Defendant, the Defendant's parent company, are both substantial FTSE companies. Both companies are involved in the business of oil and gas explorations. The Claimant wished to extend its commitment to Uganda and the Defendant to realise its investment in Uganda and move on.

2. It was a term of the Joint Operating Agreement ("JOA") between them that in the event of the Defendant wishing to dispose of its 50% interest the Claimant had a right of pre-emption, and when the Defendant entered into first a Letter of Intent in November and then a Sale and Purchase Agreement in December 2009 with a third party, Eni S.p.A., the Claimant exercised its right of pre-emption, with the result that the Claimant and Defendant entered (on the same terms) into a Sale and Purchase Agreement ("the SPA") dated 26 January 2010, whereby conditional (by Article 2) upon various matters, in particular the consent of the GOU, the Defendant agreed to sell, and the Claimant to purchase such 50% interest. The condition of the GOU's consent was obviously crucial, and by Article 2.3 each party agreed to use best endeavours to procure it. The consideration was a Base Purchase Price of $1.35 billion, plus an Adjustment Amount (Article 3.3(a)) to be determined, and by Article 3.1(b) a Contingent Amount of $150 million (or in certain circumstances a lesser amount) conditional as there set out. This amounted to a sum which the Claimant asserts, and the GOU subsequently calculated, to amount to a profit to the Defendant of some $1.3 billion.

3. Provision was made by the SPA for the incidence of taxes. By Article 7.1 all "*Transfer Taxes*", defined as "*stamp duty payable under the laws of the Republic of Uganda*" were to be borne by the Claimant as purchaser. "*Non-Transfer Taxes*", meaning "*any Taxes other than Transfer Taxes*", were to be the responsibility of the Defendant as Seller. This dispute arises out of the indemnity sought by the Claimant in respect of the payment by it on 7 April 2011 to the GOU of US$313,477,500, claimed by the GOU in respect of *Non-Transfer Taxes*, thus made the responsibility of the Defendant.

4. Articles 7.2 and 7.3 read as follows, the "*Indemnifying Party*" being the Defendant and the "*Indemnified Party*" being the Claimant:

> "*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 . . . 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 therefor 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."

5. By Article 3.2 of the SPA, the Base Purchase Price was to be paid into an escrow account on the third business day prior to the Closing Date. The Closing Date was in the event 26 July 2010. By an Agreement of that date ("the Supplemental Agreement") the parties set out as follows, Recital A having referred to the SPA:

"*(B) On 6 July, the Minister, Ministry of Energy 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").

(D) *On 16 July the Permanent Secretary, Ministry of Energy and Mineral Development wrote to . . . McCarthy Tetrault* [the Defendant's solicitors] *and confirmed that upon the Seller depositing with the URA an amount equal to 30% of the amount of tax stated in the Assessment and providing a bank guarantee acceptable to the Government to secure the remaining 70% of the amount of tax, the Government will be satisfied that the conditions set out in the Conditional Assignment Approvals are met.*

(E) *In order to facilitate the satisfaction of the condition set out in the Conditional Assignment Approvals and the procurement of the Assignment Approvals on an unconditional basis such that the parties are able to proceed to Closing, the parties have agreed to enter into this . . . Agreement in relation to certain matters that are supplemental to or which amend the Sale and Purchase Agreement.*"

6. After these Recitals, there was provision, so far as the consideration was concerned, by Article 3.1(c) and Article 4.2, for the Contingent Amount to be settled in the sum of $100 million, and for the following payments:

(i) $1,045,075,000 to be made direct to the Defendant:

and, as to the balance of the figure now agreed as $1.45 billion,

(ii) $121,477,500, being the 30% of the Income Tax Assessment referred to in Recital (C), to be made by the Claimant, on the Defendant's behalf, to a GOU nominated bank account:

(iii) $283,447,500 into an escrow account established with Standard Chartered Bank in London, pursuant to the terms of an Escrow Agreement dated 23 July 2010.

7. Although the letter dated 16 July 2010 referred to in Recital (D) of the Supplemental Agreement was indeed written to the Defendant's solicitors by the Permanent Secretary, it soon became clear that the payment of the 70% of the tax into an escrow account in London was not regarded by the GOU as a satisfactory compliance with the provision for an acceptable bank guarantee and on 3 August 2010 the Minister of Energy and Mineral Development, Mr Onek, wrote to both the Claimant and Defendant stating that the conditions stipulated for Government consent had not been fulfilled, and therefore the transaction was of no effect.

8. A tax assessment had been issued on the Defendant by the Uganda Revenue Authority ("URA") dated 9 April 2010, assessing the tax payable on the Defendant's gain by

reference to the Base Purchase Price of $1.35 billion at $404,925,000. The Defendant responded, by letter dated 13 April 2010, asking for the withdrawal of such assessment because it was premature "*to demand payment of tax in respect of the Proposed Sale when the sale may not be completed and at a time when* [the Defendant] *has yet to receive, and has no basis for receiving, any sale proceeds*". The URA withdrew the assessment by letter dated 22 April 2010 "*without prejudice*" to its reissue, and such reissue occurred by Notice dated 6 July 2010, under letter signed by Mrs Allen Kagina as Commissioner General, the same day as the issue of Minister Onek's letter of conditional consent. This is the assessment to which reference is expressly made in Recital (C) of the Supplemental Agreement above set out. As provided by the Supplemental Agreement, 30% of the assessment was paid over to the URA, by the Claimant on the Defendant's behalf out of the purchase price, and the balance of 70% of the sum assessed was paid into the escrow account. This Notice of 6 July 2010 is referred to as "the First Assessment Notice". The Defendant lodged an objection to the First Assessment Notice under s 99(1) of the Income Tax Act ("ITA") on 18 August 2010, and on 12 November 2010 Mrs Kagina as Commissioner General issued an "*Objection Decision*", rejecting the Defendant's objection to the First Assessment Notice.

9. A "Second Assessment Notice", in respect of tax assessed on the $100 million paid additionally to the Base Purchase Price by way of the agreed Contingent Amount, was issued against the Defendant on 19 August 2010 in the sum of $30 million. The Defendant lodged its objection to the Second Assessment Notice on 1 October 2010, and an Objection Decision from the URA rejecting the Defendant's objection was delivered on 1 December 2010.

10. The Defendant has taken two steps to contest these assessments. First by way of appeal in Uganda to the Tax Appeals Tribunal against both Notices, which appeals were dismissed respectively on 23 November and 7 December 2011 after a hearing; the Defendant has lodged appeals to the Ugandan High Court against these decisions, which appeals have not yet been heard. The second step was by way of challenge to the GOU by the Defendant in an Uncitral Arbitration arising out of the Production Sharing Agreements of 2004 to which the Defendant and the GOU were parties, containing an arbitration clause. Although I have not seen those arbitration pleadings, it was common ground before me that a jurisdictional point was taken by the GOU that the Arbitrators had no jurisdiction to resolve the issue relating to the liability of the Defendant for tax pursuant to the assessments, and that by a decision issued during the hearing before me the Arbitrators resolved that jurisdictional point in favour of the GOU, so that, although that arbitration continues in respect of other matters, there can and will be no challenge to the tax liability of the Defendant otherwise than in its appeal to the Uganda High Court.

11. The claim in this action arises by reference to the indemnity claim by the Claimant, arising out of the following steps taken against it by the GOU:

    (i) Service upon it of a notice on 27 July 2010 under s108 of the ITA ("the First Agency Notice"). This arose by reference to the following section of the ITA:

    "*108. Recovery from Agent of Non-Resident.*

(1)The Commissioner may, by notice in writing, require any person who is 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 but not exceeding the amount of tax due.

(2) The captain of any aircraft or ship owned or chartered by a nonresident person is deemed to be in possession of the aircraft or ship for the purposes of this section.

(3) The tax payable in respect of an amount included in the gross income of a non-resident partner under section 67 is assessable in the name of the partnership or of any resident partner of the partnership and may be recovered out of the assets of the partnership or from the resident partner personally.

(4) The tax payable in respect of an amount included in the gross income of a non-resident beneficiary as a result of the operation of section 72 or 73 is assessable in the name of the trustee and may be recovered out of the assets of the trust or from the trustee personally.

(5) A person making a payment pursuant to a notice under subsection (1), (3) or (4) is deemed to have been acting under the authority of the taxpayer and of all other persons concerned and is indemnified in respect of the payment against all proceedings, civil or criminal, and all processes, judicial or extrajudicial, notwithstanding any provisions to the contrary in any written law, contract, or agreement.

(6) An amount due under this section is treated for the purposes of the tax as if it were tax due."

The First Agency Notice, addressed to the Claimant, stating that it was copied to the Defendant, signed by Mrs Kagina, attached a copy of s108 and read in material part as follows:

"*RE: APPOINTMENT AS COLLECTION AGENT FOR HERITAGE OIL & GAS LIMITED*

In exercise of the powers conferred upon me by s108(1) of the [ITA]*, I hereby require you to pay to* [URA] *the sum of USD 283,477,500 . . . being tax payable by Heritage Oil & Gas Limited registered in Mauritius from any monies which may, at any time from the date of service of this notice be held by you for, or due by you to the said person; including but not limited to, pension, salary, wages or any other remuneration.*

Payment Instructions:

- *Period:* *Payment should be effected immediately ON THE DATE OF RECEIPT of this notice*
- *Payee:* *[URA]*

. . .

- *Amount:* *Not exceeding USD 283,477,500 . . .*
- *Form of payment:* *Bank Draft/Transfer*
- *On behalf of:* *Heritage Oil & Gas Limited*
- *Precedence:* *Before paying any other party including the account holder.*

Note the following:

a) You should, on the date of receipt of this notice, immediately remit USD 283,477,500 . . .

b) Where you comply with this notice and have effected payment of the FULL amount as required, this Agency Notice is automatically lifted."

(ii) "The Second Agency Notice" was issued against the Claimant on 2 December 2010, under s108 (above), but also pursuant to s106 of the ITA, which reads as follows:

"*106. Recovery of Tax from Person Owing Money to the Taxpayer*

(1) Where a taxpayer fails to pay income tax on the date on which it becomes due and payable, and the tax payable is not the subject of a dispute the Commissioner may, by notice in writing, require any person –

(a) owing or who may owe money to the taxpayer;
(b) holding or who may subsequently hold money for, or on account of, the taxpayer;
(c) holding or who may subsequently hold money on account of some other person for payment to the taxpayer; or
(d) having authority from some other person to pay money to the taxpayer,

to pay the money to the Commissioner on the date set out in the notice, up to the amount of tax due.

(2) The date specified in the notice under subsection (1) must not be a date before the money becomes due to the taxpayer or is held on behalf of the taxpayer.

(3) At the same time that notice is served under subsection (1), the Commissioner shall also serve a copy of the notice on the taxpayer.

(4) Where a person served with a notice under subsection (1) is unable to comply with the notice by reason of lack of moneys owing to, or held for the taxpayer, the person shall, as soon as

is practicable and in any event before the payment date specified in the notice, notify the Commissioner accordingly in writing setting out the reasons for the inability to comply.

(5) Where a notice is served on the Commissioner under subsection (4), the Commissioner may, by notice in writing-

(a) accept the notification and cancel or amend the notice issued under subsection (1); or
(b) reject the notification.

(6) A person dissatisfied with a decision under subsection (5) may only challenge the decision under the objection and appeal procedure in this Part.

(7) A person making a payment pursuant to a notice under subsection (1) is deemed to have been acting under the authority of the taxpayer and of all other persons concerned and is indemnified in respect of the payment against all proceedings, civil or criminal, and all processes, judicial or extrajudicial, notwithstanding any provisions to the contrary in any written law, contract or agreement.

(8) An amount due under this section is treated for all purposes of this Act as if it were tax due."

This Second Agency Notice was again served upon the Claimant, copy to the Defendant, from Mrs Kagina, and again attached the statutory provisions. Apart from the fact that it was headed up by reference to both sections, and related to $30 million rather than $283,477,500 it was identical to the earlier Notice.

(iii) By letter dated 15 March 2011 ("the March Demand"), written in circumstances to which I shall refer below, the URA (by Mrs Kagina) wrote to the Claimant under the heading *"Without Prejudice Re: Liability Under Notices Issued Under Section 108* [ITA] *in respect of* [the Defendant]" as follows:

"Reference is made to the Agency Notices issued to you on 27th July 2010 and 2nd December 2010.

Please be advised that objection decisions under s 99(5) [ITA] *were issued on 15th November 2010 rejecting objections made by Heritage Oil & Gas Limited against a) an assessment for USD 404,925,000 issued on 6th July 2010 and b) an assessment of $30,000,000 issued on 19th August 2010. You are hereby required to pay the balance due in respect of these assessments of $313,447,500 on or before 12th April 2011.*

Your attention is drawn to s 108(6). Interest will accrue under s136 in respect of late payment."

12. By letter dated 29 December 2010 ("the 29 December Letter") the Ugandan solicitors for the Defendant wrote to the Claimant as follows:

> "*We act for and on behalf of* [the Defendant] *and make reference to the third party agency notice dated 2nd December 2010 wherein . . . the URA tried to appoint you as a collection agent for our client.*
>
> *s106(1) of the* [ITA] *empowers the URA to issue a third party agency notice only where the tax payable is not the subject of a dispute. As you are well aware, the amount being claimed by the URA in the third party agency notice is still the subject of a dispute. Our client raised an objection to the tax and an objection decision was served on our client on 2nd December 2010. Our client is entitled to exercise its statutory right to file an application for review before the Tax Appeals Tribunal or to lodge an appeal in the High Court, which it intends to do within the prescribed time period. Accordingly, take note that the third party agency notice is not in compliance with the provisions of the law.*
>
> *Furthermore, s106(2) of the* [ITA] *provides that the date specified in the notice (i.e. date of receipt of the third party agency notice) must not be a date before the money becomes due to the taxpayer or is held on behalf of the taxpayer.*
>
> *Lastly, we would like to draw your attention to clause 3.7 of the* [SPA] *entered into between yourself and our client which provides inter alia that all payments to be made under the agreement shall be paid without set-off, withholding or any deduction of any kind of taxes or claims. We trust that you will honour this provision of the agreement.*
>
> *Our client shall not recognise any amounts remitted to the URA pursuant to the invalid third party agency notice and shall still demand the amounts from yourselves as and when any amounts become due.*"

13. The Claimant paid the URA the sums the subject matter of the First and Second Agency Notice and of the March Demand, in the total sum of $313,447,500, on 7 April 2011, having signed with the GOU a Memorandum of Understanding dated 15 March 2011, which contained a number of provisions, to which further reference will be made below, but relevant at this stage is Clause 1, which read:

> "*Payment by* [the Claimant] *as agent in respect of tax payable by* [the Defendant] *on the Heritage Sale*
>
> *1.1 In accordance with the terms of the Agency Notice served on* [the Claimant] *by the URA,* [the Claimant] *shall pay unencumbered US$313,447,500 to URA (being equivalent*

> *to part of the tax assessed to be payable by [the Defendant] to the URA in relation to the Heritage Sale.*"

14. The Memorandum of Understanding was contemporaneous with the March Demand and with a "*Letter of Commitment to Tullow*" which reads as follows (I omit capital letters):

> "*Reference is made to the Memorandum of Understanding between the* . . . [GOU] . . . *URA and* [the Claimant] *in which* . . . [the Claimant] *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* [the Defendant] *in relation to the assignment of* [the Defendant's] *50% participating interests in* [Blocks] *1 and 3A to* [the Claimant].
>
> *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* [the Defendant] *in relation to the Heritage Sale, URA shall issue a receipt to* [the Claimant] *acknowledging receipt of taxes paid by* [the Claimant] *on account of* [the Defendant] *in accordance with S. 108 of ITA.*
>
> *2.* *In the event that* [the Defendant] *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* [the Claimant] *and not* [the Defendant].
>
> *3.* *In the event that* [the Claimant] *is required to pursue a claim against* [the Defendant]*, the URA will on a strictly good faith basis but without prejudice, give all evidence necessary to enable recovery of the said amount from* [the Defendant] *or its escrow agent.* "

15. The Claimant claims recovery of the sums so paid to the GOU/URA plus interest, by way of an indemnity claim pursuant to Article 7.2 of the SPA and in the alternative (because so to claim is unnecessary if it succeeds in contract) in restitution/unjust enrichment.

16. The following matters are common ground:

    (i) I should decide the case without resolving the issue (which would only be relevant to the alternative claim in unjust enrichment) whether in fact the Defendant was liable for the Ugandan tax or was rightly assessed, and adjudged on appeal, liable to pay such tax. The parties reached the following agreement during the course of the hearing:

"*1. The Court will determine the Claimant's contractual claim at this hearing.*

2. The Court will determine all issues relating to the Claimant's restitution claim at this hearing, save for [the] *following issues, which will be dealt with as set out below; (i) the . . . Defendant's alleged tax liability under Ugandan law; (ii) the amount of any such alleged tax liability; (iii) the question of whether this alleged tax liability was discharged by the Claimant's payment.*

3. The issues identified in paragraph 2 will be postponed, will not be the subject of submissions at the present hearing, and will not be determined at the present hearing. Following the Court's ruling on the other issues that arise in respect of the Claimant's restitution claim, that claim will (assuming that it has not been dismissed as a result of the Court's ruling) be stayed pending the final conclusion of (a) the Ugandan proceedings between the . . . Defendant and the [URA]*, and (b) the arbitration between the . . . Defendant and the* [GOU] *after which the parties will take steps to arrange for the outstanding issues to be determined by the Court.*"

The reference to the Arbitration has of course gone by the board in the light of the subsequent decision in that Arbitration, to which I have referred in para-graph 10 above. A suggested challenge to the quantum of the assessments was thus not explored before me.

(ii) No separate issue arises before me in respect of the Second Defendant, which is the Guarantor under the SPA, and whose liability stands or falls with that of the Defendant.

(iii) Notwithstanding matters raised in the pleadings and in the written submissions, I am not, at any rate until and unless I consider any consequential relief arising out of my judgment, to consider issues relating to payment out of the escrow account.

(iv) No time bar arises in respect of Article 7.4 of the SPA, which provides that the indemnities in Article 7.1 and 7.2 shall not apply unless the Notice is given within 7 years of the closing date.

(v) As was expressly conceded in the course of argument by Mr Qureshi QC on behalf of the Defendant, after the point was identified, in Closing Submissions (paragraphs 113 to 116) by Mr Wolfson QC for the Claimant, causation is not in issue, indeed is not pleaded, i.e. it is not suggested by the Defendant that the Claimant must show that 'but for' its belief in the validity of the Notices it would not have paid.

(vi) After some earlier interlocutory skirmishes, there was no privilege claimed (and/or it was waived) in respect of legal advice given to the

Claimant at the material time in respect of the Agency Notices, by either its Ugandan or English lawyers.

17. With regard to the issues with which I must deal, and which at this stage I only briefly summarise:

(i) If the Agency Notices were valid at Ugandan law, then it is not in dispute that the Claimant succeeds, subject to any contractual defences referred to below.

(ii) If I am not satisfied that the Agency Notices were valid at Ugandan law, then:

(a) Did the Claimant pay the $313,447,500 knowing that the Notices were not valid? If so, then they cannot recover. The Defendant submits that the Claimant did so pay without any belief in the validity of the Notices, but did so simply in order to further or maintain their relationship with the GOU. The Claimant denies this: although the initial view of the relevant representatives of the Claimant was that the Notices were invalid, and indeed they were resisted, and although their initial Ugandan law advice was to that effect, by the time they made payment in April 2011 they had and relied upon Ugandan legal advice that the Notices were valid, as asserted by the URA. The Claimant accepts that it cannot recover if it knew that the Notices were not valid or if a belief in their validity was fanciful, and submits that there is thus only a limited role if any for what Mr Qureshi has submitted to be an objective test.

(b) The Defendant however does not accept that 'objectivity' is so limited. Although the Defendant's case is primarily, and forcefully, that the Claimant had no genuine belief in the validity of the Notices when payment was made (and that it had not changed its mind from the initial view), and although (subject to a 'contractual' point to which I shall immediately refer) there is no such case in their pleadings, their case is that no reasonable person knowing what the Claimant knew could have formed or had the view that the Notices were valid (paragraph 2 of their Closing Submissions), or that there was no reasonable basis for the Claimant to have such view or belief or to have changed its mind (Transcript Day 12/259). This is derived from a case that was pleaded (paragraph 26.1 of the Reamended Defence and Counterclaim) namely that:

> "*Tullow was not 'charged' to tax within the meaning of Article 7.2 SPA in circumstances where there was no legal basis for the payment request made by the URA to Tullow and/or no apparent legal basis for such payment request and/or Tullow was aware of the absence of any such legal basis or apparent legal basis*".

Leaving aside the assertion of lack of genuine belief, to which I have already referred, the assertion of lack of "*apparent legal basis*" is derived by the Defendant from reference to Article 7.5 of the SPA, (set out in paragraph 18 below) which prescribes what is to happen when the Indemnified Party becomes "*aware of any Tax Claim*" being made to which the indemnities in Articles 7.1 or 7.2 may apply, and from the definition of Tax Claim as being "*any claim, counterclaim, notice, demand, assessment, return, account, letter or other document issued or prepared by or on behalf of any Tax Authority from which it appears that a liability for Taxes will fall on the Buyer*". The Claimant does not accept this proposition, and refers, as being more relevant, because the words "*Tax Claim*" do not appear in Article 7.2, to the definition of *Tax* or *Taxes* (which words do appear in Article 7.2), and to which I shall refer in paragraph 67 below. In any event the Claimant asserts that I should not conclude, if such case arises, that there was no reasonable basis for the Claimant's belief as to the validity of the Notices at the time when payment was made in April 2011.

18. I turn to address the contractual defences, for which purpose I must set out the rest of Article 7, so far as is material:

> "*7.5 Upon the Indemnified Party becoming aware of any Tax Claim being made to which the indemnities in Articles 7.1 or 7.2 (as applicable) may apply, that Indemnified Party shall:*
>
> *(a) within 20 . . .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 . . . 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 . . . is . . . 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 . . . 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 . . . the relevant Tax liability on such terms as it may in its absolute discretion think fit.*"

19. These defences are:

(i) Is the Agency Notice an "*execution remedy*", so that it does not fall within Article 7.2 at all? The Defendant submits that it is, and does not. The Claimant submits that it is not an execution remedy, and even if it were it does not fall without Article 7.2.

(ii) Was notice given within Article 7.5(a) of the First Agency Notice, or of the Second Agency Notice? The Defendant denies receiving a copy from the URA of the First Agency Notice, even though it was addressed to it, but accepts having notice of the Second Agency Notice (as a result of which the 29 December Letter was written). The Claimant itself gave notice of the 15 March Demand.

(iii) If not, what is the consequence? Is the giving (or receiving) of such notice a condition precedent to the Claimant's entitlement to the indemnity?

(iv) If Article 7.5(b) applies (or would have applied), would the Claimant have been entitled to have relied upon Article 7.6 (b)?

(v) Were Articles 7.5 to 7.7 overridden by the provisions of Clause 3.1(a) of the Supplemental Agreement, namely:

> "*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.*"

(vi) Whatever be the effect of Clause 3.1(a), was there a breach of that clause by the Claimant (it is conceded that any such breach must post-date the Supplemental Agreement)?

(vii) If so, what was or would have been its effect?

There are two final defences put forward by Mr Qureshi which fall within a slightly different category:

(viii) The first is what he calls "collusion". He asserts that by virtue of the alleged collusion between the Claimant and the URA, the Claimant is disentitled from recovery under the indemnity because:

(a) The Claimant was not a 'passive recipient' of the Notices, and thus falls without the protection of Article 7.2 as properly construed.

(b) It was in breach of Clause 3.1(a) of the Supplemental Agreement, and is thus disentitled from the relief.

(c) He relies on the analogy of the law of guarantee, in which a creditor can be disentitled by virtue of collusion or bad faith.

The Claimant denies the factual basis, and in any event the relevance, of the allegations, asserting that it was entitled to protect itself and its commercial interests, not least by reference to Article 7.6(b), denies any breach of Clause 3.1(a), and any such construction of Clause 7.2 by reference to "passive recipient" as is asserted, rejects, by reference to decided authority, any analogy with the law of guarantee, and relies, so far as necessary, upon Article 15.7 of the SPA, namely:

> "*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.*"

(ix) Finally Mr Qureshi asserts that the indemnity is inapplicable where the party seeking to be indemnified has obtained benefits as part of what he calls a "*package*".

20. I turn then to summarise the issues so far as restitution is concerned, making plain that the parties accept that this only arises if the Claimant has not succeeded on its contractual indemnity claim, due to an inability to surmount the contractual restrictions on the claim for indemnity. It is common ground that payment under legal compulsion, which the Claimant here asserts, of another's debt leads to an entitlement in unjust enrichment. It is in this regard that the parties have reached the agreement set out in paragraph 16(i) above that I should decide all other questions than whether in fact the Defendant was under liability to pay the tax. The live issues here will be:

    (i) Whether, as Mr Qureshi asserts, if the Claimant has not been entitled to recover its indemnity by reliance on contract, it cannot get round it by claiming restitution. Mr Wolfson submits that this is a misconceived submission in law.

    (ii) That apart, the Defendant relies by way of defence to restitution upon the following:

        (a) The defence adumbrated in paragraph 19(ix) above to the contractual claim, by reference to the Claimant having obtained other benefits. Mr Wolfson submits that this is not only as misconceived as it is by way of defence to the claim for the contractual indemnity, but misinterprets the concept of unjust enrichment.

        (b) Finally Mr Qureshi submits that to allow recovery by way of unjust enrichment would be indirectly to enforce a foreign revenue law, a submission which Mr Wolfson contends is misconceived.

21. So far as the Defendant's counterclaim is concerned, now that no case is, at any rate at this stage, pursued in respect of the Escrow Agreement (see paragraph 16(iii) above), the case put forward is in respect of alleged breach of Clause 3.1(a), namely that if the Claimant is entitled to recover notwithstanding having breached, if it has, such clause, the Defendant would be entitled by way of counterclaim to recover the same sum.

The Background

22. The GOU was already, when the proposed deal was to be with Eni in December 2009, and certainly by February 2010, publicising the fact that it was expecting payment of substantial capital gains tax by the Defendant in respect of the sale of its interest, which would involve a very substantial contribution to its budget; and the Defendant, who was, and remained, non-resident in Uganda, and was in the event to transfer the consideration (save for the deposit) out of Uganda was, as can be seen from its subsequent objection once the First Assessment Notice was served, denying liability, at least in the amounts claimed.

23. There is no doubt that by at least May 2010 the GOU was planning to place a burden upon the Claimant, remaining in Uganda, to pay the sums which were to be, and in the event were, assessed against the Defendant, and the pressure which was brought to bear by the GOU on the Claimant was enormous. This pressure began with the letter

from Minister Onek of 3 August 2010 referred to in paragraph 7 above, but it was followed with a letter of 17 August 2010 from Minister Onek stating that the deadline to apply for a petroleum production licence for the Kingfisher field in exploration area 3A had now expired, and that this field no longer formed part of the Claimant's exploration area, and, as will be seen, this was followed by an unremitting series of very stern, indeed often intimidating, meetings with the highest officers of the GOU, from the President himself downwards.

24. There is also no doubt that the Claimant had, as was obviously the GOU's intention, a very substantial incentive to reach an agreement with the GOU, involving what Mr Martin, Tullow's General Counsel and Company Secretary, described in his witness statement as a "*strong commercial imperative*" to resolve the disputes with the GOU which were thus created against the background of the GOU's determination to ensure its receipt of the capital gains tax assessed on the Defendant, all of which required to be resolved by the Memorandum of Understanding referred to in paragraph 14 above:

    (i) The Claimant had paid the purchase price of $1.45 billion to or to the order of the Defendant (as appears in paragraph 6 above), but while the Defendant had received all such consideration (with the exception of the deposit and the sum in escrow), distributing a substantial quantity of it in dividends, the Claimant was unable, until the Government was prepared to give its consent, to receive and thus to operate, the interest which it had purchased.

    (ii) The Claimant was in the course of negotiating to 'farm down' to third parties its interests in the oil fields in a sum of $2.9 billion, but which it was prevented from completing, unless and until the GOU gave its approval.

    (iii) The GOU had refused, and was continuing to refuse, to renew the licence for the Kingfisher field, and was refusing to consider a new licence in respect of Exploration Area 1, which was due to expire on 30 June 2011.

    (iv) The GOU was pressing for payment of substantial payments of tax in respect of various challenged assessments.

    This was all compounded by the service on the Claimant of the First Agency Notice referred to in paragraph 11(i) above.

25. It is quite clear that, for those reasons, quite apart from the service of the First Agency Notice upon them, which the URA was insisting was valid, and should be complied with, that the Claimant was under immense pressure to pay the tax assessed against the Defendant.

26. The advice that the Claimant received from its Uganda lawyers, Kampala Associated Advocates ("KAA") and its tax advisers, PricewaterhouseCoopers in August and September 2010 was:

    (i) that the capital gains tax assessed against the Defendant appeared to be due.

(ii) that the First Agency Notice was not valid, for reasons referred to further below.

27. By September 2010, after three meetings with the President, the Claimant could see that there was going to be no alternative for it but to make payment under the First Agency Notice, and by December 2010 the Second Agency Notice also.

28. The picture which is clear from the evidence of Mr Martin and of Mr Inch, the Claimant's Head of Tax, is one of constant meetings with representatives of the URA and the GOU at which they put their case, including the case that they could not be required to pay under the Agency Notices. It seems that, at least in the early days, the URA believed that the purchase price had been paid away by the Claimant after the service of the First Agency Notice, although it appears that at least Mrs Kagina was persuaded at a meeting in October 2010 that the monies had been paid into the escrow account prior to the receipt by the Claimant of the First Agency Notice, but this made no difference to the URA's determination that the Claimant should, pursuant to the First Agency Notice, pay to the URA the sum of $283,477,500, being the amount that had been paid into the escrow account.

29. When the Claimant received, on 18 November 2010, for the first time advice (by Mr Peter Kabatsi the senior partner of KAA) that the Agency Notice was likely to be found valid by a Uganda Court, as will appear below, the Claimant had already committed to the President to make the payment required by the URA: on 2 December 2010 Mr Martin confirmed to Minister Onek the Claimant's agreement to the package of proposals which had been offered by the GOU at a meeting with the President and others at Gulu ("the Gulu Meeting") on 18 November, but negotiations continued thereafter and, as set out in paragraphs 13 and 14 above, it was not until 15 March 2011 that a Memorandum of Understanding was signed which resolved all issues between the Claimant and the GOU and was accompanied by the Letter of Commitment.

30. During this period of negotiation, various developments occurred so far as the Claimant was concerned. As will appear below, the Claimant, by Mr Inch and Mr Murray (another in-house solicitor), took advice at English law from English solicitors, Ashurst LLP ("Ashursts"), and English Counsel, Mr Wolfson QC, who advised that they were very doubtful, as a matter of English law, about the validity of the Notices, as to which Mr Inch informed them that the Claimant had had Ugandan advice as to their validity. As will appear, further instructions were given to KAA in Uganda, and by a draft advice, to which I shall refer below, KAA gave their advice that, insofar as the Notices relied upon s108 of the ITA they were valid. As to this, Mr Inch gave the following answer in cross-examination, as to whether he had to receive the advice of KAA to make the payment, and he said as follows (Transcript Day 10/170):

> "*I didn't believe we had to have that specific advice to make the payment. We would have made the payment – the discussions with the Ugandan authorities were over. Now we would have made the payment under the – you know, in accordance with the MOU by this stage, in Uganda, the Ugandans now and Tullow are agreed were making the payment under the Notice. I'm not seeking any further legal advice with respect to that*

> *payment under the MOU. That's done, I think. You know that's the URA's position. We're agreeing with it. Nevertheless having made the payment on that basis, we would not have done, - we would not have launched separately the indemnity proceedings against Heritage without the comprehensive legal advice.*"

Mr Qureshi said:

> "*If I have understood, the comprehensive legal advice was to support the proceedings against Heritage but was irrelevant for the payment to the Ugandans?*
>
> *A: Yes.*"

31. Prior to the Memorandum of Understanding, and in particular prior to the making of the payment on 7 April 2011, Mr Martin put his recommendation to the Board of the Claimant, in the following terms:

> "*The URA is demanding $313 million payment from us as agent for Heritage on the basis we are in possession of assets belonging to Heritage, namely (i) the $283 million in escrow and (ii) certain rights and obligations arising under the SPA. We are advised this is a valid position for the URA to take under Ugandan law, even if not under English law.*"

The Relevant History

32. The first meeting between the Claimant and the URA after the receipt of the First Agency Notice, was a meeting between Mr Inch and Mrs Kagina and her officials on 3 August 2010, in which the URA was quite insistent that the Claimant should pay pursuant to the Notice, and, as described by Mr Inch, Mrs Kagina lost her temper, and there was shouting and she was very angry. Things fared little better at a meeting between a delegation of the Claimant led by Mr Heavey, its Chief Executive Officer, and the President on 23 August 2010. The Claimant attempted to instruct and make use of a significant local figure, Mr Bitature, as a go between, but a suggestion of the provision of a guarantee by the Claimant in the sum of the amount in the escrow account fell on deaf ears.

33. At this stage the Claimant was obtaining the professional advice as to the validity of the Agency Notice to which I referred in paragraph 26 above. Mr Mpanga, a tax partner at KAA, said in terms on 27 August 2010:

> "*URA's basis for considering action against Tullow could be, I suppose, based on the fact that Tullow is a signatory to the escrow account, and that the escrow account is still in credit. Whereas I fully understand your explanation, it needs to be clear to everyone that if this matter came up before a judge there is no way Tullow can be found to* [be] *in control of the funds. For information, the effect of the appointment as collection agent is that, if it is found that Tullow is in*

> *possession or control of Heritage's funds, then Tullow would* [be] *obliged to pay the tax due from Heritage. In the event of failure, in such an event, URA would initiate recovery measures against Tullow. It is in view of the above that it is important that the issue of the entire transaction and what Tullow remains in control of is carefully analysed and interrogated so that a legal strategy is mapped for action.*"

34. Similar advice was given from another tax partner of KAA, Mr Kambona on 2 September 2010, who took two grounds of opposition to the Agency Notice. First, in agreement with Mr Mpanga he said that:

> "*Clearly, the reading of s108 requires that Tullow must be in possession of money belonging to Heritage, which is no longer the case. The funds in escrow are not funds in possession of Tullow. Tullow cannot unilaterally withdraw the funds from the account and this is critical for s108 to come into play. The escrow Agreement has set out the conditions upon which the funds can be released and the only exception would be a court order. My opinion is therefore that URA cannot enforce s108 on Tullow as there are no funds in its possession due to Heritage.*"

He then raised what he called a "*second line of argument*", namely that, by reference to sections 99 and 103(2) of the ITA, where a taxpayer, had lodged a notice of objection to an assessment, as the Defendant had, and 30% had been deposited (which the Claimant had done on its behalf) there was "*technically . . . no further tax due until a decision has been made by the URA on the objection.*"

35. PricewaterhouseCoopers gave similar advice on 27 September 2010. Mr Inch reported to Mr Martin on 19 September 2010 that "*we don't believe the s108 notice issued on 27 July is valid as the tax is under appeal and the $283m isn't due. In any event, though, we are not in possession of cash that belongs to Heritage, nor were we at completion, as it was already in escrow.*"

36. Notwithstanding that these points were put to the URA and to the GOU, the pressure to pay continued, and in a meeting between the President and Mr O'Hanlon, the Vice-President of the Claimant, and Mr Bitature on 15 September 2010, the Claimant's arguments were again rejected, and Mr O'Hanlon found himself having to start committing the Claimant to making payment: Minister Onek confirmed by a letter dated 15 October 2010 to Mr O'Hanlon that the GOU would only confirm the Claimant's acquisition of the Defendant's interests in Exploration Areas 1 and 3A as unconditional upon full payment of the taxes due from the Defendant. A further fruitless meeting between Mr O'Hanlon and the President took place on 16 October.

37. Meanwhile, at a private meeting at the home of Mrs Kagina at the beginning of October 2010, Mrs Kagina at a meeting with another partner of KAA, Mr Matsiko, appeared to relent, certainly to the extent that she was at least persuaded by a dossier of documents which she was shown that the monies had indeed been placed into escrow before the service of the First Agency Notice. The Claimant's case that the URA '*never wavered*' is to that extent inaccurate. But unfortunately, Mrs Kagina was

back on song at a meeting of the GOU Technical Committee on 19 October 2010, when there was complete stalemate, and Mrs Kagina insisted, as she stated in an email to Mr Inch shortly afterwards on 26 October 2010 that "*Tax is imposed and collected by law not by compromise.*" Mr Mpanga felt that at that meeting there had been a compromise, even though Mrs Kagina did not recognise it as such. He had suggested, and agreement was reached, that the Claimant should make the payment, which would be "*deemed*" to be paid under s108. Mr Martin remained sceptical. Mr O'Hanlon wrote a letter to the President dated 29 October 2010 to say that he was "*very pleased that, together with the URA, we have found a solution acceptable to all parties to enable Tullow to pay $283m to the Government, bringing total payments on account of the taxes due by Heritage to $404m*", and on 26 October to his potential partners in the proposed 'farm down', that any proposal that GOU should wait until the Courts decided on the matter and the $283m was released from escrow *"was not acceptable to* [President] *Museveni, who described Tullow as 'having let the criminal escape': so Tullow must pay $283m of its own money and recover (if it can) the other $283 from escrow later.*"

38. By the time of the Gulu Meeting the figure which the Claimant was going to have to pay had increased to $313 million, because of the extra $30 million the subject of the Second Assessment Notice, and discussion was continuing to resolve the other problems set out in paragraph 24 above, with a view to a 'package' which could be agreed. There was much to discuss, and legal advice to be obtained from KAA by the Claimant on all the various issues. In addition to Mr Mpanga and Mr Kambona from KAA, the Senior Partner Mr Peter Kabatsi, a former director of Public Prosecutions of Uganda (1986 to 1990) and Solicitor General of Uganda (1990 to 2002) was present. Mr Martin and Mr Inch gave evidence, as did Mr Kabatsi, about discussions which they had with him both in the evening after the Gulu Meeting and on the following day when the Claimant and its lawyers had what has been called a 'post mortem' meeting.

39. In the course of discussion about the possibility of judicial review being brought by the Claimant against the GOU to challenge the GOU's position in relation to the Kingfisher field, Mr Kabatsi expressed pessimism as to the outcome of such an application, and in that context Mr Martin asked him what he thought would be the position if the Claimant challenged the validity of the Agency Notice. Mr Kabatsi expressed the view on both occasions, more fully at the post mortem meeting, that the Notice was valid, and he gave the following evidence (Transcript Day 6/141):

> *"A. My view was that the Ugandan court interpreting s108 of the Income Tax Act would very likely come to the conclusion that in the circumstances of that notice and the surrounding factors it would be considered to be valid. My Lord, if I may give the reasons I gave at that time?. . .*
>
> *First, that there was no dispute between Tullow and Heritage as to whose asset it was. It was actually Heritage's, Tullow had no claim on it but Tullow held power to let Heritage have it. That was number one.*

> *Number two, the fact that this account had been opened outside the jurisdiction, I thought that was an important factor the court would consider.*
>
> *Number three, I also knew from practice, I couldn't remember an occasion where a receiver, a recipient of a notice had actually objected to it successfully and somebody mentioned a case which I later saw which was a Supreme Court decision. It wasn't dealing with possession but it did say that a recipient of a notice will not challenge its validity, the taxpayer would.*
>
> *And all of this was at the back of my mind and I felt that it would be that local court, and also the policy of taxation, it is very very strong both in that section as well as in the Act as a whole, that unless there are clear provisions exempting tax payment costs tended to be decided in favour of the Commission of Income Tax.*
>
> *My Lord, I should also add that since 1995 when our new constitution came into force, courts were taking a broader view of interpreting sections of the law or provisions of the law in such a way that substantive justice is done without the due regard of technicalities. That is in the constitution. There are many, many cases after that. My view then was that my friends, my colleagues, were taking a very, very narrow view of this section and it would be more likely than not the Ugandan court at that time, or even now, would come to the conclusion that Tullow was in possession of this asset."*

He said that he thus expressed the view at the post mortem meeting that in his opinion it was more likely than not that the Agency Notice would be upheld in a Uganda court, which he explained in evidence as being "*perhaps 60/40*". Mr Martin stated that it was apparent that Mr Kabatsi was putting forward an opinion with which his more junior partners, the specialists in tax, did not agree. KAA was in any event to provide a 'comprehensive opinion' on all the matters in issue, and this aspect was to be dealt with as part of that advice.

40. This oral advice, 'off the cuff' as Mr Qureshi described it, was described by the Claimant as a turning point in its thinking. Mr Inch describes his view of what happened as follows, namely that, after the discussion of the implication of a judicial review application with regard to Kingfisher, he asked Mr Kabatsi (Transcript Day 10/17) "*Peter, what would happen then on this Agency Notice, would we be found to be in possession of an asset?*" He said that it was "*highly significant when the former Solicitor General of Uganda . . . looked me right in the eye . . . and said 'Richard, a judge in Kampala could quite easily find you were in possession of that asset', and he said it with a quite credible authority.*"

41. When the 'comprehensive advice' arrived, dated 30 November 2010, it was signed by Mr Kabatsi and by a retired judge (now deceased) Justice Mulenga ("the November Advice"), although Mr Kabatsi told the court that it had in fact been drafted by Mr Mpanga, and approved by him and Justice Mulenga. The passage dealing with the

"*Payment of the Heritage Capital Gains Tax*" formed only a small part of the lengthy opinion. On the material question the Advice recorded as follows:

> "*Tullow's position notwithstanding, and in the interest and in consideration of reaching a resolution of this issue with Government on this and all, Tullow is agreeable to paying the amount due from HOCL on account of tax. This payment would be made on the basis that in accordance with s108 of the Income Tax Act (ITA) and Tullow being one of the signatories to the escrow account into which up to USD 283m was paid, it is in a position of being deemed to be in possession of* [the Defendant's] *asset. On making this payment and on the basis of the indemnity contained in the same s108 of the ITA, Tullow is able to recover the amount paid from the escrow account.*"

It is apparent that, as Mr Kabatsi himself accepted in the witness box, this does not record the view as he had expressed it, but simply repeats or ratifies the 'deeming compromise' which Mr Mpanga had formulated at the meeting on 19 October. Not only did Mr Martin, as he put it in evidence, not "*focus*" on that opinion but in fact he had not even received the advice, let alone read it, when, on 2 December 2010 he wrote to Minister Onek confirming the Claimant's agreement to the package of proposals which had been offered at the Gulu meeting, attaching a draft Memorandum of Understanding, which was to form the basis of negotiations which took place over the following months.

42. Mr Inch gave evidence, which was challenged by Mr Qureshi, pointing out that it was neither confirmed by any contemporaneous notes nor contained in his witness statement, that he at some stage in December had a conversation with Mr Murray because he had noted that the simple reference to *deeming* in the November Advice did not in terms reflect what Mr Kabatsi had said in the post mortem meeting; and he recalled that he was told by Mr Murray that Mr Murray had had a conference call, either with Ms Shah or direct with Mr Kabatsi, when he was told that (Transcript Day 10/46-49) "*what Peter was saying was: you were deemed to be in possession in accordance with the section, ie a court would deem you to be in possession.*" Mr Inch said that he did not know until February that what he "*was going to get back was the kind of Mpanga/Kambona revised opinion*", when he had expected a fully reasoned and explained opinion from Kabatsi/Mulenga. Mr Kabatsi said that he had had no further contact with the Claimant on this topic after the Gulu Meeting, Mr Wolfson speculates that the response in fact came back from Mr Mpanga, and Mr Qureshi speculated that there was a disagreement between the KAA colleagues and that they were not able to produce an agreed position.

43. At a meeting with the representatives of the URA, including Mr Sseketawa, the URA's litigator, at the end of January, Mr Inch had a discussion with Mr Sseketawa at the end of the meeting, when he took the opportunity to ask him about the practice and frequency of the URA sending out Agency Notices where there was a dispute, from which discussion he concluded that s108 was used as a provision intended to deal with securing tax owed by a non-resident, was usually sent out to banks when there was a dispute, and that the banks did not challenge the Notices but paid up, and if the Notice were later lifted the URA would give the money back to the banks.

44. Mr Inch and Mr Murray were now involved in obtaining advice from Ashursts and in consultation with Mr Wolfson on a number of matters. The relevant documents recording Instructions to counsel and advice given both by the solicitors and by counsel are as follows:

(i) Telephone advice on 20 December 2010, seemingly in the context of the receipt of the Second Agency Notice based upon s106 as well as s108 . Given that the entirety of the money in the escrow account was covered by the First Agency Notice, the Second Agency Notice could only apply, if at all, to other monies owing by the Claimant to the Defendant arising out of the SPA or the JOA, which by that time amounted to some $20 million, and the Adjustment Amount pursuant to Article 3.3 of the SPA remained to be agreed (and was agreed in March 2011 as some $13 million).

"*Mr David Wolfson QC ("DW"), Mr Ronnie King of Ashurst ("RCK"), Mr Murray ("AM") and Mr Inch ("RI").*

4. DW - URA Notice: don't think 108 easily applies. Section 106: very difficult for Tullow to know whether or not tax is disputed.

. . .

6. [DW] Don't think that 108 applies – difficult to read 'in possession of an asset' as including a debt you owe someone. In 'possession' usually means of a physical item. Difficult to apply to a chose in action plus fact that 106 is there suggests that 108 doesn't apply to owing cash.

7. RI – for purposes of s108 could say we are (1) in possession of legal interest in Blocks, which still belongs to H; (2) Escrow Funds?

8. DW – both quite difficult. If H has only legal interest and thus no beneficial interest, his interest is probably of no value.

9. RCK – Ashurst and DW saying 108 doesn't apply. S. 106: problem: we know tax is disputed by H.

. . .

14. AM – URA says money in escrow is in our possession.

15. DW – that's inconsistent with saying we've paid money in escrow to H.

16. RI – unless can get same Ugandan advice saying we're in possession, don't see on what basis we can pay out.

17. RCK – seems extremely unlikely.

. . .

23. *RCK . . . 106 and 108 . . . don't seem to apply, . . . Quite comfortable that transaction is subject to CGT. RCK has serious concerns that we may be paying without a legal obligation to do so.*"

(ii) Teleconference between Mr Inch and Mr Murray and Ms Shah and Ashursts of 27 January 2011:

"*6. Ashurst and David Wolfson QC have previously advised Tullow that s106 and s108 of the Ugandan Income Tax Act do not appear to give the Government authority to require Tullow to pay the tax on the Heritage Transaction on Heritage's behalf:*

(a) s106 is ousted by the fact that Heritage has appealed the tax assessment;

(b) s108 applies where a person is '. . . in possession of an asset, including money belonging to a non-resident taxpayer . . .'

7. The fact that Heritage is a co-signatory to the escrow Agreement and/or that Tullow may owe a debt to Heritage under the SPA in respect of the completion adjustment amount does not, in English law, mean that Tullow possesses an asset owned by Heritage, as required by s108 . Accordingly, Ashurst is concerned that a notice issued by the URA requiring Tullow to pay the tax on the Heritage Transaction will be invalid.

8. RI responded that Tullow has obtained advice from Ugandan lawyers that the s108 notice issued by the URA is binding on Tullow. Tullow's Ugandan lawyers are of the opinion that Tullow's rights against the funds held in escrow constitute 'possession of an asset' belonging to Heritage for the purposes of s108, RI also noted that Tullow believes there may be an argument that Tullow is in possession of Heritage's legal interest in Blocks 1 and 3A, given that the Government has not yet given its unconditional consent to the Heritage Transaction. RI thought that this could give further grounds for arguing that Tullow is in possession of an asset belonging to Heritage for the purposes of s108 . RI admitted that this was somewhat of a 'grey area'.

. . .

10. *RCK stressed that in his view, s108 was not applicable to Tullow. It appeared that s106 and s108 were intended to*

> *dove-tail and were not intended to apply simultaneously to the same factual situation. RCK thought that Tullow fell clearly within s106, not s108. In response, RI stated that Tullow had to make a commercial decision based on the fact that it had been served with a notice from the Ugandan Government requiring it to pay the tax and based on the advice received from Tullow's Ugandan lawyers that the notice was valid and binding on Tullow.*"

(iii) A letter dated 28 January 2011 from Ashurst to Mr Murray refers to Mr Inch's "*understanding*", seemingly derived from Mr Sseketawa,

> ". . . *of the status of a payment made pursuant to a s108 demand in circumstances where the taxpayer (Heritage) has disputed the amount of tax, namely that it is a form of security fund which it held pending final determination of a challenge by the taxpayer* "

and continues

> *"First, they may argue that a s108 notice is not valid given the nature of the escrow arrangement. I understand that you have received Ugandan legal advice which indicates that a s108 notice would still be valid, as a matter of Ugandan law notwithstanding the escrow. As you know, both David Wolfson QC and I have reservations about that analysis."*

(iv) Mr Inch to Ashurst dated 3 February 2011, copied to Mr Murray and to Mr Martin:

> "*a) So far as the notices are concerned, the background is that we didn't pay on receipt as firstly we didn't believe originally we had to pay while the tax was under dispute. I now think that is incorrect : as discussed payment is due under 108 even though no tax is payable by H at this until their assessment is complete, and it is in that sense I say the payment is security for the payment by H – it is tax paid on their behalf to satisfy any liability they may have.*
>
> *The second point is the 'in possession point' where, while not easy to accept, the advice is we have is that a Kampala court could well take the view we are in possession of the escrow account as a signatory.*
>
> *b) $283m versus $313m : we didn't touch much on this, but leaving aside the whole issue of ownership of the licences, it is primarily due to commercial considerations, including advice from our lawyers that we are unlikely to get a win no matter how good our case, that we can't challenge paying the $30m, which is in excess of the MV of the escrow account.*"

(v) Further consultation with Mr Wolfson on a number of matters on 4 February 2011:

a) The Instructions include:

> "*Tullow accepts that s106 ITA is inapplicable in the present circumstances as Tullow is aware that Heritage has challenged all the tax assessed to it in relation to the Transaction. However, Tullow has received advice from its Ugandan lawyers that Tullow is 'in possession of an asset' belonging to Heritage for the purposes of s108 ITA by virtue of Tullow's rights pursuant to the escrow account (see the third paragraph on page 2 of the letter of advice from Kampala Associated Advocates at tab 4).* [This is the November Advice]. *Tullow also believes that as the Government has not given its unconditional consent to the Transaction, the legal interest in Blocks 1 and 3A remains vested in Heritage and Tullow holds that interest on trust for Heritage. Tullow believes that this may also constitute possession of an asset belonging to Heritage for the purposes of s108 ITA. Instructing Solicitors are concerned that the Ugandan advice received by Tullow is unconvincing. It is difficult, in Instructing Solicitors' opinion, to consider the funds in arrears as being in Tullow's 'possession'. The legal interests retained by Heritage in Blocks 1 and 3A are title without any value.* "

b) Consultation by telephone

> *"1. Leading Counsel reminded Tullow that Ashurst and Leading Counsel were not persuaded by the advice from Tullow's Ugandan lawyers that s108 ITA gave the URA the power to require Tullow to make the Tax Payment.*
>
> . . .
>
> *3. Leading Counsel noted that Tullow accepted the advice from its Ugandan lawyers that the s108 URA Notice was valid. RI noted that Tullow was comfortable in relation to the amount of USD283 million URA Notice but less comfortable in relation to the USD 30 million URA Notice."*

45. The next step was to go back to KAA for a final written advice, and Mr Inch sent an email of 16 February 2011 to Ms Shah the Claimant's International Tax Manager:

> "*When you have a chance could you follow up with* [Mr Kambona] *on the position with the URA defence filing? Seems*

> *we are close now to finalising. We also need something from him confirming liability under s108, but perhaps you could discuss that with* [Mr Murray]. *I'm not sure how he wants to cover the gap between the 283 plus [Working Capital] versus the 313* [being a reference to the extra $30 million in the Second Agency Notice]."

46. There are then two emails from Ms Shah to KAA, of which I set out the material parts below, because it is submitted by Mr Qureshi that this was not a "*genuine exercise*":

(i) 16 February 2011 to Mr Kambona:

> "*As discussed on the call earlier today we should be grateful if you would assist us with the following formal opinions:*
>
> *1) Whether Tullow is in possession of an asset, including money, belonging to Heritage for the purposes of a s108 notice. We should be grateful if you would consider the escrow account, the amount owed to Heritage as part of the completion process and also any other assets such as the legal ownership of the interests in EA 1 and 3A.*
>
> *2) Status of a payment made under a s108 notice and also the implications if Heritage and/or the URA pull out of the CGT case filed at TAT either before or after the $313m payment is made by Tullow to the URA under a s108 notice.*
>
> *As discussed on the call we need these opinions for our lawyers here in London (to assist in recovering, from Heritage, the amount paid) and also for our Executives who will rely on these opinions to support their decision to make the 313 payment. We would therefore need the opinions to be as comprehensive as possible and to refer to all Ugandan law references, relevant case law, statutory instruments, precedents etc.*"

(ii) To Mr Kambona and Mr Mpanga dated 17 February 2011:

> "*As discussed on our call earlier today below is a summary of the scope of the two opinions requested* [the second related to the Status of a payment under a s108 notice, in relation to which Mr Kambona had already supplied a draft]:
>
> *Opinion 1: Whether Tullow is in possession of an "asset" belonging to Heritage under s108 and as a matter of Ugandan law.*
>
> *In respect of the $313m payment Tullow would be looking to claim under the indemnities provisions in the SPA with Heritage on the basis that the Heritage tax was been charged*

> *to Tullow under s108. To support this claim we should be grateful if you would consider, with reference to any legal basis under Ugandan law, including any case law or practice notes whether the following could be argued to be a) an asset belonging to Heritage and b) in Tullow's possession for the purposes of s108 ITA:*
>
> *i) escrow account*
>
> *ii) Amount owed to Heritage as part of the completion process (Article 3.3 and 3.4 and Schedule A of the SPA)*
>
> *iii) Any other assets, including interests in EA1 and 3A, and rights and obligations in the SPA with Heritage.*
>
> *For the purposes of this opinion, it is important that we put ourselves in the URA's shoes and also consider the arguments they have forward in reaching the position that Tullow is in possession of assets belonging to Heritage. I now understand following our call earlier today that the issue of whether Tullow is in possession of an asset was previously discussed with Elly* [Karuhanga, another KAA partner] *and perhaps also Peter Kabatsi and they were of the opinion that a local judge would also take the same position as the URA i.e. that Tullow was in possession of an asset belonging to Heritage. This I believe was in the context of the escrow account. Perhaps you can also touch base with Elly and Peter in case they have any further thoughts on this.*
>
> *Following our call I also looked at the comprehensive opinion again and on page 2 KAA does refer to the position that as Tullow is one of the signatories to the escrow account it would be deemed to be in possession of HOGL's asset. As discussed on the call we should be grateful if you could expand on this with your analysis of how we reach to this conclusion under Ugandan law.*"

47. Mr Murray sent an email dated 21 February 2011 to Mr Inch noting:

> "- *(a)Recent mixed messages from KAA on the possession of an 'asset' advice and (b) Ashurst/Wolfson scepticism around 'asset' argument. $283 v $30 in relation to 'asset' discussion. $30 million is harder argument to make.*"

48. The advice from KAA dated 21 February 2011 ("the February Advice") was supplied to Ms Shah on 22 February under cover of an email which said: "*Attached is the draft opinion requested.*" It was never further formalised. The relevant part of the advice is as follows:

"*You have requested our opinion on whether the following could legally be considered a HOGL asset in Tullow's possession:*

i) Funds held in the escrow account

ii) Amount owed to Heritage as part of the completion process (Article 3.3 and 3.4 and Schedule A of the SPA)

iii) Any other assets, including interests in EA1 and 3A, and rights and obligations in the SPA with Heritage.

A general point that we would like to make here is that the term 'possession' employed in s108 (1) is not separately defined in the Income Tax Act nor has it been subject to case law interpretation. Our opinion is that the issue of possession as such [is] *a factual matter that would have to [be] proved or disproved in each case. In a dispute basing on s108 (1) on whether a recipient of an agency notice is in possession of an asset or not, each of the URA and the party would have to factually prove their assertions accordingly.*

(a) escrow account

We have studied a copy of the escrow Agreement dated 23rd July 2010 between HOGL, Tullow and Standard Chartered Bank. Our understanding is that on the basis of Clause 6.1 of the escrow Agreement, Standard Chartered Bank, as escrow Agent, can only release the funds on the basis of a Transfer Instruction, an enforceable order of court or a reimbursement request. In the absence of a court order to the effect, the escrow funds can only be released through a Transfer Instruction or a Reimbursement Request signed by both Tullow and HOGL.

Tullow is the only signatory to a Transfer Instruction that would be required to release the funds in escrow other than HOGL who would be the beneficiary. This power places Tullow in a position of being deemed to be in possession of an asset belonging to HOGL, since all that stands between HOGL and the funds in escrow is Tullow's signature:

(b) Amount owed to Heritage as part of the completion process (Article 3.3 and 3.4 and Schedule A of the SPA)

Whereas we have not read the provisions of the SPA cited above, if the contractual provisions and the circumstances are such that it firmly places HOGL in a position of entitlement to funds owed by Tullow, then the provisions of

> *s108 (1) apply. Tullow would be deemed to be in possession of an asset belonging to HOGL and would be required by law to remit it in satisfaction of the Agency Notice.*
>
> *(c) Any other assets, including interests in EA1 and 3A, and rights and obligation sin the SPA with Heritage.*
>
> *Just like the other categories in (a) and (b) above, if it is proven that Tullow is in possession of assets belonging to HOGL, then Tullow would be required to comply with the Agency Notice. If on the basis of the SPA it is proven that Tullow is in possession of interests in 1 and 3A exploration areas that otherwise belong to HOGL, then it would be required to remit the tax. We however do not believe that this is the case because Tullow has neither received Government approval necessary for the interest to vest into Tullow, nor* [has] *Tullow been permitted to be the operator of the Blocks for it to be deemed in physical possession of the assets.*"

This was sent to Ashursts by Mr Murray on 23 February 2011.

49. There was an illuminating exchange between Mr Martin and Mr Qureshi (Transcript Day 6/17) when I had asked Mr Martin what his state of mind was on reading this advice from KAA:

> "*A. I think along the lines of Mr Mpanga and Mr Kambona were now agreeing with Mr Kabatsi.*
>
> *MR QURESHI: Or put another way: 'This will do, we've got what we wanted', yes?*
>
> *A. No. . . Mr Kabatsi had given an opinion and his colleagues were agreeing with him.*
>
> *MR JUSTICE BURTON: But you didn't feel: 'This will do. We have got what we wanted'?*
>
> *A. I don't think in the sense that counsel is implying, that this was some sort of coup or something. It was the confirmation, if you like, that the URA had been right all along.*
>
> *MR QURESHI: It was confirmation that the URA had been right all along. So forget the scandalous suggestion that you were thinking 'This will do, we got what we wanted'; a sigh of relief when you read this?*
>
> *A. I don't recall, Mr Qureshi."*

50. The Board approval, the Memorandum of Understanding and the payment followed, as set out in paragraph 31 above.

<u>The witnesses</u>

51. There were the two witnesses from the Claimant Company, Mr Martin and Mr Inch, together with Mr Kabatsi, Senior Partner of KAA. I have had an unusual difficulty in this case, as the judge of fact and as the assessor of oral evidence. I listened to Mr Martin cross-examined for 3½ days and Mr Inch for the best part of 3. I have thought long and hard about this, but I must record my conclusion that I found them both impressive and honourable witnesses, doing their best to give their recollections and a true account. There is no doubt that Mr Martin as an experienced solicitor should not have disposed of documents when clearing out his office in Kampala, but in general many documents were retained and in particular many detailed handwritten notes by Mr Inch. No notes were taken, or at any rate kept, by Mr Murray, who has now left the company, but the absence of the taking or at any rate keeping of notes is mirrored on the Defendant's side where (apart from one note not disclosed on grounds of privilege) none have been disclosed. Whatever may be the proper criticism of in-house solicitors either not keeping or not retaining documents (and it is in my experience regrettably not uncommon) it was not suggested (until the Defendant's Closing Submissions, to which I shall return) and certainly not put to Mr Martin, that he disposed of documents deliberately in order to avoid their disclosure, and I do not find that that occurred. Indeed so many documents were produced by the Claimant which supported – indeed provided – the Defendant's case with regard to the Claimant's own opinion, and particularly the scepticism of Mr Martin, as to the validity of the Notices, that it is difficult to see, if there was an attempt to dispose of 'incriminating' documents, that it succeeded. If anything, there were times when Mr Qureshi was pointing out the absence of documents which would have supported the Claimant's case, where the consequences of Mr Martin's clearing out of his office in Kampala could be said to have disadvantaged the Claimant. But, disclosure of documents apart, I concluded that Mr Martin and Mr Inch were both impressive witnesses. I cannot say the same for Mr Atherton, the only witness of fact called by the Defendant, who was shown to have given false evidence to the Tax Appeals Tribunal in Uganda, when he said on oath to that Tribunal (and his evidence was at that stage accepted) that the change in registration of the Defendant from the Bahamas to Mauritius was "*based on corporate planning, . . . not purposely done to take advantage of the benefit Mauritius could offer in light of the transaction with Tullow*", when in fact he accepted before me that the move to Mauritius (not disclosed to the URA at the relevant time) was indeed a part of the Defendant's tax planning, because Mauritius was one of the few countries which had a double tax treaty with Uganda. Mr Atherton's evidence however was of peripheral relevance to the case, save in relation to his suggestion that there was collusion between the Claimant and the GOU, to which I shall return.

52. My difficulty relating to the oral evidence of Mr Martin and Mr Inch is however that I was asked in the Defendant's Closing Submissions to find that they were deliberately dishonest. There would be difficulty in reaching such a conclusion by way of an assessment of reputable and experienced professional men, even where they have been fully tested in cross-examination on that basis. Such difficulty is however compounded where that has not been the case, and, as I commented in the course of Mr Qureshi's oral closing, it almost seemed as if the authorship of the Closing Submissions was different from the authorship of the cross-examination.

53. In nine separate paragraphs of the Closing Submissions Mr Martin and Mr Inch are accused of *deliberately false and misleading* evidence, and additionally Mr Inch is

described as *cunning* and Mr Martin as *not genuine* and having made a *deliberate misrepresentation*. Those suggestions, accusations, were not put to Mr Martin or Mr Inch.

54. The Defendant's primary case was that the Claimant knew that the notices were invalid, and paid notwithstanding. The only time and manner in which this case was put to the two representatives of the Claimants called as factual witnesses was when it was put first to Mr Martin at the close of his cross-examination, which had lasted nearly 4 days, consisting of the following exchange (Transcript Day 6/69):

> *"Q . . . the reality is that there was no fundamental change in thinking: the position as a matter of law as you had understood it being constantly stated to you and Mr Kabatsi's advice changed nothing, did it?*
>
> *A No, I disagree.*
>
> *Q The reality is that when you made your decision to enter into MOU, when you signed off on it on 16 December 2010 you did so knowing that the agency notices were not valid, didn't you?*
>
> *A No.*
>
> *Q Let us go, 2 months further back. When you had your meeting with the Ugandan Authorities on 19 and 20 October, when you agreed to make the payment you agreed in circumstances where your legal advice was crystal clear that there was no way an Ugandan Court would hold you to be in possession of an asset, wasn't it?*
>
> *A Yes, at that point in time, yes.*
>
> *Q And you agreed a fiction so as to provide the vehicle for payment, didn't you?*
>
> *A No, that's not the case."*

55. There was a similar exchange with Mr Inch, nearly at the end of his third day in the witness box (day 10, page 216).

> *"Q. Mr Inch, the simple fact of the matter is that at the time you agreed, you Tullow, agreed to make the payment of 283 million you did not believe that the agency notice was valid?*
>
> *A. Hang on. In terms of when we agreed to pay the 283 million, do you mean when the MOU was sent?*
>
> *Q. 19 October or 20 October or when Mr Martin signed off on the MOU on 16 December, at any of those dates you did not believe that the agency notice, either the 27 July notice or the 2 December 2010 notice, were valid?*

> *A. I think the position is quite clear. We were going to make - we would - commercially we had no alternative but to fund this payment. We started off with a deposit. We had an advance royalty idea. We kept coming up with suggestions.*
>
> *As far as the validity of the notice is concerned, we had - we started off on the position that we didn't believe it was valid. We had the discussion - we had the discussion with Peter Kabatsi on 19 November after which I did, and I still do believe, that if I had been taken to court in Kampala a judge would have enforced that against us. And that's the truth.*
>
> *Q. Mr Inch, the simple fact of the matter is that neither on 19 or 20 October or the 16 December or at the time you received the Kabatsi advice, as you put it, which was the opinion of 30 November, or at the time you received the 21 February advice, let alone the time of payment did you believe that the agency notices were valid?*
>
> *A. No, as at - again, you are going through all those dates. Certainly at the 19/20 October, that date when we had the discussions with the Committee and it was agreed as between Tullow and the URA to deem us as a matter of contract to be in possession, at that point I didn't believe these notices were valid.*
>
> *By the time we got to December - actually by the time I got to December and we had the discussions round about the 9th in all honesty I was quite, you know, it didn't actually seem to me to - it seemed to me at that stage that the notices were - they were valid.*
>
> *From December - from the time I had the discussion with Peter, and we still had a long way to go before we got comfortable about making an indemnity claim, but basically from 19 November onwards it's my honest belief that that notice would have been enforced against us in Kampala.*"

56. At no time was it suggested to either Mr Martin or Mr Inch that either of them was dishonest, or cunning, or was lying or not telling the truth as to having received advice which caused them to change their mind as to the enforceability in the Ugandan Courts of the Notices.

57. The suggestion that they both originally thought the Notices to be invalid, and received advice to that effect, was accepted by each of them.

58. It was never suggested that Mr Kabatsi, the former Solicitor General of Uganda, who was called for the Claimant and was cross-examined for most of an afternoon, was not telling the truth when he said that he had advised the Defendants, on the occasion (after the Gulu Meeting) of which both Mr Inch and Mr Martin spoke, with regard to his own opinion as to the enforceability in the Ugandan Courts of the Notices. Indeed

such suggestion was expressly abjured by Mr Qureshi (Transcript Day 10/43), when he made it clear that all he was saying was that a note that Mr Inch had taken of the post-mortem meeting did not appear to include a record of that conversation (contrary to Mr Inch's view). Nor was it suggested to Mr Kabatsi that he had given that advice dishonestly, or without belief in its reliability or without knowledge that it would be relied upon. In their written submissions delivered after the close of the hearing, Counsel for the Defendants suggested that "*it was made clear to Mr Martin that the thrust of Heritage's case was that reliance on Mr Kabatsi was opportunistic*". That suggestion of course, if made, would not amount to a case that Mr Martin and Mr Inch did not believe the advice or were dishonest in saying that they did, but in any event I am not persuaded that the case was even put to them in those terms.

59. In written Closing Submissions, Counsel for the Defendant expressly stated (in paragraphs 67, 69 and 159) that Mr Inch, in stating in December 2010 and January 2011, to the Claimant's English lawyers Ashursts that the Claimant's Ugandan law advice had been that the s108 Notice was valid and binding on the Claimant was making "*materially false and misleading*" statements, and "*not true*", and such that "*he had deliberately misled them in so asserting*". Not a question therefore that he had, or may have, misunderstood the legal advice, or that he was being '*opportunistic*' in relying on it, but that he was making a deliberately false statement. This was not put in cross-examination to Mr Inch. The only material cross-examination, during the whole lengthy period Mr Inch was in the witness box, by which he was suggested not to have told the truth, related to whether, as he said, he had asked Mr Murray from the Claimant's Legal Department for, and received from him, via his tax colleague, Ms Shah, oral confirmation of Mr Kabatsi's earlier opinion, and asked for a further written opinion. Mr Qureshi suggested to Mr Inch that this account was "*simply not true*". The terms of such challenge contrast strikingly with the absence of any similar challenge with regard to the central part of the Claimant's case. What is clear from the account of the telephone calls and consultations with Ashursts and Mr Wolfson in December 2010 and January 2011 (set out at paragraph 43 above) is that Mr Inch was telling them that he had received the Ugandan advice. Unless he was indeed making a false statement and deliberately misleading them, which, as I have said, was not put to him, then the only alternative conclusions would be either that he had received such advice (and Mr Kabatsi has confirmed the giving of the oral advice on 19 November 2010) or that at least he believed he had received such advice.

60. It was not suggested in cross-examination to Mr Martin that he deliberately misled the Board of the Claimant, and in their Closing Submissions Counsel for the Defendant do not so suggest in terms, simply asserting (at paragraph 89 of their Closing Submissions) that "*the terms of, and amendments to, this Board paper . . . reflect badly on Mr Martin*". But neither in cross-examination nor in the Closing Submissions is the suggestion made as to his having deliberately misled the Board, which then approved the payment.

61. As a result of the point being raised by Mr Wolfson and by the Court in the course of Mr Qureshi's oral closing, as to the fact that these serious allegations of dishonesty had not been put, the defence team put in some further written submissions, and both parties drew attention to the Court of Appeal decision in **Markem Corp v Zipher Ltd** [2005] R.P.C. 31 761 where Jacob LJ referred at 785 to the words of Lord

Herschell LC in **Browne v Dunn** (1894) 6 R 67, HL that he had always understood that:

> ". . . *if you intended to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.*"

He further referred to the passage in the then (12th) edition of **Phipson** that:

> "*Where it is intended to suggest that the witness is not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation; and this probably applies to all cases in which it is proposed to impeach the witness's credit . . . Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character.*"

62. I was further referred by the Claimant to the judgment of Morgan J in **Rahme v Smith and Williamson Trust Corp Ltd** [2009] EWHC 911 (Ch) who referred, by reference to **Markem** and **Browne v Dunn** to the fact that:

> "*The need for cross-examination which specifically challenges the truthfulness of the witness' account is clearly established*" (paragraph 90).

In response the Defendant drew my attention to the fact that in **Rahme** there had not it seemed (see paragraph 70) even been a challenge to the accuracy of the witness' evidence in that case, and that may be the reason why in **Rahme** Morgan J considered that his "*hands . . .* [were] *tied . . . by the failure to challenge his evidence in this respect*". I do not consider that my *hands are tied*. But in my judgment if there is to be such an onslaught on the honesty and credibility of these two professional witnesses as has been carried out in the Closing Submissions, challenge to the *accuracy* of their evidence is plainly insufficient, and it must be necessary and in any event sensible and fair to put to a witness that in certain (in this case apparently numerous) respects he has been dishonest and is not telling the truth. This is not simply out of fairness to the witness, but it is also necessary for the judge, because if I am to conclude that an otherwise apparently honest and respected professional has been deliberately false and misleading, I must have the opportunity to see how the witnesses respond to each such suggestion and see whether I am persuaded by their answer (if any).

63. A similar position arises in respect of the issue of Ugandan law. The Defendant's case in the Closing Submissions is, as set out above, that the evidence of Mr Martin and Mr Inch, that they changed their minds, and were caused to change their mind by the advice as to the validity of the Notices first given by Mr Kabatsi orally and later confirmed in the February draft advice, is untrue and dishonest. It is suggested in the Closing Submissions that they cannot have believed such advice because it was

absurd. The opinion in Ugandan law which was expressed briefly by Mr Kabatsi after the Gulu Meeting, and was explained by him in oral evidence before me, and contained in the February Advice from KAA, and which was supported by the Claimant's independent expert Professor Bakibinga, Professor of Commercial Law at Makerere University, was described as *absurd* no less than 12 times in the course of the Defendant's Closing Submissions from paragraph 3 through to paragraph 296. The suggested consequence is obvious, namely that if the Ugandan law advice was obviously *absurd*, that is another reason why Mr Martin (English lawyer) and Mr Inch (Scottish Chartered Accountant and Chartered Tax Advisor) cannot have believed (did not believe) it, albeit that it was given by those Ugandan lawyers. The difficulty for me is as follows:

(i) It was not put to Mr Martin or Mr Inch that the advice was so obviously *absurd* that they cannot have believed it. More significantly:

(ii) It was not put to Mr Kabatsi, the former Solicitor General, that the oral advice he gave (the giving of which was not challenged), and which he repeated in evidence before me, was *absurd*. I would have wished to have witnessed Mr Kabatsi's response to this suggestion.

(iii) Even more significantly it was not suggested to the Claimant's independent expert Professor Bakibinga, who was for 6 years from 1991 to 1997 Head of Legal Services at the URA, and was during his time at the URA involved in the drafting of the ITA and the accompanying Tax Appeals Tribunals Act 1998, that the advice he gave as to the validity of the Agency Notices was *absurd*. Although the Defendant's Ugandan Law Expert, Mr Akunobera, disagreed in certain respects, and in particular in relation to the validity of the Notices, with Professor Bakibinga, he did not once suggest that the alternative views of his former tutor at Makerere University were *absurd*.

64. Against this background I turn to resolve the issues.

<u>The Claimant's belief in the validity of the Notices at the time of payment</u>.

65. The case I must consider primarily is the main case for the Defendant and (subject to Mr Wolfson's agreement that a fanciful belief would not be enough, referred to in paragraph 17(ii) above) the only case which the Claimant accepts it has to meet, namely that at the date of payment of the $313 million the Claimant did not believe that the Notices were valid. I propose:

(i) to consider this case before addressing the expert evidence, to which I shall return below, save insofar as it may touch upon the proposition that the advice as to validity in Ugandan law, which the Claimant asserts it accepted by the time it made payment, was obviously *absurd*.

(ii) to address first the alternative case which the Defendant puts forward based upon what Mr Qureshi has called '*objectivity*'.

66. <u>The alternative case</u>. The relevant Articles are set out in paragraphs 4 and 18 above. Mr Qureshi submits that in order to be a *Tax Claim* (referred to in Article 7.5) it must fall within the Definition, which I have set out in paragraph 17(b) above, i.e. that it

must be a claim issued by the Tax Authority *"from which it appears that a liability for Taxes will fall on the Buyer*." He submits that this means that the Agency Notice, to be a valid subject for indemnity, must have 'apparent legal basis'. He submits that the Agency Notices, respectively under ss108 and 106 did not, for the reasons given by his expert, primarily relating to the requirement for it to be shown that the monies in the escrow account were in the possession of the Claimant within the meaning of s108, and that, for the reasons given in the legal advice obtained by the Claimant at the time (at least prior to the alleged 'change of mind', the reality of which he denies), they were not 'objectively sustainable'. He also submits that, for the same reason, there was no 'objectively sustainable' *charge* (within Article 7.2) on the Claimant, but only on the Defendant.

67. Mr Wolfson submits that there is no such test. So far as Article 7.2 is concerned what is required is that "*any Non-transfer tax is charged at any time to the Buyer*" and the definition of *Non-transfer tax* cross-refers to the definition of *Tax*, which expressly includes within the definition "*regardless of whether such taxes . . . are 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.*" As for the reference to *Tax Claim*, there is no reference to those words in Article 7.2, which is the governing provision as to the applicability of the indemnity, and which simply requires that, as just set out, in the event that any Non-transfer tax is charged at any time to the Buyer in connection with the transaction, the Seller must pay; and Non-transfer tax as defined was so *charged*. Mr Wolfson submits that there is no room for an overlay of "*validly charged*", and he points to Article 7.3, which makes it clear that the eventual figure may work out to be less than, or different from, that which was originally charged. It must be right that a recipient of a charge by reference to this Article has no obligation to challenge its validity or question the amount, not least because the provisions are intended to create speed and certainty, and the investigation of the validity of the Notice may take many years. Mr Wolfson pointed to the similar conclusion to which Hart J came in **Scottish & Newcastle Plc v Raguz (No.3)** [2007] 1 P & CR 1 at 109, where he held that the claimant in that case was entitled to meet arrears irrespective of its strict liability to pay them, namely where "*the fact that it paid sums in respect of rent . . . which were not the subject of valid Section 17 Notices . . .* [is] *irrelevant to the question of its being able to recover those sums from the defendant*".

68. The Defendant's case in opening was that the charge which the Indemnified Party was being required to pay must be shown to be objectively sustainable (he did not elaborate on where the onus lay), by which he submitted that this meant 51% likely – i.e. on the balance of probabilities. For the reasons given by Mr Wolfson, this would appear to me to place an inappropriately heavy burden on a proposed Indemnified Party with an entitlement such as is recorded in Article 7.2 here. In closing, Mr Qureshi put the case more attractively, as set out in paragraph 17(ii)(b) above – which addressed (again where the onus lay was not identified) whether there was any reasonable basis for the Claimant to believe, or whether any reasonable person in the position of the Claimant could have believed, in the validity of the Notices. At one stage he seemed to adopt from me as being the "*articulation of . . . the high point of* [his] *case*", that there was no reasonable basis for the Claimant to believe, when it made the payment, that it was obliged to do so, and that it did not so reasonably believe.

69. It seems to me that there must be some role for the reference to *Tax Claim* as being, if not contained in, at any rate an attempted précis of, Article 7.2, but it is to be noted that, by reference to the procedure in Article 7.5 and following, it is only at the instance of the Indemnifying Party that the Indemnified Party is to be required to dispute the Tax Claim, and even then on the terms, and with the exemptions, provided by Articles 7.5 and 7.6. It seems to me plain that if the claim is obviously bad on the face of the Notice or Demand then there is scope for saying that there is not a *Tax Claim* or, more relevantly by reference to Article 7.2, there has not been a *charge on* the proposed Indemnified Party. But I do not consider, on a true and proper construction of this agreement, that there is any call for an objective test. There is perhaps some limited role for objectivity in the way in which the Claimant's case was most simply expressed in Mr Wolfson's closing, namely (Transcript Day 12/53-54):

> "*If it is apparently valid, you pay up, unless you know or believe that it is not or is absurd or fanciful.*"

If it is obviously bad on its face, then it is likely to be concluded that the recipient knew or believed it was not valid.

70. I propose then to address the question of whether the Claimant, through, primarily, Mr Martin, but also Mr Inch, either knew or believed that the Notices were not valid or that they knew or believed that they were absurd or fanciful. It seems to me that it may assist the clarification of the issue, on the facts of this case, to start from the proposition that the Claimant did not believe – indeed that no reasonable person in the position of the Claimant could have believed - that the Notices were valid on the basis of the Ugandan law advice that the Claimant received in August/September 2010, namely that the Notices were not valid and would not be upheld in a Ugandan Court. The question is whether a similar conclusion, that the Claimant knew that they were invalid or knew that any suggestion to the contrary was absurd or fanciful - or even whether no reasonable person in the position of the Claimant could have believed that they were valid – is reached by reference to the time the Claimant came to make payment in April 2011.

71. It is quite plain that the Defendant has a good kicking off point for its case. The Defendant's case can be summarised as follows:

(i) The Claimant received the clear Ugandan law advice in August/September 2010 set out in paragraphs 34 and 35 above.

(ii) The Claimant was under enormous pressure from the GOU, in the position in which they had been placed, with the $1.4 billion purchase price having been paid over and no oil field received, to make the payment in any event. The fact that they did not do so until April 2011 is explained by Mr Qureshi by reference to the fact that they had to tie up all the other arrangements before doing so.

(iii) They received the sceptical, if not hostile, views of Ashursts and Mr Wolfson in London as to the validity of the Notices, looked at from an English law point of view.

These would almost be common ground. The Defendant would then add the following:

(iv) The advice to the contrary is, and was, obviously *absurd*.

(v) Mr Kabatsi's oral advice was off the cuff, and was not recorded in any real sense in the 30 November advice signed by Mr Kabatsi and Justice Mulenga, which in any event Mr Martin did not read before he sent off the Defendant's agreement to the GOU's package and the draft Memorandum of Understanding: and the Claimant did not call Mr Murray or Ms Shah as to the account which Mr Inch gave of the subsequent clarification of the Kabatsi/Mulenga advice and its reference to "*deeming*", which in any event Mr Qureshi suggested was not true.

(vi) The obtaining of the Mpanga/Kambona February Advice was not a genuine exercise.

(vii) The case for the URA as to the validity of the Agency Notices was never put on the basis of the Claimant's being in possession of the escrow account, but only upon the basis that the Claimant had paid away the money into the escrow account after receipt of the First Agency Notice, which it did not.

(viii) The Claimant never had an answer to the point which also formed part of the August/September 2010 opinions of Mr Mpanga/Kambona and PricewaterhouseCoopers, namely that the tax being sought by the First Agency Notice could not be recovered pursuant to that Notice because it was disputed and the requisite deposit had been paid.

(ix) The Claimant cannot have believed in the validity of the Second Agency Notice, because they paid away despite it, to the Defendant, all the debts which were falling due to the Defendant, totalling some $35 million up to and including payment in March 2011 of the Adjustment Amount (see paragraph 2 above). If they disregarded the Second Agency Notice in that regard, then they must have had no belief in its validity, or consequently in that of the First Agency Notice.

(x) The fact that Mr Inch told Ashursts (if he did) in December 2010 that he had not obtained Ugandan law advice shows his lack of reliance on any such advice, and he subsequently dishonestly and falsely told Ashursts that he had had such advice.

(xi) Mr Martin's Memorandum of recommendation to the Board (see paragraph 31 above) had been changed in draft, including amendment to change to "*valid*" what previously had read "*acceptable*".

There is then the Defendant's overriding point that no reliance should be placed upon the evidence of Inch and Mr Martin because they are dishonest witnesses (see paragraphs 51-62 above).

72. The Claimant's answers can be summarised as follows, and I address them in doing so: I use the same numbering as in paragraph 71.

(i) Mr Martin and Mr Inch are honest and truthful witnesses. They were frank about their receipt of, and their belief in and reliance upon, the August/September 2010 legal advice. Thereafter the position changed.

(ii) They had indeed every reason to make payment to the GOU, given the position in which they had been left by the Defendant, but see the frank account of the position by Mr Inch set out in paragraph 30 above.

(iii) The Ashursts/Wolfson advice was forcefully and understandably sceptical of the position as it appeared to those advising at English law, but recognised that the issue fell to be decided by Ugandan law. Armed with the knowledge of the Ashursts/Wolfson scepticism about the possession/asset argument (and the "*recent mixed messages from KAA*" on the subject) (see paragraph 47 above) the Claimant requested the Mpanga/Kambona February Advice. In any event, as is clear, Mr Inch told the English lawyers in January that they would have to make a "*commercial decision*" based on the advice received from the Claimant's Ugandan lawyers.

(iv) The Ugandan legal advice was and is not *absurd*. There are five major issues raised before me in the experts' opinions:

(a) Whether Ugandan law would consider that the Claimant was in possession of the escrow account for the purpose of s108.

(b) Is a s108 Notice enforceable against the 'Agent', even if the taxpayer has appealed it and paid the necessary deposit?

(c) Does s108 apply to the $30 million?

(d) Was the original First Assessment Notice premature?

(e) Which governs – the precise wording of the s108 Notice or the terms of the statute (annexed to the Notice) under which it is issued?

As to the latter two, (d) and (e), these points were not raised by the Claimant or with its advisers at the material time, so cannot be said to feature in an examination of the 'state of mind' of the Claimant. With regard to the others:

(a) <u>Possession</u>

There is an issue between Professor Bakibinga and Mr Akunobera, as discussed below. In addition there is the unchallenged evidence that, after the Gulu Meeting, Mr Kabatsi gave his advice orally at the time, and he repeated it in court at this hearing; and he emphasised the view which he concluded a Ugandan Court would take, at the instance of the URA, by reference to the control which the Claimant exercised over the escrow account. There was then the Mpanga/Kambona February Advice. Although Mr Mpanga and Mr Kambona were not produced as witnesses, Mr Kabatsi was, and of course crucially so far as the suggestion of *absurdity* is concerned, so was Professor Bakibinga. I shall consider the differences between the experts below, but I can say immediately that, even after Mr Brettler's able cross-examination of Professor Bakibinga, I did not begin to be persuaded that the advice he

was giving as an independent expert, which accorded with Mr Kabatsi's evidence and with the Mpanga/Kambona February Advice, was *absurd*.

(b) 'Payable'

Although the Claimant has sought to keep alive the suggestion that the Second Agency Notice was valid by reference to s106 also (see further below), it is enough if it is and was valid by reference to s108. Although Professor Bakibinga and Mr Akunobera disagree as to whether a s108 Agency Notice is valid where the taxpayer is disputing the debt, for reasons which I will give, I have no difficulty in preferring the evidence of Professor Bakibinga. It seems to me clear in any event that by the time that the Ashurst/Wolfson advice was being sought and given on 20 December, this point was now resolved (see paragraph 6 of that advice (paragraph 44(ii)) where (albeit from the English point of view) it is only s106 and not s108 which is being said to be ousted by the existence of the appeal. In any event, it may be that Mr Kabatsi had dealt with this point (see Transcript Day 6/171), but it is certainly plain that Mr Inch had received what he regarded as satisfactory confirmation from Mr Sseketawa that s108 Notices were regularly pursued even where there was a dispute (see paragraphs 43 and 44(iii) above).

(c) As to the point about the Second Agency Notice, this was certainly a worry for Mr Inch and Mr Murray, as to whether the case was as persuasive in respect of the Second Notice as it was for the first (see paragraphs 44(iv)(b), 44(v)(b), 45 and 47 above), but the Mpanga/Kambona February Advice resolved this. As it happens, the two experts agree in their opinions, hence not *absurd*, that the outstanding debts did fall within s108 (subject to a point of construction, referred to in paragraph 95 below, which was not raised at that time).

This constitutes the Claimant's answer to the case that Mr Martin and/or Mr Inch did know/must have known, or that no reasonable person in their position would have concluded other than, that advice as to the validity in the Ugandan Court/at Ugandan law of the Agency Notices was *absurd*.

(v) The evidence of Mr Martin and Mr Inch as to what Mr Kabatsi said, and how he said it, after the Gulu Meeting and in particular in the post mortem meeting, and by Mr Kabatsi at this hearing, is persuasive, and the fact that he gave the advice is not challenged – and, if it were, there is some support for it in Mr Inch's handwritten note (referred to in paragraph 58 above). It was in Mr Martin's view a significant moment in relation to his belief, up to then singularly doubtful, as to the validity of the Notices (see paragraphs 39-40 above), and as to Mr Inch, he said as follows (Transcript Day 10/139):

> "*My job is to make a judgment on the advice that I receive. The most compelling advice I had had on*

> *this was the simple advice from Peter Kabatsi that if we were in court in Kampala, a judge could quite likely find us to be in possession.*"

The fact that Mr Kabatsi's oral advice was not recorded in the 30 November Kabatsi/Mulenga opinion (now known to have been actually drafted by Mr Mpanga) may be accounted for in a number of ways (see paragraph 42 above) and in any event it was not read by Mr Martin before he signed up to the agreed package. The fact is however that Mr Kabatsi gave the oral evidence, and, as Mr Kabatsi put it in answering Mr Qureshi and adopting his words (Transcript Day 6/196) he was "*effectively bless*(ing) *the arrangement that they had wanted to enter into with the Ugandan Authorities*": and KAA in February were subsequently asked to confirm this opinion, and did so. Absent a suggestion of conspiracy, or of dishonesty by Mr Kabatsi and his partners, which is not made, the case for the Defendant seems difficult, if not impossible, to support.

(vi) Not least in those circumstances, the suggestion that the instruction by the Claimant of Mr Kambona and Mr Mpanga in February 2011 was not a "*genuine exercise*" is very difficult to understand. I refer to the Instructions, which I have set out at length in paragraph 46 above. Mr Inch was criticised for an answer (Transcript Day 10/177) that his "*understanding was they were prepared - we understood they were preparing . . . an opinion which would be positive . . . positive in as much as it was confirming Peter Kabatsi's opinion*". It was suggested that this was a slip of the tongue, and that he was in fact going to say that they were "*prepared*" to give such an opinion. Even that would not, in my judgment, particularly as I am aware there had obviously (as appears from paragraph 46 above) been previous telephone conversations explaining what the Instructions were to be, constitute anything sinister, certainly without any suggestion that KAA were in a conspiracy. But in any event, I see nothing in the Instructions to cause me any doubt that they were genuine, and genuinely intended to resolve the "*mixed messages*", and resulted from Mr Martin's desire (Transcript Day 5/174) for "*more definitive advice from Kampala on the issue*" and his concern about the English advice, which chimed with his own feeling as to the escrow account (Transcript Day 5/178 and paragraph 47 above). I refer again to the exchange between Mr Martin and Mr Qureshi (Transcript Day 6/17) set out in paragraph 45 above. Mr Qureshi was suggesting that Mr Martin's attitude was "*this will do. We have got what we wanted*". I do not myself see any problem if that was his attitude, absent the un-suggested conspiracy. Albeit that the February Advice was, and remained, in draft, it was sent to Ashursts.

(vii) Mr Qureshi points out that even in the 30 November Kabatsi/Mulenga Opinion, the URA position is recorded as being that the money had been paid into the escrow account impermissibly after the receipt of the First Agency Notice, notwithstanding Mrs Kagina's acceptance that such was not the case at the meeting in October. He suggests that when

Mr Mpanga came up with his "*deeming*" compromise, that the Claimant was and remained in possession of the escrow account, at the meeting of 19/20 October, he was mischaracterising, or speculating as to, the case which URA might make, but had not made: on any basis that position was accepted by the URA (albeit that Mrs Kagina did not regard it as a compromise – see paragraph 37 above). However Mr Wolfson points to a number of matters which support the proposition that the URA was indeed making such case, by reference for example to the first draft of the minutes of the very meeting of 19/20 October, and certainly Mr Murray is recorded at paragraph 14 of the note of the 20 December 2010 tele-conference, set out in paragraph 44(i) above, as saying that "*URA says money in escrow is in our possession*". In the Instructions to Mr Kambona and Mr Mpanga of February 2011, set out at length in paragraph 46 above, Ms Shah recorded as a matter of course the arguments which URA had been putting forward, so that KAA could advise on them ("*in the URA's shoes*"), including the suggestion that the Claimant remained in possession of the escrow account. The point is, at its best, not a strong one for the Defendant, suggesting that the Claimant was busy obtaining legal advice (unsuccessfully in August/September, and certainly from the London end) about an argument which in fact was never being put forward, when in fact the case was that the URA was chasing a point which was easily capable of being disproved. In my judgment this underestimates the clear expertise of the URA, which was originally demonstrated by the very use of s108, when both the Claimant and the Defendant appear to have been expecting only s106 to be relied upon.

(viii) I have already addressed the *payable* point in dealing with the *absurdity* issue. As there set out, I am satisfied that the point was addressed by the Claimant, and that its advisers came to the right conclusion, as more fully discussed below.

(ix) There is no doubt that Mr Inch was exercised by whether the continuing debts owed to the Defendant could or could not, should or should not, be paid over to the Defendant notwithstanding the Second Agency Notice, and even as late as February (see paragraph 44(v) above) he was reflecting with Ashursts that the position might be more difficult in relation to the Second Agency Notice. Mr Inch told Mrs Kagina in an email of 13 December 2010, on the assumption that the Notice was not valid, that the Claimant could not make payment to the GOU of $14 million of these debts, and in an email of 12 January 2011 Mr Murray took a similar view for slightly different reasons. But whatever the self-justification for not making the payments to the GOU and for continuing to make them to the Defendant, Mr Martin's evidence (Transcript Day 2/109, Day 4/166, Day 6/23 and 31, Day 8/27 and 37) was that for commercial reasons they simply could not take the risk of failing to make payment to the Defendant. In the 29 December Letter the Defendant's solicitors had put the Claimant on notice of their intended reliance on Article 3.7 of the SPA, requiring all payments to be made under the SPA, without set-off. Mr Qureshi points out that in

fact there is a saving in that Article (significantly not quoted in the 29 December Letter) of "*save as required by law*", but Mr Martin explained that there was a real risk that, if the Defendant were not paid, they would trigger, or avoid the release of, the Standard Chartered Bank Guarantee, which was continuing in place, to the detriment of the Claimant, until discharge of all remaining contractual debts owing to the Defendant; and Mr Atherton confirmed (Transcript Day 7/153) that in fact the Defendant would indeed have taken the view that they would not release the Standard Chartered Bank Guarantee in those circumstances, had it arisen. This is very persuasive evidence to show that, irrespective of the position as to the Notices by March 2011, the Claimant was driven to pay out the monies continuing to be owed to the Defendant.

(x) This point is a difficult one for Mr Qureshi to run, given his case that in fact Mr Inch lied to Ashursts about having Ugandan legal advice as to the validity of the Notices. His case is that in fact Mr Inch told Ashursts/Wolfson on 20 December that he did <u>not</u> have such advice. This arises as a result of a dispute about the wording of the typed attendance note of the 20 December telephone conference, which I set out in paragraph 44(i) above, in paragraph 16. It reads: "*unless can get same Ugandan advice saying we're in possession, don't see on what basis we can pay out*". Mr Qureshi submitted, and indeed put to Mr Martin, who was not present on the call, the suggestion that what was in fact said by Mr Inch was "*unless can get <u>some</u> Ugandan advice*", in which case this would mean that he was telling Ashursts/Wolfson that he had <u>not</u> got Ugandan advice (contrary to the case on any basis, given the unchallenged nature of the evidence of Mr Kabatsi, albeit being said to have been 'off the cuff'). Although there was no handwriting expert available or called, particularly given that this was only raised in the middle of the hearing, the original handwritten note was produced, and quite apart from the fact that to the uninitiated amateur it did look more like "*same*" than "*some*", Mr Inch's clear evidence was indeed that it was "*same*"; and that he was explaining, in the context of the advice that was being sought (entirely consistently with all the surrounding documents, including the Instructions to Counsel) relating to the recently served Second Agency Notice, that at that stage, unlike the Kabatsi advice, he had had no Ugandan advice – which he subsequently obtained. I am satisfied that Mr Inch is right. I am also satisfied that, having thus made it clear that he would need further Ugandan law advice as to the Second Agency Notice, he made it clear on several occasions, as recorded in the various notes and Instructions set out in paragraph 44 above, that he already had advice in relation to the First Agency Notice, and, as he said in evidence, that his reference in his email of 3 February (set out at paragraph 44(iv)(a) above) was a reference to what he had gathered from Mr Sseketawa.

(xi) The Memorandum to the Board went through a number of drafts, and was advised on by Ashursts. The terms of the Memorandum are set out in paragraph 31 above. Mr Martin accepted that he changed Mr

Murray's original word "*this is an acceptable position for the URA to take*" to "*this is a valid position for the URA to take*". Mr Qureshi submits that this supports a case that Mr Martin did not believe in the advice and/or that no reasonable person could have believed it. Mr Martin confirmed that that was his belief in the light of the advice that he had now obtained, particularly when it is seen against the contrasted "*even if not under English law*": this in the context of his statement set out in paragraph 49 above that the Mpanga/Kambona advice was "*the confirmation, if you like, that the URA had been right all along.*" The Instructions to Mpanga/Kambona made it quite clear (paragraph 46(i) above) that the Claimant's Executives would rely on the advice being sought.

73. I have already set out in paragraph 51 above that I found the oral evidence of Mr Martin and Mr Inch persuasive and impressive. None of the eleven points put against them in the Defendant's case, or indeed the suggestion of dishonesty, whether to the Court, at the Ashursts consultations or in the Memorandum to the Board, is made out, for the reasons which I have summarised in the course of paragraph 72 above. No lies by Mr Martin or Mr Inch are established, and the only piece of evidence specifically challenged as such (paragraph 59 above) was, I am satisfied, simply a misunderstanding or mis-recollection (see paragraph 42 above) caused by Mr Mpanga reconciling his original *deeming* 'compromise' with the view that Mr Kabatsi had expressed, and which in the end he confirmed, after the express question in the last paragraph of Ms Shah's email set out in paragraph 46(ii) above, in the February Advice.

74. I am satisfied that when the Claimant paid out to the GOU on 13 April, notwithstanding that it was doing so as a result of a long and concerted period of pressure by the GOU as described above, it did so in reliance on Ugandan legal advice and in the belief that the Notices were valid, and that such belief was not fanciful or absurd, and was not one to which no reasonable person in the position of the Claimant could come. If necessary, and if there were a case pleaded and capable of argument, I would be satisfied that the Claimant so believed on reasonable grounds.

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75. I have therefore concluded that, whatever the test of the Claimant's belief in the validity of the Notices served, being the First Agency Notice, the Second Agency Notice and the 15 March Demand (served upon the basis of the earlier Notices and 'restarting' the interest due), I am satisfied that (subject to the availability of the defences referred to in paragraph 18 above) the Claimant will be entitled to an indemnity arising out of its payment to the GOU on 7 April.

76. It is however common ground that, if the Notices were in fact valid at Ugandan law, or, more accurately, if I concluded that a Ugandan Court would find the Notices to be valid, the indemnity is in any event (again subject to those defences) enforceable. This depends upon my conclusions as to Ugandan law by reference to the expert evidence called. The approach to this is most helpfully addressed in the judgment of the Court of Appeal, delivered by Evans LJ, in *MCC Proceeds Inc v Bishopsgate Investment Trust Plc* [1999] CLC 417 at paragraphs 23-24, whereby its purpose is described as being

> "*where there is no authority directly in point, to assist the English judge in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there . . . to predict the likely decision of a foreign court, not to press upon the English judge the witness's personal views as to what the foreign law might be.*"

77. Each party called an independent expert, to whom I have referred above, the Claimant's expert being Professor David Bakibinga and the Defendant's Mr Festus Akunobera. In addition I heard, in circumstances described above, the evidence on the Claimant's behalf of Mr Kabatsi, who explained and expanded the legal advice that he had given orally to the Claimant after the Gulu Meeting. I have already indicated that I found Mr Kabatsi a persuasive and impressive witness, not surprisingly given the high office which he had held in Uganda, and, leaving aside a seemingly entirely irrelevant passage of cross-examination about his wife, he was not in fact subjected to any attack on his credit or credibility. As to the two independent experts:

(i) Professor Bakibinga for the Claimant is now and has been since 1998 Professor of Commercial Law at Makerere University, but, as set out at paragraph 63(iii) above, he was prior to that Head of Legal Services at the URA, from its inception in 1991, and was involved in the drafting of the ITA. He has not appeared as a practitioner in court since 2002, but he has been the author of a stream of academic and professional publications, including works on Revenue Law and Taxation. He was cross-examined vigorously by Mr Brettler. It was apparent that he had not considered prior to the hearing, notwithstanding reference to it by Mr Akunobera, the relevance (if any) of the Uganda Constitution, though he dealt robustly with the points made to him: and he had also not considered the availability of judicial review in the Uganda Courts, with which Mr Akunobera was much more familiar, relating to the *locus standi* to complain of a party (such as a recipient of a s108 Notice) to whom an express remedy or route was not given by the ITA, the statute with which he was so familiar. These matters apart, he gave what seemed to me to be a persuasive and thorough response to Mr Brettler's cross-examination, based as that was upon an English lawyer's analysis of what appeared to be illogical or unsatisfactory in the workings of the ITA, as interpreted by the Professor.

(ii) Mr Akunobera, was, as referred to in paragraph 63(iii) above, a former student of Professor Bakibinga at Makerere University, where he obtained his BA between 2001 and 2005. After that time he was full time involved in postgraduate studies in New York and Uganda until 2008, and an Associate at PricewaterhouseCoopers in New York until January 2010, while also a part time lecturer at the East African School of Taxation in Kampala. His practice as an Advocate in Uganda in the areas of International and Domestic Tax effectively began in June 2010, where he now practises, while continuing his lecturing and obtaining a further Postgraduate Diploma at SOAS. He too was an impressive witness although I was surprised at his apparent lack of

> appreciation, or understanding, of the difference, or at any rate the potential difference, in commercial or tax law between the words "*due*" and "*payable*", and I concluded that he was readier than was justifiable by reference to the authorities to which he referred to ascribe to the Ugandan Courts an approach of construing tax legislation in favour of the taxpayer. In this regard I preferred the view of Mr Kabatsi (quoted in paragraph 39 above) and of Professor Bakibinga, particularly in the context, which the Professor heavily emphasised, of what he described as the aggressive approach of the ITA towards the collection of tax from non-residents. Given my task, as described by Evans LJ in **MCC**, I was persuaded that, although, as Mr Akunobera pointed out, he had, both in his practice and for the purposes of his expert evidence in this case, studied the caselaw, the much greater experience, albeit not as a recent advocate, of Professor Bakibinga, coupled with the way in which he dealt with his cross-examination, was more likely to lead me to the correct answer.

78. I turn to the various issues relating to the validity of the Agency Notices.

79. The first (Issue 1) is the question which has been called '*Prematurity*', namely whether the First Assessment Notice of 6 July 2010 was issued prematurely so as to be itself invalid, such that the First Agency Notice, based upon it, was itself invalid. This was not a point that was raised or discussed at the time when the Claimant was receiving its advice as to the invalidity of the Agency Notice, which is itself suggestive that it was, at the least, not a point which leapt up for attention. The two experts before me addressed the point, by reference to the fact that the First Assessment Notice was issued on 6 July, assessing the tax payable in respect of the purchase price under the SPA, when the price had not yet been paid over. Professor Bakibinga referred, in paragraph 47 of his Supplementary Report, to the Recitals to the Supplemental Agreement to emphasise his conclusion that the assessment related to "*a transaction which the URA knew all details of and which had been given conditional consent on the same day as the assessment*", and concluded that it was justifiable for the URA to have served an assessment in advance of the completion of the transaction in respect of which it was on notice, relying upon the provisions of sections 92(8), 95(4), 96(3) and 98(3) of the ITA, to conclude that, in relation to a non-resident about to leave Uganda, the URA was entitled in those circumstances to raise an assessment on the basis of the "*Commissioner's best judgment*", and '*substantial compliance*' with the ITA, as he expanded in oral evidence. Mr Akunobera did not agree, but remained of the view that the Notice was invalid for prematurity; but he accepted that Professor Bakibinga's opinion was arguable, concluding, after giving the matter some further thought, (Transcript Day 11/259) "*I believe arguments could be made on both sides. I believe for sure arguments could be made*". I am content to resolve this by reference to the fact that there is a decision of the Uganda Tax Appeals Tribunal resolving the *Prematurity* point against the Defendant, albeit on a different basis than that supported by Professor Bakibinga. As of now there is thus a decision of a Uganda court disposing of this very point when raised by the Defendant by way of challenge to the assessment by the URA. I am satisfied that a Ugandan court would not in those circumstances find that the First Agency Notice, subsequently issued, based upon that assessment, was itself invalid.

80. I turn to Issue 2, called the *Payable* issue. This relates, as partially referred to in paragraph 72(v)(b) above, to whether the First Agency Notice, under s108, or the Second Agency Notice, insofar as it related to s108, could be validly issued and served when, in the case of the First Agency Notice, there had been payment of the 30% deposit, an objection (albeit met by an Objection Decision) and an appeal, and in the case of the Second Agency Notice, although there had been no payment of the deposit, there had been an objection, an Objection Decision and an appeal. The argument is as follows. Whereas (as set out in paragraph 11(ii) above) s106 provides that the Commissioner could serve a Notice "*where a taxpayer fails to pay income tax on the date on which it becomes due and payable, and the tax payable is not the subject of a dispute*" (the section being headed "*Recovery of Tax from Person owing Money to the Taxpayer*"), there is no such restriction in the case of s108 ("*Recovery from Agent of Non-Resident*"), whereby the Commissioner may by such a Notice require a person in possession of an asset belonging to a non-resident taxpayer "*to pay tax on behalf of the non-resident up to the market value of the asset but not exceeding the amount of tax due*".

81. S 103 of the ITA provides, so far as material to an assessment by the URA, (as opposed to a self assessment under s96), as follows:

> "*1. . . . tax charged in any assessment shall be payable –*
>
> . . .
>
> *(b) . . . within forty five days from the date of service of the notice of assessment.*
>
> *2. . . . where a taxpayer has lodged a notice of objection to an assessment, the amount of tax payable by the taxpayer pending final resolution of the objection is thirty per cent of the tax assessed, or that part of the tax not in dispute, whichever is the greater.*"

Thus the payment obligation is that 100% is payable within 45 days, or if notice of objection is served within that 45 days, then a maximum of 30% is payable until a resolution of the objection/appeal.

82. Professor Bakibinga's opinion is that there is a distinct and deliberate difference between the words *due* and *payable* (coupled with the saving for the existence of a dispute) in s106 and *due* in s108 , the latter of which is intended to regulate, and be applicable only to, tax recoverable in respect of a non-resident. A s106 Notice can only be served if the tax is *due and payable* and not if there is a dispute; thus plainly during the 45 days no s106 Notice can be served, and after the 45 days, if there has been payment of the deposit and an objection within the 45 days, then there can be no s106 Notice issued because no sum is payable. In the case of s108 however, as a result of the difference in wording, there is no such limitation, and a s108 Notice can be served in respect of the amount assessed against the taxpayer (or the balance after any payment by way of deposit or on account) even though it is not payable and even though there may be a dispute. His opinion is that *tax due* is the tax as per the assessment, and *tax due and payable* is that which requires to be paid by way of the ordinary structure of s103. A s108 Notice however, aimed as it is against non-

residents, or those who are departing from Uganda, can be operated in respect of tax which has been assessed but which is not yet payable by the taxpayer (i.e. before the 45 days in respect of the whole sum and even after the 45 days in respect of the balance after a 30% deposit). This construction (a) respects and reflects the difference in wording between the two sections (b) reflects the intended aggressive approach of the ITA towards collection of tax from non-residents. Particularly in the context of non-residents, the approach of the Ugandan courts to tax is, he explains, one of '*pay now and argue later*' (he refers to the Ugandan Supreme Court decision of **Uganda Projects Implementation and Management Centre v URA** (Constitutional Appeal No. 2 of 2009) at p25.

83. Mr Akunobera's opinion is that there is no such difference, and that the words *due* and *payable* have no different meaning, such that the use of the two words was mere surplusage. He points out that there is no specific definition of the word *due* as being the sum the subject of an assessment (or self-assessment). He accepts that this construction would run counter to the principle of statutory interpretation that meaning should be given to the words used by the legislature rather than any words being regarded as mere surplusage, but he submits that the construction should be looked at in what he calls full context. His persuasiveness in this regard is somewhat lessened by the fact that he said that he had not encountered any case law, even in banking law which he had studied, as to any difference between the words *due*, *payable* and *due and payable*. If he is right then the Agency Notice was premature in antedating the 45 days, and in any event invalid in respect of the 70% after the 45 days.

84. Mr Kabatsi in evidence noted the difference between s106 and s108 (Transcript Day 6/171) by reference to s108 giving less protection to a non-resident taxpayer in this regard.

85. There was inevitably, in the statutory context, discussion of other sections in the ITA:

(i) S105 ("*Collection of Tax from Persons leaving Uganda Permanently*") gives the Commissioner power in respect of such persons, where he has reasonable grounds to believe that they may leave Uganda permanently without paying all tax due, to issue a certificate, containing particulars of the tax due, to the Commissioner of Immigration, and to request that Commissioner to "*prevent that person from leaving Uganda until that person (a) makes payment of tax in full; or (b) provides a financial bond guaranteeing payment of the tax due.*" It seems to me clear that this is bringing forward the date of payment (even if there has been an objection/payment of a deposit/making of an appeal) or at any rate imposing the obligation to provide security prior to payment (much as Mr Sseketawa advised Mr Inch was a purpose of s108). This thus supports both of Professor Bakibinga's propositions (a) as to the difference in wording (b) in relation to the special *aggressive* approach to non-residents.

(ii) In s107 (*Collection of Tax by Distraint*) there is a provision at sub-section (4) of a period within which the taxpayer must "*pay the tax due together with the costs of the distress*": In sub-section (5) the proceeds of such a disposal may be applied "*towards the tax due and payable*".

It seems to me that there is nothing inconsistent here with the distinction drawn by Professor Bakibinga between tax, or a sum, being due, and then, after the expiry of a period, its becoming due and payable.

(iii) Sub-sections 108(3) and (4), to which reference will be made further below, provide that tax due from a non-resident (in the one case partner and in the other case beneficiary) can be levied against a resident partner or trustee. Each sub-section provides that "*the tax payable in respect of an amount included in the gross income*" of the non-resident is "*assessable in the name of*" the partner/trustee. It seems to me that this too is not inconsistent with Professor Bakibinga's proposition, where, as he explained, what was being addressed was the obligation to pay tax on behalf of the taxpayer by way of the amount being *assessable* against the third party.

86. I am entirely satisfied that the Claimant's construction is correct at Ugandan Law, both by reference to the context of the statute and its purpose, and that a s108 Notice is valid, even though the tax demanded from the Agent is not *payable* by the taxpayer, but has simply been the subject of an assessment. This means that, applying s108, the First Agency Notice was valid on that ground, and the Second Agency Notice is not only valid as to the unpaid deposit (I shall return later to the issue of 'partial validity', which does not accordingly arise in respect of s108) but was valid (subject to Issue 6 below) as to the whole $30 million, even if it was not payable by the taxpayer by virtue of the operation of s103.

87. Issue 3 relates to whether, insofar as the Second Agency Notice was a s106 Notice, it was rendered invalid by the terms of s106 itself and s103 as discussed above: this of course only arises if the Second Agency Notice is not valid by reference to s108 (as I have found it to be). Here there is an issue between Professor Bakibinga and Mr Akunobera as to whether the tax the subject of the Second Assessment Notice was the subject of a *dispute*. Professor Bakibinga submits that there cannot be a dispute if the taxpayer has not complied with the requirements of s103 and paid the 30% deposit. Mr Akunobera submits that the question as to whether there is a dispute is simply one of fact, and there was a dispute. He relies on two first instance Ugandan authorities for the proposition that there can be a dispute, and one entitling the taxpayer to appeal, even though the taxpayer has not complied with the requirement of paying a deposit. While contending that those two authorities are wrongly decided and inconsistent with the earlier Ugandan Supreme Court decision of **Uganda Projects**, Professor Bakibinga in any event distinguishes them on the basis that in neither of the two first instance decisions had there been an Objection Decision, and in his view once there has been an Objection Decision by the URA, that is when the taxpayer must comply with the statutory requirements and pay the deposit, and if the taxpayer has not done so, then there is no dispute within the meaning of the ITA.

88. It seems to be that consistent with the guidance in **MCC**, I am entitled to prefer the two existing Ugandan decisions, even though they may subsequently come to be distinguished or overruled. Consequently I would decide that so far as 70% of the subject of the Second Assessment Notice is concerned, that amount is the subject of a dispute, such that a s106 Notice seeking payment of it from a third party would fall within the limitation and be invalid. However, so far as the unpaid 30% deposit is

concerned, it would seem to me that that cannot be the subject of a dispute, given the obligation to make payment of it pursuant to s103. It is in this context that Mr Akunobera asserts that the Second Agency Notice was invalid, in that it demanded more than was due, and he asserted that there was no concept of 'partial validity', although he accepted that he could produce no Ugandan authority to that effect, and went so far as to accept that English authority that a VAT invoice which demanded too much would still be valid at English law for a lesser sum (a reference to **Enik v Department for Communities and Local Government** [2012] EWHC 3027 (Comm) at 33-6) "*might apply to Uganda as well*" (Transcript Day 11/225). In any event not only did Professor Bakibinga disagree with the suggestion that a notice asking too much could not be valid for a lesser sum at Ugandan law, but the Claimant pointed to the fact that beneath the requirement in the Notice for $30 million there was in fact a demand for "*not exceeding $30 million*". If the position arose that the Claimant could only rely on the Second Agency Notice, in so far as it relies upon s106, I am satisfied that the Ugandan Courts would find it valid at any rate as to $9 million.

89. Next is Issue 4, which is essential to the validity of the First Agency Notice, in respect of which Mr Kabatsi gave his oral advice, which the Claimant describes (see paragraph 40 above) as the turning point in its approach to the validity of the Notice. Mr Akunobera, like the original advice from Messrs Mpanga/Kambona, and the Claimant's sceptical English solicitors and Counsel, is of the view that the First Agency Notice did not apply to the escrow account. Clause 2 of the Supplemental Agreement reads as follows:

> "*Operation of escrow Agreement*
>
> *In connection with the operation of the escrow agreement between the Buyer, the Seller and Standard Chartered Bank (the "escrow Agent") dated 20 July 2010, as amended and restated on 23 July 2010, (the "Escrow Agreement"), the Buyer and Seller agree in relation to the amount of . . . $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* [GOU] *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 recipients(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.* "

The *Transfer Instructions* required to be signed by both the Defendant and the Claimant.

90. I summarise the case for the Defendant, based upon the opinion of Mr Akunobera but in particular, as organised in logical English fashion, by Mr Brettler in his cross-examination of Professor Bakibinga:-

(i) A general principle of Ugandan statutory construction is that no tax is to be imposed except with clear statutory language, and that ambiguity should be resolved in favour of the taxpayer.

(ii) The obligation on the third party recipient of a s108 Notice who is in possession of an asset belonging to a non-resident taxpayer is to pay tax on behalf of the non-resident "*up to the market value of the asset but not exceeding the amount of tax due*", the implication being that the asset must be (a) valued (b) convertible (c) accessible to the third party *Agent*.

(iii) The Claimant had no access to the money in the escrow account, but can only be described as a 'gate keeper' without the power to dispose, unless with the participation of the Defendant, of the content of the escrow account. The Claimant had a 'negative' role: the ability to prevent the Defendant getting at the money but no ability to get at the money itself.

(iv) The money in the escrow account did not belong to the Defendant, because, by virtue of the alternative transfer instructions, there was an alternative payee, namely the URA.

(v) It would be unjust, and the statute should not be so construed, for the Agent to be required to pay over its own monies, when he had no ability to access the taxpayer's money. The Notice could only be construed as applying to monies of the taxpayer which the Agent was in a position to pay over.

(vi) This is the more unfair and unconscionable because there is no method for the third party to recoup the money from the taxpayer, as s108(6) only *indemnifies* the paying party against the consequences of having paid over the taxpayer's asset, but does not give a remedy against the taxpayer: the indemnity is a 'shield not a sword' on any sensible construction of it.

(vii) If the URA is enabled to take money from the third party without recompense, it is contrary to the Ugandan Constitution Article 26(2) whereby:-

> "*No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied –*
>
> > *(a) the taking of possession or acquisition is necessary for public use or in the interest of*

> *defence, public safety, public order, public morality or public health and*
>
> *(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for –*
>
> *(i) prompt payment of fair adequate compensation, prior to the taking of possession or acquisition of the property; and*
>
> *(ii) a right of access to a court of law by any person who has an interest or right over the property."*

The third party is compulsorily deprived of his property in satisfaction of a debt owed by the taxpayer without prior compensation.

(viii) The third party could, should and must challenge any liability under the Notice on the basis that it was not in possession of a relevant asset.

(ix) If necessary, if the possession of the asset otherwise fell within the wording of s108, the First Agency Notice in this case (set out in paragraph 11(i) above) addressed "*any monies which may, at any time from the date of service of this notice be held by you for, or due by you to the said person, including but not limited to, pension, salary, wages or any other remuneration*", and the obligation of the recipient was restricted to the terms of the Notice and thus, if necessary, a lesser obligation than the terms of the section under which the Notice was issued would otherwise impose.

91. Professor Bakibinga's answers (coinciding with, although naturally much expanded upon, the evidence of Mr Kabatsi) are as follows (again I follow the same numbering):-

(i) While disagreeing with Mr Akunobera's suggestion that as a matter of Ugandan statutory construction taxation legislation should, at least in the event of ambiguity, be resolved in favour of the taxpayer, in any event his opinion (drawn not only from his involvement in the drafting of the ITA but from consideration of such sections of the ITA as s105 (referred to in paragraph 85(i) above)) is that there is no ambiguity, and that (as set out in paragraph 77 above) the Ugandan Courts would (and should) strive to construe s108 *aggressively* so as to assist in the recovery of tax due from non- residents. Mr Kabatsi's view as to the anticipated purposive construction by the Ugandan Courts (Transcript Day 6/195), and as set out in paragraph 39 above, was to the same effect.

(ii) S108 specifically addressed valuation, so that an amount *up to*, but no more than, the value of the asset could be recovered from the third party. There is no requirement for converting or accessing the asset

itself, provided that the *Agent* is in *possession* of an asset belonging to the non-resident taxpayer.

(iii) There is no definition in the ITA of *possession*, and the courts would construe *possession* broadly. Both he and Mr Akunobera referred to 'control' in this context. Professor Bakibinga also refers to *joint constructive possession*, which in his view applied to the Claimant and Defendant in this case in relation to the escrow account, which Mr Akunobera did not address.

(iv) The escrow account was indeed held to the Defendant's order, either so as to be paid over to the Defendant or to be paid out to URA on its behalf.

(v) Professor Bakibinga particularly founded, and the Claimant relied, upon the express provisions in s108(3) and (4), set out in paragraph 11(i) above, as illustrating the working of s108 as a whole. By virtue of those subsections, when a non-resident partner does not pay his personal tax, that tax may be recovered by way of a s108 Notice not just out of the assets of the partnership but *from the resident partner personally*. Similarly so in respect of a non-resident beneficiary (of a trust) who does not pay his tax, that tax may be recovered *from the trustee personally*. This is a very stringent provision, which clearly constitutes the resident partner and the resident trustee personally as *agent* of the non-resident, to pay out of their own assets, *up to* the value of the non-resident's tax debt.

It is no answer for the third party Agent (or partner or trustee) to assert that it cannot access or sell the asset belonging to the taxpayer of which it is in possession; but if it had no assets at all to pay then it could make application to the Court by reference to s108(6) and s99 of the ITA.

(vi) In any event, the Agent has an indemnity against the taxpayer -s108(5) does not simply render him indemnified, but constitutes the third party an agent, with an agent's rights and remedies, including the availability of court orders if necessary, to require the taxpayer to take steps to reimburse him (if necessary by release of the asset, although the Professor accepts that this might be more difficult if steps were required to be taken in a foreign jurisdiction and that foreign jurisdiction took the view that such steps would amount to the indirect enforcement of a foreign revenue debt). The partner within s108(3) and the trustee within s108(4) and indeed the captain of an aircraft or ship within s108(2) would be in the same position.

(vii) Professor Bakibinga was firmly of the view that Article 26 of the Constitution was inapplicable, because this did not constitute a *compulsory taking of property*: this was underlined by the fact, which Mr Akunobera was driven to accept, that on that basis s108(3) and s108(4) would be contrary to the Constitution (Transcript Day 11/208).

(viii) As to (viii), which does not appear to me to be central to the point I have to decide, I shall return to this in paragraph 93 below.

(ix) Professor Bakibinga did not accept that there was any concept of Ugandan law which could justify cutting down the ambit of s108 by reference to the terms of the particular s108 Notice, particularly where a copy of the section itself was attached to the Notice. However, even if that were so, on his analysis of the meaning of possession in s108(1), and in the context of (iii) and (iv) above, the contents of the escrow account were "*held by* [the Claimant] *for*" the Defendant.

92. I must remind myself of my task within the ambit of **MCC**. I find particularly persuasive, as to the express purpose of s108, the existence of subsections 108(3) and (4), not to speak of s108(2), so far as the intended breadth of the statute and its impact on non-resident taxpayers is concerned, I conclude that a personal liability to pay is imposed upon a recipient of a s108 Notice. In addition:-

(i) The use of s108 Notices against banks, discussed by Mr Sseketawa (as appears in paragraph 43 above) does, as to an extent Mr Akunobera in cross-examination by Mr Wolfson was driven to accept, argue for a wider concept of possession than the norm.

(ii) 'Accessibility' is a flexible concept – as Mr Akunobera again could not dispute when addressed in cross-examination by Mr Wolfson with the example of an asset of the taxpayer held by a third party consisting of a bond irredeemable for 5 years.

(iii) Particularly given that I accept the concept supported by Professor Bakibinga of the Agent's right of indemnity, the payment by the agent can be seen, much in the context of s105, and as discussed by Mr Sseketawa, as analogous to the provision of security for eventual payment by a non-resident, particularly given that the Notice is, as I have concluded, enforceable even while there is a pending appeal.

(iv) Much appeared, in Mr Akunobera's mind, to depend upon his "*understanding of 'possession', you must have effective control*" (Transcript Day 11/204). I prefer the opinion of Professor Bakibinga, and Mr Kabatsi, that possession, as to be construed in Ugandan taxation law, is not so limited.

93. As to the question of whether, as Mr Akunobera submits, the third party could, should or must apply to the court to challenge the Notice, Professor Bakibinga relied upon a decision of the Kenyan Court of Appeal in respect of identically worded tax legislation **BX v The Commissioner of Income Tax** 4 EATC (Pt.1) 234 for the proposition (at 238) that "*it is neither incumbent upon nor open to the person declared an agent*" under the similar legislation "*to inquire into the validity of the notice served upon him*". Although it is accepted that such a decision is regarded as persuasive in the Ugandan courts, Mr Akunobera pointed out that since 1965 there has been considerable development of the law of judicial review, and Professor Bakibinga accepted that there would now be a right for the agent to challenge such a Notice, either by way of judicial review or under s14 of the Tax Appeals Tribunal Act.

Having heard both the experts, I am satisfied that, whereas Professor Bakibinga is no longer right to say that it is not open to the Agent to challenge the Notice, there is nothing which has affected the conclusion that it is not *incumbent* on the Agent to make the challenge, particularly in the light, as the Claimant points out, of the risk of irrecoverable costs. In any event this is now immaterial, because I am now deciding, with the benefit of expert Ugandan law advice, what in my judgment a Ugandan Court would have concluded as to the validity of the First Agency Notice, by reference to the issue of the escrow account, and I resolve it in favour of the Claimant.

94. I turn to Issues 5 and 6, which arise out of the Second Agency Notice. The English lawyers had considered in January 2011 (paragraph 44(ii)) that s106 and s108 should be regarded as complementary, and consequently that debts falling within s106 could not also fall within s108. Both Ugandan law experts however, in harmony on Issue 5, disagree with that English lawyer's approach, so that it is agreed that prima facie the sums owed by the Claimant to the Defendant (referred to in paragraph 72(ix) above) can fall within the ambit of a s108 Notice and thus within the Second Agency Notice.

95. However a new point is raised by the Defendant (Issue 6), namely that a s108 Notice only applies to debts which are already owed to the taxpayer at the time of the service of the Notice, and not to debts falling due thereafter. This point has a chequered history. It was not considered at the time as a problem in the Mpanga/Kambona February Advice. The contrary was positively asserted by Mr Akunobera in his first expert's report at paragraphs 31.4 and 32.5. But, in the course of his oral evidence, Mr Akunobera made the point, and from an English lawyer's point of view it seems to carry some force. He pointed out the different wording of s106(1), whereby a Notice may require payment "*on the date set out in the Notice*" by a person who (a) ". . . *may owe*" (b) ". . . *may subsequently hold money*" (and similarly (c)), whereas s108 simply refers to any person *who is in possession of an asset*. The tense '*is*' does seem to me to carry with it the possibility of including *becomes*, by reference to the fact that there is no mention of the timing of the payment as there is in s106: but the fact is that there is a much greater clarity of wording in s106, although there is the problem of the need for a date in the s106 Notice.

96. I did not have the benefit of Professor Bakibinga's views on this, because the point was not put to him, as it was only raised by Mr Akunobera for the first time (and contrary to his original report) after the Professor had given his evidence, but I can see the force of the Defendant's case in this regard. However, since

    (i) 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:

    (ii) This argument does not affect the First Agency Notice, which depended entirely on the question of the escrow account:

    (iii) $9 million of the $30 million is in any event covered by the fact that the Second Agency Notice was also under s106 and it is due and payable, as an unpaid deposit (see Issue 3, paragraphs 87 and 88 above):

(iv) Some of the debts, possibly as much as the balance of $21 million (see paragraph 323 of the Claimant's Closing Submissions) were already owing by 2 December 2010:

In those circumstances I do not need to resolve this interesting question of Ugandan law.

97. The last possible point of difference between the two experts which I need to address related to the validity of the March 2011 Demand. It was common ground that the validity of that Demand would fall away in the event of invalidity of the two earlier Notices, but additionally Mr Akunobera took the point in his supplemental report that it was invalid by reference to s136(3) of the ITA, because the authority for waiving interest on unpaid tax lay with the Minister of Finance on the advice of the Commissioner of the URA. The 15 March Demand sent by the Commissioner Mrs Kagina was copied to the Minister of Finance, and I have no doubt that a Ugandan Court, whether by reference to satisfaction as to compliance with s136(3) or by reference to the 'substance not form' provision of s98(3) of the ITA, would be satisfied as to its validity.

The Defences

98. The Defendant relies on a number of pleaded defences, primarily by reference to the terms of the SPA, of which I have set out those that are material at paragraph 18 above. The second of these relates to the question of giving of notice, which arises if the claim by the Claimant is a *Tax Claim* (as defined in the SPA) which for these purposes I assume: if, as the Defendant asserts, the claim is not a Tax Claim, then the notice periods do not in any event apply. Article 7.5(a) requires that the Claimant give notice in writing of a Tax Claim to the Defendant within 20 business days. Both the First and Second Agency Notices recorded that the URA had sent a copy to the Defendant, thus giving it notice, but the Claimant itself did not give such notice. As for the First Agency Notice, it is clear from an internal email of 1 November 2010 received by both Mr Atherton and Mr Buckingham of the Defendant, headed up "*Tullow on the Rack*", that the Defendant knew of it by that date. As for the Second Agency Notice, the Defendant had plainly received it by the time when the Defendant's Ugandan lawyers sent the 29 December letter. The Claimant did give the requisite notice of the 15 March Demand.

99. It is plain to me that compliance with the Notice requirement of Article 7.5 is not a condition precedent to liability:

(i) Article 7.4, referred to in paragraph 16(iv) above, 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.

(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 the Claimant, 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 the Claimant.

(iii) Article 7.5 is not limited to sub-paragraph (a) but contains other provisions (as set out above) 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.

(iv) The Claimant refers if necessary to Article 15.7, set out in paragraph 19 above, which provides for the indemnity to survive a breach of duty (plainly including a contractual duty) by the Indemnified Party.

100. On the basis, which I have found, that Article 7.5(a) does not provide a condition precedent, but simply amounts to an obligation which, in the case of the First and Second Agency Notices, would have been breached, the question arises as to the consequence of those breaches, and it is plainly significant in that regard to take into account the Defendant's actions after they had knowledge of the Notices, and certainly in relation to the Second Agency Notice the content of that Notice. The issue is what the Defendant would have done had it received notice from the Claimant within the 20 day period:

(i) When they knew of the First Agency Notice and received the Second Agency Notice and the 15 March Demand, they took no steps pursuant to Article 7.5(b): the only step they took was to write the 29 December Letter, which may possibly (but certainly not clearly) have fallen within the general terms of a *reasonable request to dispute* the claim. In particular, and significantly, the Defendant took no such steps after receipt of the 15 March Demand and prior to the payment by the Claimant on 7 April 2011.

(ii) I have no doubt at all that, given the inordinate pressure which was being put on the Claimant by the GOU in the light of the various substantial unpaid tax assessment arising out of the SPA, and the real risk there was to the future of the Claimant's future investment and business in Uganda, they would have formed, indeed did form, the reasonable opinion that any action that might have been reasonably requested by the Defendant pursuant to Article 7.5(b) could not be required of them by reference to Article 7.6(b).

101. There is then the additional question of Clause 3.1(a) of the Supplemental Agreement, set out in paragraph 19(v) above. This is described as being "*notwithstanding any provision of*" the SPA (as opposed to constituting an Amendment to the SPA, as provided for in Clause 6). It seems to me clear that this does not replace, amend or substitute for the provisions of Article 7.5(b) and 7.6, but that 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. The clause however simply records that the Defendant "*has the right to conduct the Dispute*" (as defined in Recital (C) set out in paragraph 5 above), including all proceedings, arbitration etc. and confirms 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 Defendant. Whatever the Claimant

may have done (to which I shall refer below) in its own best interests of safeguarding its position, and in order to salvage its relationship with the GOU, and ensure that if it had to pay over the sums the subject of the two Agency Notices it was in the best position to recover them back, I am not satisfied that there has been a breach of Clause 3.1(a). Leaving aside the impact of Article 15.7 of the SPA, which survived, it is plain that the express terms of Clause 7.6(b) would not be overridden or prevailed over by anything other than the express terms of Clause 3.1(a), and no alleged implied term to be spelt out of Clause 3.1(a) has been articulated or is, in my judgment, arguable. The Defendant has retained the sole right and responsibility to conduct the Dispute, as defined, with the URA, and has done so both in the Tax Appeals Tribunal, and in the Arbitration, and now in the pending appeal in Uganda against the decision of the Tax Appeals Tribunal.

102. I am satisfied that the Claimant is not disentitled from seeking its indemnity by reference to Article 7.5(a). In any event it has retained its right in respect of the 15 March Demand, which I have concluded to be valid at Uganda law. In any case its failure itself to give notice in respect of the First and Second Agency Notices, in breach of Article 7.5(a) would have led to no loss, its right pursuant to Article 7.6(b) would have continued and did continue, and there would have been and was no breach of Clause 3.1(a).

103. Related defences arise out of the question whether there was any claim for an indemnity within the SPA. I have already addressed in paragraphs 66 to 70, and resolved in paragraph 74, above, the nature of the Defendant's case as to 'apparent validity' which arises out of the definition of *Tax Claim*, defined as being any claim, notice, demand etc. "*from which it appears that a liability for Taxes will fall on the Buyer*". In so far as it is necessary for the claim within Article 7.2 to be a Tax Claim, other for the purpose of the operation of the 20 day notice, I have already resolved that the claim made by all three of these Notices was 'apparently valid'. Even if the claims made were, as Mr Qureshi submitted, claims "*by way of execution remedy*", I am satisfied that they were claims for tax within the definition of *Tax or Taxes* ("*all forms of taxes, duties, imposts, charges, withholdings and levies in the nature of taxes . . . regardless of whether such taxes* [etc.] *. . . are 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*") within Article 7.2, *charged* to the Claimant *in connection with the Transaction*. However they were not, in any event, by way of an *execution remedy* since they imposed, as Professor Bakibinga has concluded, and as I have found at paragraph 92 above, a personal liability upon the Claimant *"up to the market value of the asset*". Insofar as, at one stage, it was going to be contended that questions of quantum of the tax assessments were to be argued, that was not pursued.

104. The next group of defences arise out of the way in which the Claimant acted in the light of the claims against it by the URA, based upon its assessments against the Defendant of more than $300 million. They are loosely described as *collusion*, but can be broken down as follows:

(i) It is submitted that there is, by analogy with the law on guarantees, a duty of good faith owed by the indemnified party, such that, in appropriate circumstances, that party can be disentitled from recovery under the indemnity by his conduct.

(ii) It is submitted that Article 7.2 should be so construed as not to apply except to a 'passive recipient'.

(iii) It is submitted that there have been breaches by the Claimant of Clause 3.1(a). I have already addressed this question, though without specific reference to the actions complained of by the Defendant.

The Claimant so far as necessary relies on Articles 7.6(b) and 15.7 addressed above.

105. As for the first of these, Mr Qureshi refers to two authorities relating to contracts of guarantee, **Bank of India v Patel** [1982] 1 Lloyds Rep 507 and **Dubai Islamic Bank PJSC v PSI Energy Holding Co BSC** [2011] EWHC 2718 (Comm). However the applicability to commercial contracts of indemnity of any equitable doctrines arising in the law of guarantee was decisively and persuasively rejected by Hart J in **Scottish & Newcastle Plc** (supra). I agree with him (his decision was upheld by the Court of Appeal and the House of Lords, but this point was not reconsidered). With regard to the suggested construction of Article 7.2, that an indemnity is not available to anyone who is not a passive recipient, particularly without the interposition of equitable concepts such a construction appears to me to be completely unarguable: and especially so where, as in this case, there is not only the safeguard for the Indemnified Party acting in his own best interests provided by Article 7.6(b), but in particular Article 15.7, which positively provides for the indemnity to remain *irrespective of* (effectively) the Claimant not being a *passive recipient*: the Claimant points to the operation of an identical clause to Article 15.7 in **Acergy Shipping Ltd v Société Bretonne De Reparation Navale SAS** [2011] EWHC 2490 (Comm).

106. The use of the word *collusion* derives from a speaking note made by Mr O'Hanlon of the Claimant, preparatory for the September meeting with the President, to meet the suggestion forcibly being made by the GOU that the Claimant had colluded with the Defendant in order to avoid the tax payable on the purchase. Mr O'Hanlon's defensive words were:

"*We are only guilty of colluding with GOU against Heritage.*"

The context is obvious in relation to the desperate attempts by the Claimant, faced with potential economic disaster in Uganda, to persuade the GOU not to punish it for what were seen to be the misdeeds of the Defendant and when, as discussed in paragraph 101 above, the SPA itself foresaw that there would be circumstances in which the Claimant was required to act in its own interest and not in the interests of the Defendant (Article 7.6(b)).

107. The following seems clear:

(i) It is plain, as I stated in paragraph 72(vii) above, that the Claimant was as surprised as the Defendant that a s108 Notice was served by the URA (they had anticipated a s106 Notice). Accordingly, it was urgent for them to ensure that, if they were required to pay up, it was essential that the URA and the Defendant locked properly into the resolution of the liability for tax of the Defendant to the URA, as the Claimant believed (after obtaining legal and accountancy advice) was likely to be the case. The Claimant did not want to, and could not, take the risk

that the Defendant could avoid its capital gains tax obligations to the URA.

(ii) The Claimant supplied to the URA the tax advice which they had received from PricewaterhouseCoopers that the Defendant was indeed liable. While trying (unsuccessfully) to persuade the GOU not to insist on handover of the $283 million, or at any rate to receive it only by way of returnable security, and desperately seeking to persuade the GOU to back off on the commercial pressure, in relation to its refusal to approve the purchase for which it had already paid, and to sanction further oil fields, they communicated to the URA a "*strategy*" to assist them in putting forward the best arguments to ensure success in recovering the tax claimed from the Defendant (including involvement in the drafting of the URA's Objection Decision).

(iii) Once the URA had served the Second Assessment Notice for $30 million, the Claimant anticipated and expected the Second Agency Notice.

(iv) As part of the documentation being prepared and agreed for the Memorandum of Understanding, intended to resolve all the issues between the GOU and themselves, the Claimant itself drafted the terms of the March Demand, which was needed to avoid interest running on the first two Notices.

In the course of this it is apparent that the Claimant became increasingly irritated with, and critical of, the Defendant, at having left them 'holding the baby', and at risk of enormous losses.

108. Having considered the facts fully in this case, even if, contrary to my conclusion, Clause 3.1(a) fails to be construed so as to include some implication, I do not consider that the Claimant was in breach of it, nor that the Claimant is disentitled to claim its indemnity.

109. The last of the Defendant's defences to the contractual indemnity is a novel one, recently pleaded and not supported by any authority. It is pleaded that the Claimant is not entitled to an indemnity under Article 7.2, as it obtained *valuable benefits* when it made its payment to the GOU. This arises from the fact that the payment was made by the Claimant at the same time as it finally persuaded the GOU to back off from the economic pressure that had been imposed by the GOU, by its refusing its approval to the sale and to the other licences for which the Claimant wished to apply. It is not pleaded as a set-off – that the Claimant must offset, or give credit for, any sums/benefit it received from the GOU, when it paid over the monies – but as a disentitlement. Mr Qureshi's answer to that was that the Claimant could have pleaded a riposte to indicate what if any benefit they had received, so as to admit a set-off, but that is no answer:

(i) The Claimant's claim is in debt, not damages; no question of credit or mitigation arises.

(ii) It is for the Defendant to assert - and this only emphasises the difficulty – what the benefit is that it is alleged was given in consideration for (if such is the allegation) the indemnity, which will then need to be tested on the ground not only of causation but also materiality, to enable the court to decide whether on the facts the amount of relevant benefit (i) should be taken into account (ii) should disentitle the indemnity.

110. The argument can only be mounted by asserting, as with the *passive recipient* contention, an implied limitation, by means of construction, into the wording of Article 7.2: and it would inevitably interfere with the straightforward concept of indemnity. The defence is in my judgment unarguable.

111. Accordingly in my judgment the Claimant's claim for an indemnity in respect of its payment to the GOU on 7 April 2011 pursuant to Article 7.2 of the SPA succeeds in contract, and I shall need to be addressed on the consequential matters such as the destination of the sum remaining in escrow.

Restitution/Unjust Enrichment

112. The Claimant's alternative claim only arises if it does not succeed in contract, as I have concluded it does. In principle the necessary ingredients of a claim for unjust enrichment would be proved, by reference to my findings of fact so far as concerns a payment made under legal compulsion, but by virtue of the agreement between the parties set out in paragraph 16(i) above I would have left over the issue as to whether the payment was on account of a debt owed by the Defendants (as presently found by the Tax Appeals Tribunal) such that the Defendant's payment discharged the Claimant's liability.

113. The only circumstances that would have arisen for a need for me to consider this alternative claim would be if I had concluded that one of the Defendant's defences, discussed in paragraphs 98 to 110 above, had prevented recovery under the SPA. In those circumstances Mr Qureshi would submit that the fact that indemnity was prevented by the terms of the contract would also inhibit recovery in restitution. This proposition, drawn by Mr Qureshi from the judgment of Cooke J in **Taylor v Motability Finance Ltd** [2004] EWHC 2619 (Comm) has been criticised in **Goff & Jones** (8th Ed) at paragraphs 3.12 and 2-84, where the opposite conclusion is reached, in **Mitchell, The Law of Contribution and Reimbursement** paragraph 13.06, and particularly is inconsistent with the subsequent decision of the Court of Appeal in **McCarthy v McCarthy & Stone Plc** [2008] 1 AER 221 CA (per Morritt C at 38-39). But in the event I do not need to resolve this question, as I have found that the indemnity is not prohibited by the terms of the contract.

114. The Defendant again raises the novel *valuable benefits* defence, which is again submitted by the Claimant to be misconceived, not least in this respect because the concept of unjust enrichment focuses not on what has been received by a Claimant but upon the enrichment of a Defendant; but again I do not need to resolve the point.

115. Finally, there would have been a separate defence to the restitutionary claim, not pursued in respect of the contractual claim, that to give such restitution would offend against the concept that the English courts will not indirectly enforce a foreign revenue law. This too was a late and recent amendment. It has resulted in an

exchange of authorities, particularly in relation to the Claimant's answer, that the Irish case of **Peter Buchanan Ltd v McVey** [1955] AC 516 (Note) relied upon by Mr Qureshi was restricted to its own facts when considered in the **Government of India v Taylor** [1955] AC 491 and **Williams & Humbert v WNH Trademarks (Jersey) Ltd** [1986] 1 AC 368, and as applied in **Air India Ltd v Caribjet Inc** [2002] 2 AER (Comm) 76, such that, as the Claimant submits, the Court would only find a claim by a (foreign) company to be an attempt at indirect enforcement of a foreign state's revenue laws if (i) such company is in liquidation (ii) its sole creditors are the revenue authorities of that state, (iii) those tax demands remain unsatisfied and (iv) the proceeds of the company's claim will (apart from those recoveries used to satisfy the costs of proceedings) be paid to the foreign revenue authorities – effectively where, as described by Simon Brown LJ in **QRS 1 ApS v Frandsen** [1999] 1 WLR 269, the foreign claimant company is a "*nominee*" for the foreign revenue authorities. None of that would apply here, and I am satisfied that such defence would not have availed the Defendant even if I had needed to consider the issue of restitution, which, as I have indicated, I have not.

Counterclaim

116. I am satisfied that there has been no breach of Clause 3.1(a), and in any event no loss suffered by the Defendant by virtue of any breach of that clause or of the notice provision in Article 7.5(a).

Conclusions

117. Accordingly I give judgment for the Claimant against both Defendants (see paragraph 16(ii) above) and will give any further directions required.