Neutral Citation Number: [2024] EWHC 3146 (Comm)

Case No: CL-2022-000338

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 December 2024

**Before** :

**The Honourable Mrs Justice Dias**

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**Between :**

**(1) TAQA BRATANI LIMITED**
**(2) TAQA BRATANI LNS LIMITED**
**(3) SPIRIT ENERGY RESOURCES LIMITED**

**Claimants**

**- and -**

**(1) FUJAIRAH OIL AND GAS UK LLC**
**(2) ROCKROSE ENERGY LIMITED**
**(3) VIARO ENERGY LIMITED**
**(4) VIARO INVESTMENT LIMITED**
**(5) FRANCESCO MAZZAGATTI**
**(6) FRANCESCO DIXIT DOMINUS**

**Defendants**

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**Mr David Allison KC and Mr Niranjan Venkatesan** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimants**
**Mr Jonathan Nash KC and Mr Daniel Hubbard** (instructed by **DAC Beachcroft LLP**) for the **Second to Fifth Defendants**

Hearing dates: 7-10, 14-17, 21, 29-30 October 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 6th December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Mrs Justice Dias:**

**The Honourable Mrs Justice Dias:**

## INTRODUCTION

1. This dispute has its origins in a joint venture partnership between (amongst others) the Claimants and the First Defendant ("**UKCS8**") relating to the operation of various oil and gas fields in the Brae complex in the North Sea. More specifically, it concerns a dividend of US$84 million declared by UKCS8 in favour of its then parent, the Second Defendant ("**RockRose**"), on 24 December 2020 before immediately thereafter being sold for US$1 to a wholly state-owned UAE entity, Fujairah International Oil & Gas Corporation ("**FIOGC**"). On 8 February 2023, the company was wound up following the presentation by the Claimants of a winding-up petition on 16 December 2022 in the wake of default judgments for sums exceeding £35 million entered against UKCS8 on 13 April 2022.

2. By this action, the Claimants effectively seek to reverse the payment of the dividend under sections 238 and/or 423 of the Insolvency Act 1986 (the "**Act**"), alternatively by means of a claim for damages for unlawful means conspiracy. Their case is that UKCS8 was insolvent within the meaning of the Act when the dividend was declared (or became so as a result of the dividend) and that the sale to FIOGC was executed the day before the company would have gone into default under the joint venture arrangements. They submit that the transaction was part of an asset-stripping exercise designed to extract all value from the company before removing it from the RockRose group prior to an inevitable default, with the purpose of putting its assets beyond the reach of its creditors and thereby benefitting the Defendants.

3. The Defendants challenge any such suggestion. It is their case that the sale of UKCS8 to FIOGC was undertaken in good faith in order to resolve an irreconcilable difference regarding the operation of the joint venture which had arisen between, in particular,

RockRose and UKCS8 on the one hand and the First and Second Claimants (collectively "**TAQA**") on the other. They assert that they reasonably believed at all times that the sale was in the best interests of UKCS8 since the joint venture was otherwise effectively deadlocked. FIOGC had undertaken to stand behind and support the company and there were good prospects that it would be able to improve the relationship with TAQA so as to enable operations to continue more smoothly, and eventually even sell the company to TAQA. The company was being sold cash and debt-free, and the declaration of the dividend was simply an essential precursor to the sale in order to clear a hitherto unappreciated inter-company balance which had come to light late in the day. There was no question of, as the Claimants alleged, "dumping" UKCS8 in the certain knowledge that it would thereafter default on its obligations.

## THE PARTIES AND THE JOINT VENTURE AGREEMENTS

4. UKCS8 is a company incorporated in Delaware which, until 1 October 2020, was the Operator under the joint venture partnership referred to above. The other partners were TAQA, which is ultimately controlled by the Government of Abu Dhabi; the Third Claimant ("**Spirit**"), and JX Nippon Exploration Production UK Limited ("**JX**", now known as NEO Energy Petroleum Limited). JX is not a party to these proceedings.

5. RockRose is a wholly owned subsidiary of the Third Defendant ("**VEL**"), which in turn is wholly owned by the Fourth Defendant ("**VIL**"). All three are UK companies comprising the Viaro group which is controlled and effectively wholly owned by the Fifth Defendant, Mr Francesco Mazzagatti, a self-employed businessman and entrepreneur. Thus, Mr Mazzagatti is the director/CEO and a 97% shareholder of VIL[1] and a director of both VEL and RockRose. The Sixth Defendant, Mr Francesco Dixit Dominus is the director/CFO of

[1] The remaining 3% shareholding is held by his former wife.

both VEL and RockRose. Until its sale to FIOGC, both gentlemen were also directors of UKCS8. RockRose was acquired by the Viaro group in 2020.

6. The Brae complex is an infrastructure hub in the North Sea consisting of various oil and gas fields each feeding back to a production platform. Of relevance to the present proceedings are the following, referred to as the "**Brae assets**":

   (a) The Brae Alpha platform which received production from the South Brae, West Brae and Central Brae fields (part of Block 16/7a); and

   (b) The East Brae platform which received production from the East Brae field (Blocks 16/3a and 16/3b) as well as from the Braemar field (Block 16/3c) and the Devenick field, the latter being operated by a third party.

7. Each of the joint venture participants held a licence to search and drill for petroleum in the North Sea granted by the Oil and Gas Authority ("**OGA**" – now known as the North Sea Transition Authority). The licences were subject to various conditions, including a statutory obligation to submit and, in due course, execute a decommissioning programme. The costs of decommissioning an oilfield and/or platform are high and can frequently exceed the anticipated revenue from the relevant fields as they near the end of their productive life (referred to as the Cessation of Production or "**COP**" date). A key feature of conducting North Sea operations is that participants must provide security for the estimated costs of decommissioning in an amount updated on an annual basis.

8. In the present case, the exploitation of the Brae assets was governed by the following agreements:

   (a) Petroleum production licences granted to each of the joint venture participants;

(b) Three joint operating agreements:

(i) The 16/7a Joint Operating Agreement (the "**16/7a JOA**" covering, among others, the South Brae, West Brae and Central Brae fields, all of which produced to the Brae Alpha platform);

(ii) The Braemar Joint Operating Agreement (the "**Braemar JOA**" covering the Braemar field which produced to the East Brae platform); and

(iii) The East Brae Unitisation and Unit Operating Agreement (the "**East Brae UUOA**") covering the East Brae field which also produced to the East Brae platform;

(c) Two Decommissioning Security Agreements ("**DSA**"s):

(i) An Amended and Restated Decommissioning Security Agreement relating, *inter alia,* to Block 16/7a (the "**Brae Alpha DSA**"); and

(ii) An Amended and Restated Decommissioning Security Agreement relating to Blocks 16/3a and 16/3b (the "**East Brae DSA**").

9. Operatorship of a joint venture such as this works on a principle of "no gain no loss", meaning that the Operator should make neither a profit nor a loss out of its position. The Operator is therefore entitled to invoice each participant for its proportionate share of the costs and expenses of operations under the JOAs.

10. Under the JOAs, one of the tasks of the Operator is to produce an annual Budget and Management Plan ("**BMP**") setting out the work plan and budget for the forthcoming year as approved by an Operating Committee made up of representatives from each partner. The BMP also sets out information about longer-term strategy for the development of the assets accompanied by an economic analysis, which includes calculations as to the remaining life

of the fields and the estimated COP dates. A preliminary BMP must be issued by 1 August each year which is then the subject of discussion with and challenge by the other partners. A final version must be submitted by 15 October for approval by no later than 15 December.

11. The Operator is also required to compile an annual Proposed Decommissioning Plan setting out the decommissioning budget and schedule and calculating the amount of security (often referred to as "**DSA security**") required to be posted that year. The bulk of decommissioning costs are incurred at the stage of plugging and abandoning a well, removing the infrastructure and then dismantling it onshore and arranging for its reuse, recycling or disposal. Further costs are incurred in relation to site remediation and subsequent monitoring. The industry approach to decommissioning has become standardised over time and typically involves a "glide path" commencing about 5-7 years before the anticipated COP date so as to allow time to establish the most economic and efficient way of carrying out the various decommissioning activities and ensuring that the necessary equipment can be procured at the right times. The purpose of putting DSA security in place is to ensure that the decommissioning costs will in due course be met as and when they are actually incurred.

12. The Proposed Decommissioning Plan had to be produced by 30 June each year and is based on the COP dates and other assumptions set out in the issued BMP. By 1 October, the Operator must issue each participant with a Provision Invoice setting out its share of the required DSA security. Partners then have the choice of either providing security by 1 December in a form which constitutes "**Alternative Provision**" as defined under the DSAs or, failing that, paying the relevant amount in cash to the DSA Trustee (in this case Law Debenture Trust) by 15 December.

13. Pursuant to the DSAs, failure to satisfy a Provision Invoice by making Alternative Provision or paying cash by the due date triggers a notice to remedy the default within five working days. Where the default is not so remedied:

    (a) The defaulting party can be formally placed in default by issue of a Notice of Default;

    (b) The non-defaulting parties become obliged to make good the amount of the shortfall in security and to pay the defaulting party's share of operational expenses thereafter on a continuing basis with a corresponding right of indemnity against the defaulting party;

    (c) After six working days, the defaulting party loses its entitlement to lift its share of extracted petroleum and, in certain circumstances, the non-defaulting parties become entitled to lift and own that share in its place.

14. Following a Notice of Default, the defaulting party is given a further 60 days to remedy the default. Thereafter, each non-defaulting party acquires the right (subject to the consent of the relevant statutory authorities) to forfeit and acquire the defaulting party's interest in the relevant JOA and associated licence.

15. All relevant deadlines are capable of extension by agreement. Such agreement requires the consent, not only of the current parties to the joint venture, but also of any second-tier participants, i.e., parties who have previously held an interest in the field and are potentially subject to decommissioning liabilities in certain circumstances.

16. With regard to COP dates, two distinctions should be borne in mind:

    (a) Technical COP is when a field effectively stops producing because it is technically impossible to extract further hydrocarbons from it. This is not necessarily the same as

economic COP which is reached when net pre-tax cash flows from the field (excluding abandonment costs) become negative.

(b) The fact that a particular field reaches its COP date does not necessarily mean that the associated platform has also reached the end of its economic life, since the latter may continue to be fed by other economically productive fields.

17. The key is to find a balance between safely maximising revenue for as long as possible while at the same time being prepared to decommission quickly if necessary. It is therefore immediately apparent that the amount of DSA security required in any particular year is very much dictated by the anticipated COP dates which in turn depend on an economic assessment driven by anticipated production flows or "profiles", as well as anticipated fluctuations in prices, costs, exchange rates and interest rates. Calculations of the security required can therefore vary significantly from year to year.

## WITNESSES

18. Before turning to the factual background, it is appropriate to say something about the witnesses. I heard evidence on behalf of the Claimants from Ms Laura Wiseman, Commercial Lead for TAQA since 1 October 2020, and Mr Iain Anderson who has been an Asset Manager with an affiliated company of Spirit since early 2019 with responsibility for the Brae assets among others.

19. Both witnesses gave evidence in a straightforward manner and were careful and fair in their answers. I therefore accept them as witnesses of truth. However, on her own admission, Ms Wiseman's involvement in the Brae area was relatively limited until early October 2020. Even then she was not part of the leadership team and was not involved in or responsible for TAQA's decisions on crucial issues. Those who were more closely

involved and who might have been able to give the court greater assistance were Mr Donald Taylor, TAQA's Managing Director, Mr Iain Lewis, the Finance and Decommissioning Director and, in particular, Mr Alexander (Sandy) Hutchison, the Legal, Commercial and Business Services Director. However, despite there not being any obvious impediment to calling them, none of these gentlemen was produced as a witness before the court. I note that Robin Knowles J in the pensions liability litigation referred to below likewise commented on the fact that Ms Wiseman had been called as a witness before him rather than those who might have been able to throw most light on events. I note also that in the further litigation referred to below before HHJ Pelling QC (as he then was), Mr Hutchison's evidence was treated with great caution by the judge.

20. While Mr Jonathan Nash KC, who appeared with Mr Daniel Hubbard on behalf of the Defendants, did not invite me to draw any adverse inferences as such from the absence of Mr Hutchison – indeed it would be unfair for me to do so, particularly without having had the opportunity to assess Mr Hutchison's creditworthiness for myself – it is a fair comment that the evidence on certain matters (particularly TAQA's thinking on COP dates and their attitudes at leadership level) was far from complete.

21. A similar criticism was made by Mr David Allison KC, who appeared with Mr Niranjan Venkatesan on behalf of the Claimants, in relation to the absence of witnesses on the Defendants' side, in particular, Mr Mann and Mr Slape who were the CEO and CFO respectively of RockRose at the relevant time. However, since both gentlemen currently work for a competitor company and since the contemporaneous documents suggest a somewhat uneasy relationship with both of them, I find this less surprising.

22. On behalf of the Defendants, I heard oral evidence from Mr Mazzagatti, Mr Dixit Dominus, Mr Graham Taylor, the Head of Growth and Technical at RockRose, Mr Jenkins, the

current non-executive Chairman of VEL, and Mr Dilmurod Nurmatov, the Group Finance Manager of the Viaro Group.

23. The Claimants accepted that Mr Taylor, Mr Jenkins and Mr Nurmatov were witnesses of truth who were honestly trying to assist the court to the best of their ability. However, they launched a full-frontal attack on the credit of both Mr Mazzagatti and Mr Dixit Dominus.

24. Mr Mazzagatti was cross-examined hard for some 2½ days. While he is extremely proficient in the English language, it is not his native tongue and he plainly struggled to understand some of the lengthier questions put to him. Since these were frequently couched in double negatives, it is unsurprising that some of the nuances may have been lost on him and I bear that in mind in my assessment of his evidence. Nonetheless, once he had understood the questions put to him, he answered them directly and concisely. He was not argumentative and accepted much of what was put to him by Mr Allison without prevarication or demur albeit he stood his ground where he felt it appropriate to do so.

25. He did not recall the precise details of every event about which he was questioned. Nor, for example, had he kept any valet car parking tickets from the occasions on which he claimed to have had meetings in the UAE in November/December 2020. This is hardly surprising and I do not hold it against him. I likewise do not criticise him for failing to remember, without sight of the document, the precise number of a particular clause in a lengthy agreement.

26. More importantly, I found his evidence consistent throughout and consistent with the contemporaneous documents. I will have to deal in more detail below with certain aspects of his thinking, but it is relevant to bear in mind that he was obviously a highly successful businessman with an entrepreneurial mindset who was willing to take risks. Very often the reason such businessmen are successful is because they have an independence of view

which does not necessarily conform to any market consensus. This is particularly relevant in relation to his views in 2019 and 2020 as to the future movement of oil prices – a matter on which he was cross-examined at length and which Mr Allison sought to deploy as fatally undermining his credibility overall.

27. In very brief outline, Mr Mazzagatti's written and oral evidence to the court was that in February 2020 he expected that oil prices would bounce back from their currently depressed levels to potentially as much as US$100 per barrel. By December 2020, his view was that they would reach US$100 per barrel in 2021 and US$120 per barrel in 2022 before declining to around US$90 per barrel in 2023. It was put to him that these expectations were way out of line with the views of market analysts at the time and could not have represented a genuinely held belief at the time. Rather, it was suggested, his evidence had been invented *ex post facto* in order to provide spurious justification for the Defendants' case, and that if he had genuinely held these views, he would have disclosed them to the various advisers who were involved from time to time and to the RockRose management when discussing the acquisition of RockRose by Viaro.

28. I regard the latter submission as unreal. As Mr Mazzagatti said with considerable plausibility, he would hardly have disclosed to a target company his belief that it might be worth more than was being asked for it. As far as the analysts and advisers were concerned, these were all regulated companies who would naturally be expected to present the prevailing market consensus. There was no particular reason for Mr Mazzagatti to reveal to them his private thinking that actually things might turn out better than the market supposed. Indeed, there is force in his evidence that if his true beliefs had been in line with the prevailing market view, the purchase of RockRose made no financial sense whatsoever. Undoubtedly, Mr Mazzagatti's expectations were markedly more optimistic than those of

the market. However, they were supported by his experience as an oil and gas trader and it was difficult to fault his underlying logic. This was that demand would bounce back once the pandemic ended, as it assuredly would one day, and further that worldwide production would decline during the pandemic as a result of under-investment thereby leading to an under-supply when demand eventually recovered, which would push prices higher still. Even accepting that no-one in 2020 could have foreseen the Ukraine war and its impact, nothing has occurred to suggest that his reasoning was flawed.

29. Having heard Mr Mazzagatti give evidence, I accept that his views were genuinely held and that he was not lying to the court. In my judgment neither this nor the other specific criticisms which the Claimants made of his testimony undermine his credibility.

30. As for Mr Dixit Dominus, his English, although good, was not as proficient as that of Mr Mazzagatti and he too had difficulty in following some of the questions he was asked. Nonetheless, he answered fairly and frankly and accepted propositions put to him straightforwardly. Again the Claimants made specific criticisms of his evidence but many of these can be attributed to a misunderstanding of precisely what he was being asked and in so far as he was reticent about disclosing details of his remuneration in open court, this is a diffidence which many people would share. To the extent that any of these criticisms are well-founded, I do not regard them as fundamentally undermining his evidence.

31. So far as experts were concerned, I heard expert evidence of Delaware law from Professor Lawrence A. Hamermesh on behalf of the Claimants and Mr R. Jason Russell on behalf of the Defendants. Both were impressive and knowledgeable witnesses who were in substantial agreement on all save two points where they concurred that there was no conclusive authority in Delaware law. I have no hesitation in accepting their evidence as representing their honest opinions on the matters in issue.

32. Both parties also called evidence from financial experts: Mr Navin Waghe, a Senior Managing Director of FTI Consulting, for the Claimants and Mr Matt Fritzsche, a partner in the Forensic & Integrity Services Department of EY for the Defendants. Mr Waghe and Mr Fritzsche agreed about many things, but they disagreed about others. Although the Claimants criticised certain aspects of Mr Fritzsche's evidence, I regarded many of these criticisms as misplaced. Certainly, they do not in my judgment affect the coherence or credibility of his views as such. Whether I prefer his views to those of Mr Waghe on the critical points is, of course, a different question which will be discussed as necessary in relation to the issues.

33. Finally on the evidence, the Claimants were critical of the Defendants' disclosure and the fact that various documents had either not been disclosed or had only been disclosed late. None of these criticisms led to any disclosure application and in no case was it apparent to me that the Defendants had failed to produce a document which was both relevant and available and which it would have been proportionate to search for and disclose. I was not persuaded that the absence of any of these documents prevented the court from having a sufficiently complete picture of events or that, to the extent there were any gaps, this should be held against the Defendants.

## FACTUAL BACKGROUND

34. The following account of the background is largely uncontroversial but where particular matters were contested, it represents my findings on the evidence.

### The acquisition by RockRose

35. UKCS8 was originally owned by Marathon Oil Corp and had been the Operator of the Brae assets under the joint venture agreements from the outset. In July 2019, it was acquired

from Marathon by the RockRose group, whose senior management included Andrew Austin (Executive Chairman), Peter Mann (CEO) and Richard Slape (CFO). TAQA itself had also unsuccessfully attempted to acquire the company at that time, motivated not only by a desire to take over as Operator but almost certainly also by UKCS8's significant tax paid history of over £1.4 billion which could be utilised to offset (at least in part) future decommissioning liabilities. It is clear that the relationship between RockRose and TAQA following the acquisition was poor and that there was bad blood between them.

36. Even before the acquisition, however, TAQA had expressed concerns about UKCS8's operatorship and following the announcement in February 2019 of the acquisition by RockRose these concerns were heightened by doubts about RockRose's financial strength and lack of experience. On 6 June 2019, after TAQA had undertaken to indemnify Spirit and JX against the costs of changing operator, the other Brae partners voted unanimously to terminate UKCS8's appointment as Operator and termination notices were served on 1 July 2019 prior to the completion of the RockRose acquisition. The validity of the termination notices was challenged by UKCS8, but following an expedited trial in December 2019 (the "**Operator litigation**"), it was held by HHJ Pelling QC that they had been validly served. In the event, this meant that TAQA would replace UKCS8 as Operator on 1 October 2020.

**The 2020 BMP and the emergence of the strategic disagreement**

37. As Operator, UKCS8 had been working towards maximising economic recovery from the Brae assets and had identified five new potential development wells in the Brae fields which would extend the life of the Brae Alpha platform. These comprised:

(a) two new wells in the West Brae Field – WPGZ and WPOZ (the "West Brae wells");

(b) two new wells in the South Brae Field (A47 and A5) and one further new well in the Central Brae Field (CPQ) – collectively the "Development Wells".

38. On 15 October 2019, UKCS8 issued the final BMP for 2020 which recommended pursuing all five wells. The budget included the associated capital expenditure required in 2020 and, on a contingent basis, the additional expenditure which would be required in 2021. The COP date for the Brae Alpha platform was estimated as 2027 taking account only of the West Brae wells (potentially later if commodity prices proved favourable) or 2030 based on all five wells. So far as East Brae was concerned, the East Brae field itself was nearing the end of its life and technical COP was anticipated at the end of 2021. However, the anticipated COP date for the East Brae platform was the end of 2023 because of continuing production from the Braemar and Devenick fields tied back to it.

39. Drilling of the West Brae wells commenced in late 2019. WPGZ was successful and delivered the anticipated volume of hydrocarbons. The drilling at WPOZ, however, whilst technically successful, only revealed a smaller column of oil than expected with the result that it was not considered economic to continue and it was agreed that the well should be plugged and abandoned.

40. The Development Wells were discussed between the Brae partners at a number of Technical Committee Meetings. CPQ was a particular subject of discussion because it presented specific technical challenges, being an "extended reach" well some distance from the platform. Nonetheless, in January 2020 the technical teams agreed the design for the wells, and the partners approved the expenditure for the long-lead items and engineering work necessary for the rig upgrade that would be required on the Brae Alpha platform, albeit on the basis that the costs of actual drilling should be subject to specific Authorisation for Further Expenditure ("AFE") from the partners.

41. Following the mixed success of the West Brae wells, TAQA began to express concern about the projected COP dates and the economic case for pursuing further development. By this time, the global pandemic had also taken hold causing a collapse in oil prices. It was clear that these developments would have to be taken into account when drawing up the draft 2021 BMP for discussion later in 2020.

42. By June 2020, however, a stark conflict between UKCS8 and TAQA had emerged regarding the strategy to be adopted by the joint venture in relation to the Brae assets. On 25 June 2020, an Operating Committee Meeting took place at which they were described by Ms Wiseman as being at "loggerheads". Mr Mann who attended the meeting on behalf of RockRose insisted that the 2021 BMP should include the three Development Wells, while Mr Ian Lewis of TAQA took the view that the BMP should start from a base case of No Further Investment ("NFI") and a COP date for Brae Alpha of 2023. The analysis presented by UKCS8 suggested that the economic case for pursuing the Development Wells was positive, despite the impact of Covid and the currently depressed oil prices, and that if all three wells were included the COP date was either 2027 or 2030 depending on which price analyst's assumptions were adopted. It is clear from the minutes of the meeting and internal contemporaneous correspondence that TAQA's insistence on excluding the Development Wells (with a corresponding advance of COP date) was driven at least in part by a desire to increase the amount of DSA security that UKCS8 and the other partners would have to post and to accelerate decommissioning so that it could align its decommissioning programme across all its North Sea assets.

43. On 31 July 2020, UKCS8 issued its preliminary BMP for 2021 which included the Development Wells. TAQA refused to approve it, but Spirit was supportive of Mr Mann's proposal to continue to include capital expenditure for the Development Wells in the 2021

BMP (as had been the case in the previous year) subject to specific AFEs before any costs were actually incurred and on the basis that the wells would meanwhile be kept under review while planning for decommissioning proceeded in parallel.

**The acquisition by Viaro**

44. Meanwhile, in February 2020, Mr Mazzagatti had approached the management of RockRose with a view to buying the RockRose group and its interests in the North Sea. As he explained, Mr Mazzagatti's first business enterprise was a logistics business which he had established in Italy in 2004 at the age of 18. This diversified into the Middle Eastern export market and is still operating. He also started trading in chemicals from the UAE and in 2012 established the Napag group focusing on oil and chemical trading. By 2018, the turnover of the Napag group had risen to US$615 million.

45. In 2019, as part of a further strategic diversification, he began to investigate the acquisition of a company with assets in the upstream oil and gas production industry, ideally in the North Sea which he perceived as having a low geopolitical risk compared to other oil and gas producing countries. In 2019, he incorporated VIL as a holding company in the UK with a view to investing in upstream assets and on 19 February 2020, he incorporated VEL. His aim was to enter the North Sea and grow the business into a leading mid-sized oil and gas producer with a long-term production target of over 100,000 bbl per day. He therefore wanted a controlling stake in any target company.

46. Towards the end of 2019, Mr Mazzagatti approached financial advisers with a view to identifying a suitable target for acquisition, and through Lambert Energy Advisory ("**LEA**") he was introduced to RockRose and Tailwind. Tailwind was only offering a minority stake which was of no interest to him and his attention therefore focussed on RockRose. At this time RockRose had a number of subsidiary companies, some of which

held assets in the UK and the Netherlands but some of which were non-producing. One of those subsidiaries was UKCS8 which held the RockRose group's interests in the Brae assets. RockRose also held assets in other North Sea fields through different companies and had already signed Heads of Terms to acquire SSE plc's UK North Sea business which would add further production assets to its portfolio. This aligned with Mr Mazzagatti's strategy which was very much focused on growth.

47. Mr Mazzagatti accordingly entered into discussions with RockRose in about February 2020. At this time, its share price stood at around £20 per share and oil prices were at around US$60/bbl. After the pandemic took hold, however, the share price dropped sharply to some £8 per share while the oil price collapsed to below US$20/bbl. Notwithstanding this collapse in oil prices, Mr Mazzagatti's evidence (which I accept: see paragraphs 27-29 above) was that once the pandemic was over, oil prices would recover to potentially as much as US$100/bbl.

48. Despite the currently depressed prices, Mr Mazzagatti believed that the fundamentals of the business were sound and, as RockRose was still willing to consider a sale despite the drop in its share price, discussions continued. Viaro engaged Hannam & Partners ("**Hannam**") to conduct financial due diligence into RockRose and DAC Beachcroft ("**DACB**"), its solicitors, to carry out legal due diligence. It is not in dispute that Viaro intended to use RockRose's own unrestricted cash to fund part of the acquisition cost, and a report provided by Hannam on 16 June 2020 noted that covenants in the surety bonds covering RockRose's existing DSA security might delay or restrict the ability to extract cash from RockRose for this purpose. Accordingly, they noted the importance of Viaro having plans in place to provide cash to repay any bridging loan or fund any shortfall. In relation to decommissioning, the report contained a timeline showing decommissioning for

Greater Brae in 2030 and setting out the surety bonds currently in place for East Brae (Liberty - £25 million and Swiss Re - £19.349 million). No mention was made of any existing DSA security in relation to Brae Alpha or of any need to post such security. While Mr Mazzagatti was aware that RockRose had arranged security bonds at a group level and that these would need to be renewed in December 2020, I accept his evidence that he did not know at this stage the total amount that would be required. Since the Hannam report had just focused on Brae Alpha as the main asset, neither he nor Mr Dixit Dominus was aware at this time that different, earlier, COP dates were contemplated for East Brae and Braemar.

49. As Mr Mazzagatti did not have any experience himself of the upstream oil and gas business, he invited two individuals who did have such experience, Dr Roger Tucker and Mr Steve Jenkins, to join the board of VEL. Dr Tucker had over 40 years' experience in international oil and gas operations, financing and acquisitions. He had begun his career at Exxon and had held senior executive positions in a number of well-known oil companies. Mr Jenkins was the founder and CEO of Nautical Petroleum and had likewise held a variety of senior roles in the industry. Both were well-respected. In June 2020, Dr Tucker was appointed to the board of VEL as non-executive Chairman while Mr Jenkins was appointed as a non-executive director.

50. The acquisition of RockRose was publicly announced on 6 July 2020 and it is fair to say that it was greeted with some scepticism in the market given that Viaro was a hitherto unknown quantity and that Mr Mazzagatti himself appeared to have no prior experience of upstream North Sea operations. The acquisition was to take place pursuant to a scheme of arrangement whereby Viaro would acquire 100% of RockRose's share capital for a consideration of US$248 million using RockRose's own unrestricted cash balance of

around US$240m to fund part of the purchase price. Viaro also entered into two one-year bridge term facility agreements, each for US$250 million, with two high net worth individuals based in Abu Dhabi, HH Sheikh Thian bin Khalifa Al Nehayan and HH Sheikh Zayed bin Suroor bin Mohammed Al Nahyan. The latter is referred to as the "**Sheikh Zayed loan**". The interest rate on these loans was high – around 12%.

51. On 8 July 2020, Mr Mazzagatti wrote to the OGA seeking some assurance or comfort that the change of control would not result in the withdrawal of any of the RockRose group's petroleum licences. This letter has not been disclosed but there was evidently a subsequent meeting on 14 July 2020 following which some further information was provided. The OGA then responded formally on 31 July 2020 stating that it would be unable to complete its assessment before 14 August 2020 and that no decision had yet been made. It noted that the OGA would focus on whether the change in control would prejudice RockRose's ability to meet its licence obligations taking into account both its financial position and the occurrence of other reasonably foreseeable adverse events. There were some outstanding questions and on the OGA's "stress case" for oil and gas prices, RockRose would require very substantial injections of capital to remain solvent. The OGA therefore needed to understand how RockRose would fund those capital requirements and an assurance that potential sources of funding would be applied for that purpose.

52. TAQA opposed the scheme of arrangement on the grounds that extracting RockRose's cash to fund the acquisition would leave UKCS8 unable to meet its obligations under the joint venture agreements, particularly in relation to decommissioning, bearing in mind that substantially more DSA security would be required in 2020 than hitherto. As appears from their solicitors' letter to RockRose dated 17 August 2020, TAQA accordingly invited RockRose to give undertakings to the court that its cash would not be used to fund the

acquisition. This invitation was declined. Mr Mazzagatti accepted that he was aware of the concerns expressed in this letter.

53. On 20 August 2020, the OGA again confirmed that it would not be able to make a decision on the change of control before the scheme approval hearing on 27 August 2020. However, it expressed a concern that using RockRose's unrestricted cash would render it less resilient to reasonably foreseeable adverse events and that while RockRose had offered a parent company guarantee from Viaro to meet this concern, further information was still required. On the basis of the limited information to date, it was *"uncertain that the Transaction would not prejudice RockRose's ability to meet its licence commitments, liabilities and obligations."*

54. In the light of these objections and concerns, Viaro secured an amendment to the Sheikh Zayed loan so that it would now be valid for three years from the date of drawdown and available not only for acquisitions but also for the general corporate and working capital purposes of RockRose and its subsidiaries. TAQA then dropped its demand for undertakings and the scheme was sanctioned by Snowden J (as he then was). As the Claimants fairly accept, the judge indicated that he was doubtful whether he would have required undertakings in any event. He nonetheless noted that TAQA's concerns had been legitimate and that it was not seriously disputed that a combination of falling oil prices and other operating difficulties (including wells proving to be non-productive) was likely to increase the liabilities of the participants for which they would need to provide security.

55. The acquisition completed on 2 September 2020 and Mr Mazzagatti and Mr Dixit Dominus were appointed managers (equivalent in Delaware law to directors) of UKCS8 and directors of RockRose.

56. In the event, Viaro did not utilise the Sheikh Zayed loan for the acquisition. As foreshadowed, it used the surplus cash on RockRose's balance sheet in the form of a loan by RockRose to VEL of £202,655,579 which was then used by VEL to pay RockRose's shareholders. The balance of the purchase consideration was funded by VEL through a loan to RockRose. The net result of these transactions was necessarily to deplete RockRose's cash balance by the end of September 2020 to around US$54 million. The Hannam report had indicated that UKCS8 needed to maintain a net worth of US$50 million for operational purposes and Mr Mazzagatti believed that there was a sufficient level of cash in the business for this purpose and that additional support could be made available if necessary through parent company support or via cash pooling. Prior to the acquisition, RockRose had operated a cash-pooling arrangement, whereby surplus cash was passed up from the subsidiaries by way of loan or cash call repayable on demand, and held at group level so that it could be deployed wherever it was most needed at any particular time. This is not an uncommon arrangement within corporate groups – TAQA had a similar arrangement – and Viaro intended to, and did in fact, operate in the same way after the acquisition.

57. On 15 October 2020, VIL and VEL executed the guarantee in favour of the OGA which had been intimated in the correspondence referred to above. This was signed by Mr Mazzagatti and undertook that VIL and VEL would provide sufficient funds where necessary to enable UKCS8 to carry out its obligations in accordance with the terms of its licences and not to take any action that would materially prejudice its ability to carry out those obligations.

58. Following the acquisition, Mr Mann, Mr Slape and the majority of the RockRose employees remained in their previous roles so that Viaro could draw on their experience and ensure continuity in the running of the company and the operation of the Brae assets.

**September to November 2020**

59. On 28 September 2020, shortly before TAQA was due to assume the operatorship, Mr Mazzagatti took part in a call to discuss the intended approach to the Brae assets. He was aware of the poor relationship which existed between TAQA and RockRose at UK level but was anxious to try to improve relations and hoped that his strong relationships with key individuals in the UAE would help him to build a more productive partnership at parent level since TAQA was ultimately beneficially owned by a UAE government.

60. The agenda for the call comprised the following:

*"1. Introduce to each other to establish a better relationship that previous ownership and plan a common strategy about brae.*
*2. Explore the possibility for Viaro to buy TAQA interest in brae.*
*3. Explore the possibility for TAQA to buy Viaro interest in brae.*
*4. Explore the possibility if TAQA want to exit north sea for Viaro to buy TAQA UK."*

61. Mr Mazzagatti's evidence was that the call mainly focused on the first item, which was his priority at that stage. During the call, TAQA indicated that its plans were to exit the UK North Sea altogether and that it wanted to decommission all its UK North Sea assets (including the Brae assets) as part of a single programme whereas Viaro wanted to explore options to extend the life of the Brae fields. However, TAQA was not interested in this and preferred not to invest any further in the Brae Area. Mr Mazzagatti could not recall any discussion about agenda items 2-4.

62. Following this call, Mr Mazzagatti instructed LEA to calculate the value of UKCS8 to TAQA, focusing particularly on its tax paid history which TAQA could use to reduce its

decommissioning liabilities significantly. LEA's email response on 5 October 2020 indicated that in 2019 TAQA itself had assessed the value to it of UKCS8's tax paid history at that time as c.US$125-US$215 million based on data submitted in the Operator litigation. This equated to US$105-US$240 million as at September 2020. LEA's email concluded *"Thought this might be helpful in formulating a potential offer to sell UKCS8 to TAQA."* Mr Slape suggested that it would be reasonable to ask TAQA to pay US$100 million for UKCS8 on the basis that it represented *"less than half [the company's] discounted value to [TAQA] and less than one-quarter of the total cash flow benefit ($464 million) they could expect over the next 20 years or so."* Mr Mazzagatti agreed.

63. Mr Mazzagatti then wrote formally to TAQA's parent company on 12 October 2020 outlining the difference of approach between RockRose and TAQA which had become apparent and proposing two options which would allow the parties to go their separate ways: (1) selling RockRose's interest in the Brae assets to TAQA with the maximum allowable tax paid history for a nil consideration; or (2) selling UKCS8 as a corporate entity (including its interest in the Brae assets, a SAGE pipeline system and a tax paid history worth £1.4 billion) for a total consideration of US$100 million. The letter pointed out that this would give TAQA full control over the Brae fields, thereby allowing it to manage operational matters and decommissioning at a group level, as well as conferring a valuable benefit in the form of the tax paid history which was worth far more than UKCS8's interest in the fields themselves. Mr Mazzagatti also left open the possibility of RockRose acquiring TAQA's interest in the Brae fields instead. Whichever option was adopted, his view was that it would be best for the joint venture if one or other of RockRose or TAQA were to leave.

64. No response was received to the offer.

65. On 30 September 2020, UKCS8 issued Provision Invoices to all the participants in respect of the DSA security to be provided in December. UKCS8's own share in respect of the Brae assets was £110 million. This was a figure based, in accordance with the joint venture arrangements outlined above, on the 2020 BMP which had assumed that the proposed West Brae wells would be successful and that the Development Wells would also be drilled. By now, of course, it was known that one of the West Brae wells had failed and it was uncertain whether or not the Development Wells would proceed. As already noted, this would have a material effect on the anticipated COP for Brae Alpha which dictated when decommissioning costs would start to be incurred and thus also how soon security would need to be posted.

66. On 1 October 2020, TAQA took over the operatorship of the Brae assets from UKCS8. On 15 October 2020 it presented its own recommended 2021 BMP which proposed a base case of no further investment and made no provision at all for the Development Wells that had previously been included, albeit on a contingent basis. TAQA's COP dates were 2024 for Brae Alpha and September 2021 for East Brae as compared with equivalent dates of 2027 (potentially 2030) and 2024 in UKCS8's proposed BMP and 2027/2030 and 2023 in the previous year's BMP. Clearly TAQA was concerned about the adequacy of the DSA security as calculated in the Provision Invoices and whether sufficient planning was being carried out for decommissioning.

67. However, RockRose and Mr Mazzagatti fundamentally disagreed with this approach. On their analysis, the Brae assets were well capable of continuing to produce profitably beyond the COP dates proposed by TAQA. TAQA's BMP was also rejected by Spirit, which remained consistently of the view that the budget should continue to include contingent capital expenditure in respect of the Development Wells (as in the 2020 BMP) unless and

until a formal decision was taken to remove them from future plans. Spirit wanted to see the wells progressed and wished to preserve that as an option. It was nonetheless supportive of a strategy which simultaneously planned and prepared for an earlier "no further investment" COP. The 2021 BMP was not ultimately approved until January 2021, by which time UKCS8 had been deprived of its voting rights and TAQA was able to vote it through without the need for Spirit's support.

68. It is unnecessary for the purposes of this judgment to determine which side had the better of the argument in this respect. What is important is that there was a fundamental and irreconcilable difference of approach between TAQA and RockRose of long standing, which the advent of Viaro had done nothing to alleviate and, if anything, had exacerbated. Mr Mazzagatti recognised this and I accept that it was at this point that he started to investigate the possibility of selling either UKCS8 or its interest in the Brae assets to a third party. His unchallenged evidence was that he invited an offer from Petrogas (who had expressed interest in purchasing some of RockRose's assets in the Netherlands) but that they were not interested in investing in the North Sea.

69. During the course of October 2020, Viaro also turned its attention to the question of DSA security. In 2019, security had only been required for East Brae and this was covered by bonds from Liberty Mutual and Swiss Re. Initially the task of raising security to cover the 2020 requirement was left to Mr Mann and Mr Slape and the rest of the RockRose management team as in previous years. Neither Mr Mazzagatti nor Mr Dixit Dominus had anticipated any problems in this regard and none had been suggested by the management team, but when it proved challenging they both became more closely involved and introduced some of their contacts. Despite all best endeavours, however, by 29 November 2020, there was still a shortfall of £55 million for the Brae assets and £139 million overall.

This was a mere two days before the deadline for making Alternative Provision, failing which the DSAs required the security to be paid in cash by 15 December 2020.

70. The difficulties in raising security added impetus to Mr Mazzagatti's efforts to find a buyer for UKCS8. Around 20 November 2020, he approached a Mr Hassan Ali Hassan of FIOGC ("**Mr Hassan Ali**"). Mr Hassan Ali had been trading in Dubai and although Mr Mazzagatti had not met him previously, he knew of him through mutual friends and was aware that he had strong relationships with representatives of the government of Fujairah. Mr Mazzagatti also knew that Fujairah was a major bunkering hub and that the government had a stake in many companies connected to the oil and gas industry. He therefore requested a meeting with Mr Hassan Ali to discuss the possibility of FIOGC providing a bond for UKCS8 or even purchasing the company. As is common in the Middle East, and as was confirmed by Mr Jenkins, business is conducted with much less formality than in Europe: meetings are generally conducted face-to-face without being recorded in writing and communications take place by phone rather than email. There is therefore virtually no contemporaneous record of their meetings or what was discussed. I nonetheless broadly accept Mr Mazzagatti's evidence as to the course and conduct of the negotiations which is consistent with the contemporaneous documents.

71. During their first meeting, Mr Mazzagatti told Mr Hassan Ali about UKCS8 and the Brae assets generally and explained the difficult situation which had arisen with TAQA. He told him that RockRose believed there was real potential to extend the life of the Brae fields and wanted to carry out further drilling to determine whether this was the case. However, TAQA was refusing to countenance this and RockRose felt that it was no longer possible to work with them. Moreover, TAQA had failed to engage at all with the offer to sell either UKCS8 or its interest in the Brae fields notwithstanding its tax paid history, which Mr

Mazzagatti thought should have been attractive given TAQA's previous attempt to acquire the company.

72. For his part, Mr Hassan Ali outlined his role at FIOGC and said that he was confident that FIOGC would be able to work well with TAQA because of the relationship between the Abu Dhabi and Fujairah governments which were the respective ultimate owners of the companies. Mr Mazzagatti explained that the immediate priority was the provision of DSA security and asked whether FIOGC would be able to provide a bond. Mr Hassan Ali said that he first needed to speak to a representative of the Fujairah government but agreed to meet further to discuss the matter.

73. At the same time, Mr Mazzagatti was also investigating the possibility of a sale to International Holding Company (an Abu Dhabi conglomerate) but they were slow to respond and he decided not to proceed further with them. Thereafter, meetings between Mr Mazzagatti and Mr Hassan Ali took place on a regular basis at which it was agreed that UKCS8 should be sold outright to FIOGC and that FIOGC would in the short term provide a bond or a letter of credit to cover the company's DSA security. In the longer term, FIOGC would assume responsibility for UKCS8's decommissioning liabilities and replace the RockRose bond that was in place for East Brae. Mr Mazzagatti provided Mr Hassan Ali with a copy of the DSA agreement for Brae Alpha and also a report from LEA which he had commissioned in order to show the value of UKCS8 to TAQA. Mr Hassan Ali was particularly interested in the latter and said that he was confident he could either convince TAQA to commit to extending the life of the Brae fields or else negotiate a sale of the company to TAQA.

74. Having considered the LEA report, Mr Hassan Ali said that FIOGC would not be able to pay any upfront consideration for the company but that it would agree to a deferred

consideration if UKCS8 was subsequently sold to TAQA or another entity. Mr Mazzagatti discussed this with Mr Dixit Dominus as there were a number of factors to be taken into account. Bearing in mind, however, that FIOGC had agreed to cover the immediate requirement for security and would be assuming responsibility for UKCS8's decommissioning liabilities and the East Brae bond, and given Mr Hassan Ali's confidence that he could work with TAQA and even ultimately negotiate a sale to it of UKCS8, they agreed to the proposal. The contingency payment was agreed at 80% of the value of any onward sale, at which point RockRose would receive some return for UKCS8's considerable tax paid history.

75. Given that this was FIOGC's first venture into the upstream market, Mr Mazzagatti suggested that in order to help with the transition, RockRose would continue to manage the assets on behalf of FIOGC on a temporary fee-paid basis. This would also ensure continuity for the other Brae partners. Mr Mazzagatti explained that UKCS8's operating expenses after sale would be covered by its production revenues which exceeded expenditure.

76. In response to a query from Mr Hassan Ali regarding the provision of security, Mr Mazzagatti explained that TAQA complied with its obligations through a parent company guarantee. He informed him that FIOGC would need a credit rating which met the requirements of the DSA and was told by Mr Hassan Ali that this would not be an issue as FIOGC had a credit rating by virtue of being wholly owned by the government.

**1-15 December 2020**

77. It is common ground that UKCS8 did not post Alternative Provision by 1 December 2020 but instead asked for a two-week extension. This is consistent with the fact that Mr Mazzagatti was still discussing with Mr Hassan Ali the form of the security which FIOGC had agreed to provide.

78. The extension was refused and on 2 December 2020, TAQA gave notice to UKCS8 that it was now required to pay £110 million in cash by 15 December 2020 failing which it would be in default under the Brae DSA. On 7 December 2020, another RockRose subsidiary, UKCS4, which held interests in the Nelson field was given a similar notice by the Nelson operator, Shell. While Mr Mazzagatti was confident that they would be able to provide acceptable security or draw down on the Sheikh Zayed loan as a last resort, he accepted that if neither of those happened by 14 December 2021, there was a risk of default in relation to both Brae Alpha and Nelson.

79. On 9 December 2020, Mr Slape raised a concern internally that the Sheikh Zayed loan would fall away if UKCS8 was placed in default and that this might also trigger cash cover indemnities in other security bonds. Mr Mazzagatti could not recall whether he was made aware of this concern at the time. Whether or not he was, it appeared that good progress was being made by Viaro in agreeing a letter of credit from the National Bank of Fujairah although in the event this came to nothing.

80. On 10 December 2020, Dr Tucker noted in an email to Mr Mazzagatti that RockRose's cash flow profile would be negative in January 2021. He was unsurprised by this, given that its previous large cash balance had been absorbed into the cash pooling arrangements but stated that there was an immediate need to understand how RockRose would be maintained as viable through 2021. He took the view that the group needed to grow as soon as possible in order to get re-financed. Dr Tucker was also critical of Mr Mann and Mr Slape's abilities, although he pointed out that they were probably disconcerted by Mr Mazzagatti's management style which was very different to what they were used to. He commented that *"Your relationships in the trading industry and the ME are probably a black box to them. But the positive is the* [sic] *time has shown where weaknesses lie. I am*

*concerned about some of the statements from Peter re not submitting the SSE SPA, wanting to take legal advice on administration, the conversations with AA, not wanting to talk with Taqa. But the two probably feel as if they have been operating in the dark."*

81. These rather cryptic comments require elucidation. The SSE SPA is a reference to the proposed acquisition of SSE plc's North Sea assets referred to in paragraph 46 above which RockRose had agreed in principle before the acquisition by Viaro. It is evident from other documents that Mr Mann had also raised the possibility of UKCS8 going into administration. This was entirely at odds with Viaro's vision for the company of increased investment and continuing profitable production and was viewed by the VEL board as unnecessary and unwarranted scaremongering. In addition, it is clear that Viaro suspected (not without foundation) that Mr Mann had been engaged in discussions with his former boss, Andrew Austin, about moving to Mr Austin's new company, Kistos, which was operating in competition with RockRose. Viaro was concerned that he may have been trying to engineer a situation in which Kistos was able to acquire UKCS8 and its interests in the Brae assets cheaply, hence his perceived reluctance to talk to TAQA about a sale of UKCS8 to TAQA.

82. Both Mr Jenkins and Mr Mazzagatti agreed with Dr Tucker's suggestion that Mr Mann and Mr Slape should be replaced although, in the event, they both left RockRose in March 2021 and currently work at Kistos, where they were appointed directors in March 2022.

83. On 12 December 2020, Mr Dixit Dominus asked James Thomson, UKCS8's Finance Director, to check the credit rating of the Fujairah government with a view to submitting the bond which FIOGC had agreed to provide to the other Brae partners for approval. He pointed out that FIOGC had assets of US$33 billion and was fully owned by the Fujairah government.

84. On 13 December 2020, Mr Mann arranged an urgent call with TAQA to discuss the provision of DSA security. This was preceded by a "pre-call" between Mr Mann, Mr Slape, Mr Mazzagatti, Mr Dixit Dominus, Dr Tucker and Mr Jenkins. By this stage, RockRose had taken legal advice as to whether the FIOGC bond would constitute Alternative Provision under the terms of the DSA. While the contents of that advice are privileged, it is likely that it was at least equivocal, not least because the DSA required any bond to be provided *"out of a United Kingdom branch by a Qualifying Surety which is a Bank or an Insurance Company."* The definition of Qualifying Surety itself required a particular level of credit rating. Clearly FIOGC was neither a Bank, nor an insurance company, nor based in the UK and it was at that stage unclear whether it had any credit rating of its own, as opposed to relying on that of the Fujairah government. This is no doubt why Mr Mann had suggested providing cash collateral for a bond from Travelers as an alternative. He had nonetheless expressed the hope that the conversation with TAQA would be easier given its background and knowledge of the UAE and the fact that FIOGC was owned by the government of Fujairah. If TAQA did not accept the bond or wanted more time to consider it, he suggested asking it to post bridging security on UKCS8's behalf.

85. Shortly before the call with TAQA, Mr Mann sent over a draft of the FIOGC bond which UKCS8 proposed to issue as Alternative Provision together with a copy of FIOGC's licence confirming that it was 100% government owned. Mr Mazzagatti did not himself participate in the call with TAQA, but TAQA's position was undoubtedly that the proposed bond did not constitute valid Alternative Provision for the reasons given in paragraph 84 above. It could therefore not be accepted except with the unanimous consent of all parties to the DSA, including the second-tier participants.

86. Correspondence within TAQA and with the other partners following the call is instructive. In an email exchange between Mr Hutchison and Ms Wiseman, Mr Hutchison commented that if UKCS8 failed to post cash in time, then a default leading to forfeiture might be the outcome, although this was far from ideal given the extent of the likely decommissioning liabilities and shortfall in security for which the other partners would thereby become liable. In response, Ms Wiseman agreed that forfeiture was not a perfect solution but pointed out that if TAQA acquired UKCS8's interests, it would have a majority stake which would enable it to vote through all major decisions. *"... this could be quite helpful to ensure we can drive cost effective decommissioning — particularly given how divided TAQA and RRE views of the asset are."* Ms Wiseman also raised the possibility of investigating what TAQA might be able to extract from UKCS8 in return for posting security on UKCS8's behalf, for example, an undertaking to vote in line with TAQA, although she recognised that this would need to be disclosed to Spirit and JX who would not be happy with the arrangement. Mr Hutchison replied outlining what he saw as the three available options: (i) putting UKCS8 into default with subsequent forfeiture (which he identified as "sub-optimal"), (ii) extending TAQA's own parent company guarantee in exchange for UKCS8's vote and possibly more, and (iii) seeking agreement from the other partners and second tier participants to accept the offered security.

87. In the event, with the approval of its Abu Dhabi parent, TAQA decided to pursue the first option of placing UKCS8 into default and on 14 December 2020, the FIOGC bond was formally rejected by TAQA and the other partners on the grounds that it did not meet the requirements for Alternative Provision. Mr Hutchison also spoke with Mr Mann on the telephone, explaining that RockRose must provide qualifying security by the next day or the default options would be followed. According to Mr Hutchison's internal report of the conversation, Mr Mann asked whether a legal opinion on enforceability would help and Mr

Hutchison explained to him that without a UK branch, the bond would necessarily be non-qualifying. The bond was likewise rejected by Neptune, one of the second tier participants under the Brae DSA, and by Shell under the Nelson DSA. Both TAQA and Spirit nonetheless anticipated that if a default occurred Viaro would provide cash, if necessary by drawing down on the Sheikh Zayed loan.

88. On 15 December 2020, Aspen renewed its existing DSA security bond for East Brae. As Swiss Re had already issued its bond on 11 December 2020, this completed the required security for East Brae which had been altogether easier to arrange since it merely involved the renewal of previously issued bonds but in a lower amount. There was nonetheless still a shortfall for Brae Alpha where no security had previously been required, and on the same day Mr Slape drafted an email to be sent by RockRose's insurance brokers, Marsh, to Liberty and Travelers in an attempt to persuade them to reconsider their previous refusal to provide security. In it he suggested that, without their support, RockRose would default with negative consequences for the bond providers in so far as other bonds they had provided would be drawn down. As an attempt to browbeat the providers, this was spectacularly ill-judged as Mr Mazzagatti recognised, even though the draft had been copied to him without objection. It received a predictably dusty response from Marsh who expressed doubts about the financial stability of RockRose and Viaro if they were unable to provide even the comparatively modest amount of £11 million cash collateral required for the security bond on UKCS4's Nelson assets. He even doubted whether the Sheikh Zayed loan existed at all and stated that *"This almost has Enron type dynamics which I am not going to be involved with on any basis."*[2]

[2] Under cross-examination, Mr Mazzagatti claimed that he had no idea what *"Enron type dynamics"* were. Mr Allison expressed some forensic astonishment at this, but since Mr Mazzagatti was only 16 at the time of the Enron scandal, I do not find it implausible.

## 15-23 December 2020: agreement of the SPA with FIOGC; default by UKCS8

89. Immediately following the rejection of the bond by the Brae partners, Mr Mazzagatti asked Mr Mann to obtain a copy of the TAQA parent company guarantee. This was provided to him, along with its supporting Counsel's Opinion. The Alternative Provision requirements for a parent company guarantee did not require the parent to be UK resident and so, notwithstanding that the bond had been rejected, if the sale to FIOGC was completed, security could be provided by way of parent company guarantee instead. The view of the VEL board was that it would be sensible to do this and Mr Mazzagatti therefore took steps to accelerate the sale so that the security could be posted and a default avoided.

90. On 15 December 2020, Mr Mazzagatti and Mr Hassan Ali signed a Sale and Purchase Agreement for the sale of UKCS8 to FIOGC which had been drafted by DACB. As is not uncommon, the sale was agreed on a cash and debt-free basis and contained the following provisions:[3]

> *"3.2 Completion shall take place immediately after:*
>
> *...*
>
> *3.2.2 the Buyer providing all such sureties, indemnities, assurances and commitments in currently in place by or for the benefit of the Company or its Subsidiaries such commitments as are to meet the decommissioning obligations of the Company and it Subsidiaries in relation to the Licences, in all cases to the Seller's reasonable satisfaction*
>
> *3.3 The Buyer will use its best endeavours to fulfil the condition in Clause 3.2.2. If conditions in clause 3.2 are not fulfilled within 28 days hereof, this Agreement may be terminated by the Seller, without prejudice to any rights that may have accrued prior to such termination.*
>
> *3.4 On Completion, the Seller and Buyer agree that the Company and its Subsidiaries shall waive the right to receive any amounts (whether provided*

[3] It had also been agreed that prior to signature of the SPA, Rockrose would buy back one of UKCS8's subsidiaries, UKCS9, which Mr Mazzagatti had been advised should stay within the Rockrose group because it was the statutory PAYE employer for the entire group. This was acknowledged in the SPA.

*through loans, subscriptions, intra group payments or otherwise) due to them from the Seller's Group."*

91. Later that day, the Commercial Manager of FIOGC, Mr Hani Ali, informed TAQA's parent company of the sale by email and attached a draft of the parent company guarantee which FIOGC proposed to offer in respect of the DSA security. Such an approach was entirely in line with Mr Mazzagatti's hope and expectation that the relationship with TAQA could now be smoothed out between the two UAE parent entities. Mr Hutchison replied to Mr Hani Ali on 16 December 2020 seeking confirmation that FIOGC satisfied the requirements of a Qualifying Surety. He set out the relevant definition and continued:

*"If QS is not incorporated in England and Wales, it must be accompanied by a Counsel's Opinion. A draft of which we have not seen.*

*We have not been able to verify that Fujairah International Oil and Gas Corporation (and any relevant ultimate holding company) meets the above Qualifying Surety rating and therefore we are unable at this time to accept the Deed of Guarantee as acceptable security under the terms of the DSA.*

*In addition, we would also require to have verified the new group structure within which RockRose now sits to ensure that Fujairah International Oil and Gas Corporation meets the requirement for the Guarantee to be issued by an 'Affiliate'.*

*If you are of the view that this Deed of Guarantee meets the requirements under the DSA, please could you demonstrate that this is the case and provide the relevant back-up information and documents for our review."*

92. Later that evening, FIOGC replied, stating that it was fully owned by the government of Fujairah and thus benefited from the government's AA- Standard & Poor's rating. A legal opinion had been requested and would be provided which would also confirm that FIOGC was the parent of UKCS8. Mr Hani Ali asked TAQA to accept the parent company guarantee and to recommend its acceptance to the other parties. On the basis that it might take some time to put the guarantee and security in place and bearing in mind the excellent relationship between the ruling families of Abu Dhabi and Fujairah, Mr Hani Ali invited TAQA to extend its own existing parent company guarantee and DSA security to cover

UKCS8's interests on an interim basis for a fee to be agreed. He also informed TAQA that a service agreement would be concluded with RockRose to ensure continuity and a smooth transition.

93. Bridging security was of course necessary because, although a parent company guarantee was in principle a valid form of Alternative Provision, FIOGC would not be in a position to provide such a guarantee until the sale had actually completed, but completion could not take place until the East Brae bond providers (Aspen and Swiss Re) had consented to the change of control. This was referred to in argument by Mr Nash as the "chicken and egg" problem.

94. Mr Hutchison replied to Mr Hani Ali on 17 December 2020 noting the DSA requirement that *"the entity providing the guarantee itself meets the Qualifying Surety definition and if that is the case due to the set up of the company and government relationship we would require that point to be confirmed under the Counsel's Opinion… We look forward to receiving your draft Counsel's Opinion for review."* The exchanges between Mr Hutchison and Mr Hani Ali were forwarded to Mr Mazzagatti.

95. Meanwhile, on 16 December 2020, Mr Mann had emailed the Viaro board expressing concerns about the proposed sale to FIOGC. While he understood the strategic rationale for selling UKCS8, he was uncomfortable about the way in which it was being done. He pointed out that FIOGC had not conducted any due diligence into the company and that, without any North Sea experience of its own, it might not fully understand the implications of the acquisition with regard to the decommissioning liabilities. He also worried about how the OGA would view the change of control. Given that there was only a week before expiry of the five-day deadline triggering a default, he suggested that Viaro consider

drawing down on the Sheikh Zayed loan so that the sale could be completed in a more measured way.

96. Dr Tucker's response to Mr Mazzagatti suggested that he did not think much of Mr Mann's concerns: *"What is wrong with this guy?"* In his own reply to Mr Mann, Mr Mazzagatti was more measured. He said that the Viaro board had begun to consider the divestment of UKCS8 some months previously. He pointed out that Mr Mann himself had highlighted the historical bad relationship between TAQA and RockRose and that, while Viaro as the new owner had tried to re-establish a good partnership, it had eventually been decided that it would be best to exit Brae altogether as it was hard to find a common strategy with TAQA. He had accordingly proposed a sale of UKCS8 to TAQA on 12 October 2020 and when this was declined, the board had started exploring other options in order to address the DSA security issue and also to find a good partner for the Brae assets, particularly one who could work with TAQA. Once TAQA also rejected the FIOGC bond, it had been decided to accelerate the proposed sale, in which regard it was considered that an Emirati government-owned entity would be most appropriate *"so they could share same kind of UBO and have a better relationship to the one that Viaro inherited from the previous ownership of RockRose."* International Holding Company had also been considered but in the end it was decided to engage with FIOGC which was a government company fully involved in oil and gas and located in the biggest oil and gas hub in the Middle East. In order to avoid any technical issues, RockRose would continue to manage the asset:

> *"In respect to financial motivation we have a third part report* [sic] *that gives the clear advice to RockRose to sell the asset since it is NPV negative on our books.*
> *As director of RockRose and as CEO of Viaro Energy, my duty is to act in the best interest of the company, to have a common sense and do not sell the asset to not reliable counterpart and to ensure that we will cause any disrupt in the asset management for the other JV partners, I do believe we covered all of those aspect.*
> *In respect of the DD of FIOGC on the asset, it is not my concern since I do not work for their company and their directors should be responsible for that."*

97. In his response, Mr Mann reiterated his view that in order to allow the sale to proceed in good order it would nonetheless be prudent to draw down £75 million cash - £54 million to cover the DSA security for the Brae assets and £21 million as working capital for January. Once the sale completed, the £54 million could be recovered (on the basis that it would have been substituted by the FIOGC parent company guarantee) and the surety provisions reallocated to assets in the Netherlands where security did not need to be renewed until January 2021.

98. On the same day, TAQA issued a notice calling upon UKCS8 to pay or secure the amount of the Provision Invoice within five working days.

99. A cashflow forecast prepared for RockRose around this time showed that it was expected to be net cashflow negative until November 2021 and internal correspondence shows that it was taking steps to prioritise payments to its suppliers.

100. On 20 December 2020, Marsh approached Liberty (an existing bond provider in relation to assets in the Netherlands), informing it of the signature of the SPA with FIOGC. The email noted that the Brae complex was a substantial drag on RockRose's balance sheet due to the very large decommissioning liabilities associated with the fields and that the sale of the company was expected to increase RockRose's net assets by more than US$200 million. RockRose had also negotiated an agreement to acquire the North Sea business of a utility company (the SSE acquisition) which was ready for signature before Christmas and would complete in mid-2021. This was expected to add significantly to RockRose's anticipated production while the vendor retained responsibility for providing DSA security for the assets being sold and would also repay RockRose a sum broadly equivalent to the post -tax cost of abandonment. Only 21% of the headline consideration would need to be paid on closing as the balance would be funded by a combination of a vendor loan and working

capital adjustments. However, the sale of UKCS8 to FIOGC was likely to take a few weeks to complete and, as RockRose had not managed to meet the full amount of DSA security required, it risked being placed in default on 23 December 2020. In these circumstances, Liberty was asked to reallocate the £25 million bond it had provided for East Brae to Brae Alpha on a temporary basis pending completion of the sale. Once completion took place (anticipated before the end of January 2021), sufficient capacity would be released to cover the Netherlands bonds when they fell due for renewal.

101. In response, Liberty raised a number of initial queries, including how a default in respect of Brae Alpha would affect East Brae or other assets and why the loan facility could not be drawn down. However, following a call with Mr Mann it indicated it would be prepared to help bridge the situation provided certain safeguards were put in place. Nonetheless, this still left a shortfall in security for Brae Alpha of around £30 million.

102. On 21 December 2020, RockRose informed the OGA of the sale to FIOGC. As appears from Mr Mann's email report, Mr Jones of the OGA queried why FIOGC did not simply invest in VEL rather than buying UKCS8 outright, given that RockRose would continue to manage the assets. He stated that the sale route was *"not very 'clean' in his eyes, with him also mentioning it looks like 'financial engineering'."*

103. On 22 December 2020, RockRose received an updated draft Counsel's Opinion supporting the proposed parent company guarantee. Mr Mazzagatti forwarded this to the Brae partners under cover of an email which announced the signature of the SPA and informed them that FIOGC was 100% owned by the government of Fujairah and consequently had an AA- rating. FIOGC accordingly intended to use the parent company guarantee to cover the DSA security. The legal opinion confirmed that the guarantee was fully compliant with the DSA and the partners were requested to review it and provide any

comments as soon as possible. Mr Mazzagatti also explained that RockRose was not currently in a position to provide the full DSA security by 23 December 2020 and asked for an extension to 31 January 2021 to allow time to complete the sale and to work with the Brae partners to put the relevant security in place. Such extension was clearly necessary if default was to be avoided because of the "chicken and egg" problem referred to above.

104. On the same day, Mr Mann and Mr Slape had a telephone call with TAQA. Mr Hutchison's interpretation of the conversation was that RockRose was in a desperate position and seeking an extension of time to avoid a default situation. He suspected that RockRose's corporate banking facilities contained 'no default' covenants and that a default could have wider consequences. RockRose had confirmed that they could not raise the entire security by 24 December 2020 and were around £29 million short. Viaro seemed reluctant to cover this although Mr Hutchison was unclear why, given its commitments to the court at the scheme approval hearing. RockRose was nonetheless aware that any changes to security amounts or deadlines would require the consent of all participants which it was not practical to obtain before the deadline expired.

105. On 23 December 2020, Mr Mazzagatti forwarded to the Brae partners a letter from FIOGC seeking confirmation that the parent company guarantee was in acceptable form. Mr Mazzagatti reiterated that due to the imminent completion of the sale, RockRose would not itself be posting security but would be working to put the parent company guarantee in place. He repeated his request for an extension of time until 31 January 2021 to allow this to happen and stated, *"Given that the legal opinion and PCG are compliant with the requirements of the DSA we would not envisage any issues in obtaining your support and approval"*.

106. In her response, Ms Wiseman said that TAQA was trying its best to review the request but that it was unlikely it would be able to do so before the deadline of 29 December 2020 due to of the intervention of Christmas. She assumed that Mr Mazzagatti would still want the partners to consider the request even after the deadline had passed and requested evidence showing the credit rating of FIOGC and confirmation of when the sale would complete so that they could do so. Mr Mazzagatti replied the same day attaching the finalised signed Counsel's Opinion. He noted that the partners had now received a legal opinion and draft parent company guarantee which met the requirements of the DSA as well as confirmation in the legal opinion that FIOGC was a Qualifying Surety with the required credit rating and a letter of confirmation from FIOGC that, upon acceptance, it would sign and issue a guarantee to the DSA Trustee. Acknowledging that the partners would need some time to review the documents, he asked that the matter be dealt with as a priority in the New Year and repeated his request for a short extension so as to be able to focus on completing the sale and getting the security in place as soon as possible rather than being side-tracked by challenging any notice of default.

107. Despite the fact that TAQA had already decided the previous day to issue a Notice of Default on 29 December 2020, Ms Wiseman responded to say that TAQA's reviews were still ongoing but unlikely to be concluded until early January. She repeated her request for the information previously sought, in response to which Mr Mazzagatti referred her to the Counsel's Opinion and again asked for an extension at least until TAQA had completed its detailed review in January.

108. As matters transpired the sale to FIOGC in fact completed on 24 December 2020. Mr Mazzagatti had expected that the sale would not happen until the latter part of January 2021 because of the need to obtain change of control consent from the East Brae bond providers.

This was completely outside RockRose's control and was anticipated to take several weeks to come through. Unexpectedly, however, consent was given on 23 December 2020. Accordingly, there was no longer any reason to delay completion and every reason to accelerate it since it would solve the "chicken and egg" problem and allow FIOGC to post the parent company guarantee as soon as possible. As Mr Mazzagatti readily accepted, it also meant that if a Notice of Default was in fact issued, it would need to be sent to FIOGC rather than UKCS8. This is reflected in his WhatsApp message to the Viaro board in the evening of 23 December 2020:

*"Surety provide agree on the change of control so we can finalize the SPA tomorrow morning and by the time UK will open we can notify to all the partners that we are not the owner anymore... So hopefully they can't issue a default notice to us but the* [sic] *could do to Fujairah Government...Good luck to Taqa CEO"*

109. Further messages in the same exchange show clearly that Mr Mazzagatti and Mr Dixit Dominus did not have much time for TAQA's CEO, Mr Marco Polo, and expressed the hope that *"his head will be first on the line"*.

**Completion: declaration of the dividend and write-off of the pension liability**

110. As already stated, the SPA provided for the sale of UKCS8 to FIOGC on a cash and debt-free basis. On 15 December 2020, after the draft SPA had been prepared and circulated by DACB, Mr Slape emailed Mr Mazzagatti alerting him to the fact that there was an inter-company balance of over US$60 million owed to UKCS8 by other group companies and that RockRose needed to make sure these obligations were extinguished before the sale. He added *"If possible, it would also make sense to hang onto the cash that is in UKCS8."* Mr Mazzagatti thereupon gave instructions to extinguish the inter-company debt, simply adopting Mr Slape's figure[4] in the process. In Mr Mazzagatti's view, he was selling a valuable asset from which FIOGC could hope to make good profits and he saw no reason

[4] Which was inaccurate; the correct amount was c. US$84 million.

why he should effectively gift it an additional US$84 million. Having taken advice from external Delaware lawyers, RockRose's in-house legal team advised that this could appropriately be achieved by declaring a dividend in favour of RockRose and drafted the requisite Distribution Notice. In a conversation with Mr Dixit Dominus, Mr Thomson explained that the balance had arisen as a result of the cash-pooling arrangements and that RockRose had previously dealt with inter-company balances by way of distribution.

111. Mr Mazzagatti and Mr Dixit Dominus accordingly authorised the declaration of the dividend and signed the Distribution Notice as directors of VEL on 24 December 2020 thus offsetting the inter-company balance owed by RockRose to UKCS8. At the same time, RockRose wrote off a liability of some US$53 million (£39 million) which the Defendants claim was ultimately owed to it by UKCS8 in respect of a pension scheme buy-out premium which RockRose had funded (the "**pension liability**"). More will be said about the pension liability write-off in due course.

112. Finally, RockRose formally agreed that to the extent clause 3.2.2 of the SPA had not been fulfilled, it should be waived without prejudice to any other provisions of the SPA.

113. This cleared the way for completion of the sale to take place that day. Mr Mazzagatti accordingly emailed the Brae partners to inform them of the imminent completion and that FIOGC would be issuing the parent company guarantee which would then fulfil the requirements of the DSA. He expressed the view that since the legal opinion already provided confirmation that FIOGC was a Qualifying Surety, UKCS8 would be in compliance once completion occurred and there would therefore be no grounds for issuing a Notice of Default. The executed parent company guarantee *"to cover the DSA requirements"* was forwarded by Mr Hani Ali to the partners on 27 December 2020 under

cover of an email which also informed them that FIOGC was finalising a service agreement with RockRose to continue managing the assets until it put in place its own technical team.

**The Notice of Default**

114. On 29 December 2020, and notwithstanding that Ms Wiseman had told Mr Mazzagatti that TAQA would not complete its detailed review of the FIOGC parent company guarantee until January, TAQA issued a formal Notice of Default under the Brae DSA. FIOGC immediately wrote to challenge the notice on the basis that valid Alternative Provision had been made in the form of the parent company guarantee. It demanded that TAQA withdraw the notice but indicated that it would still continue to work constructively with the Brae partners with regard to the Alternative Provision. Not having received a response, FIOGC wrote again on 11 January 2021, reiterating its request for withdrawal of the notice and reaffirming its commitment to building a good working relationship with the other partners.

115. On the same day, TAQA issued invoices totalling around £2.1 million for UKCS8's share of operating expenses under the JOAs payable by 21 January 2021. Further invoices were issued to the other partners on 12 January 2021 requiring them to put up a *pro rata* share of UKCS8's DSA security.

116. On 13 January 2021, FIOGC wrote again to TAQA, insisting that the Notice of Default was invalid but inviting it to enter into a dialogue so that the matter could be resolved as soon as possible taking advantage of the very strong relationship between the Abu Dhabi and Fujairah governments.

117. On 19 January 2021, a meeting of the Brae partners took place attended by Mr Hani Ali and Mr Nigel Darlow on behalf of FIOGC. Mr Darlow was an external legal adviser who had been engaged by Viaro to assist with the completion of the SPA and the drafting of the

MSA. It was agreed that the parties would meet again on 21 January and meanwhile TAQA agreed to consider a suspension of the Notice of Default to allow discussions to continue. For its part, FIOGC agreed to explore the possibility of posting a letter of credit or providing further clarification of its financial standing and credit rating, including by Government letter of support. TAQA's stated position nonetheless remained that FIOGC was not a Qualifying Surety because it did not have its own credit rating and that it would be a long and protracted process to suspend the Notice of Default. Both propositions were challenged by FIOGC on the basis that FIOGC had the benefit of its government's rating so that the DSA requirements were met, and that TAQA only had to make a quick call to the other participants recommending a suspension. During the call, Spirit made plain that it had not initiated the Notice of Default which had been unilaterally issued by TAQA. Spirit wanted to find a resolution and avoid a negative outcome for all parties and did not want to have to post additional security.

118. The impression of Mr Darlow (who took notes of the meeting) was that there was clearly *"a lot of unfortunate history between TAQA and RockRose"* and that *"TAQA may well be pursuing a strategy of driving FIOGC into default so they can obtain FIOGC Brae interests for nothing, and therefore avoid the costs of an acquisition"* although he noted that this would not provide TAQA with the benefits of UKCS8's tax paid history. He felt that the situation could be resolved with the right discussions but that it would take some time and might require a conversation at government level.

119. Mr Darlow followed up on the meeting with an email to the partners in which he noted that:

*"From a FIOGC perspective it has been a challenging introduction to Brae, having walked into the middle of a dispute on decommissioning security. It is clear that there is a lot of "history" involved, which FIOGC wishes to distance itself from and move forward*

*constructively. FIOGC was not expecting the negative reaction to the security it has offered - and has been genuinely surprised at the Brae position."*

He nonetheless confirmed that FIOGC would explore the possibility of a letter of credit and the provision of additional clarifications and reiterated its commitment to working in good faith to find an amicable solution.

120. In these circumstances, it must have come as something of shock to find that on 22 January 2021, the other partners had begun to lift UKCS8's share of production from the Brae field which they were only entitled to do if (i) UKCS8 remained in default and (ii) *"operational circumstances"* so required.[5] Mr Darlow immediately emailed Mr Hutchison and the other partners complaining that this was *"an unhelpful and aggressive course of action"* which had been completely unheralded and was *"a strong indication that neither you nor the Brae Operator has any intention of engaging in good faith discussions with FIOGC or the Brae partners to try and resolve this matter amicably in the best interest of all parties."* He asked for FIOGC's lifting entitlements to be reinstated immediately.

121. On 25 January 2021, a 30-day extension was agreed which meant that any right to forfeit UKCS8's interest in the Brae assets would not arise until 15 June 2021. However, the other partners continued to lift UKCS8's share of production with the result that UKCS8 was necessarily deprived of revenue from which to meet its operating expenses. On 2 February 2021, TAQA accordingly served further Notices of Default under the Brae and Braemar JOAs.

**The Management Services Agreement**

[5] Although the Defendants initially disputed that there had been any such operational circumstances, this objection was not ultimately pursued.

122. On 18 February 2021, RockRose and FIOGC signed a Management Services Agreement (the "**MSA**"). As noted above, this had been agreed in principle at the time of the SPA. The agreement was for a term of two years from the date of completion and provided for RockRose to manage UKCS8 in exchange for payment of a fee to be agreed. Details of the fee were set out in a separate Annexure which bore the date of January 2021. The agreed fee was to be the higher of a Service Fee (effectively cost + 10%) or a Revenue Fee calculated as an amount equal to 50% of net revenues from UKCS8's operations. There was some dispute about precisely when the MSA and the Annexure were agreed and/or signed. Having heard the evidence, however, I am satisfied that both documents were drafted in January 2021 and should have been signed together on 18 February. However, by oversight FIOGC did not sign the Annexure until 21 February 2021, having had to be reminded to do so on 19 February 2021. On 18 February 2021, FIOGC also wrote to the OGA providing certain information about itself and telling them about the MSA.

123. On 21 February 2021, FIOGC wrote to TAQA in advance of a meeting the following week offering to sell UKCS8 to TAQA and inviting it *"to make a reasonable offer in the knowledge that the $1.4 billion of UK Tax History is extremely valuable. In addition, the values above in this document exclude the broader value and synergies that TAQA can unlock by consolidating its ownership of a large operated hub like Brae Area."* TAQA did not respond formally to this offer, but a subsequent internal presentation in April 2021 confirmed that, unlike other options which were also being considered, this would produce substantial positive cashflows for TAQA.

## Forfeiture and subsequent events

124. Prior to June 2021, UKCS8's revenues from the Brae assets were notionally sufficient to cover the day-to-day operational costs. However, it is not in dispute that once

decommissioning liabilities were taken into account, the company's interest in the Brae assets had an overall negative economic value. This meant that forfeiture was something of a poisoned chalice. Nonetheless, the Brae partners concluded that not forfeiting would result in the immediate abandonment of operations and early decommissioning which would be financially even more disadvantageous. Accordingly, on 23 June 2021, each partner obtained board approval to forfeit UKCS8's interest.

125. On 4 August 2021, and notwithstanding that UKCS8 was continuing to lift its share of production from East Brae and could still pay its operating expenses under the East Brae UUOA, TAQA issued a further Notice of Default under the East Brae DSA. This was on the grounds that UKCS8 was "insolvent" within the meaning of that agreement having failed to remedy its default in relation to Brae Alpha. As contractually provided, TAQA also instructed the DSA Trustee to realise all Alternative Provision provided to it by UKCS8 under the East Brae DSA up to an amount of £33,311,000. It will be recalled that the East Brae bonds had been procured by RockRose which retained liability for them. Mr Hassan Ali had died some months earlier and so Mr Dixit Dominus wrote immediately to Mr Hani Ali saying that RockRose had been trying to contact him for a long time to find a solution to the dispute with TAQA and had now received a default notice in respect of the East Brae bond. He asserted that the default was FIOGC's responsibility.

126. Mr Hani Ali's response, on which the Claimants placed much reliance, was in the following terms:

*"I'm Always available and Francesco Mazzagatti knew very well that the dispute with TAQA should solve by His team and all outstanding payment should Handel by himself, so let me give you some facts may be you are not aware about the deal from the beginning*

*1. Francesco Mazzagatti contacted us through one third party in order to help him against TAQA*

*2. The deal was he will be responsible for all outstanding payment with TAQA which he didn't do, and we are not responsible even to issue any Letter of Guarantee.*

*3. Mr. Hassan our ex CEO before his death he explained to Francesco that we will not issue that LG, so he is aware from the beginning and he promised that he will arrange for that LG. And will pay all outstanding payment.*

*As you represent yourself as CFO of your group, kindly pay the outstanding payment of TAQA invoices and issue the LG as well so you will meet your CEO promises."*

127. By this time, it was clear that the dispute with TAQA was incapable of resolution. Accordingly, on 26 August 2021, Mr Mazzagatti wrote to the Brae partners making a formal offer to re-purchase the entire share capital of UKCS8 effective as of 1 December 2020 and to provide compliant qualifying security on completion subject to:

(a) Withdrawal of the Notices of Default and forfeiture process;

(b) Confirmation that no party would pursue legal action in relation to the current disputes;

(c) Agreement that revenues received by the Brae partners from UKCS8's share of the liftings would be offset against outstanding billings;

(d) An agreement to undertake a review of the business plan; and

(e) OGA approval of the re-purchase.

128. Negotiations took place over the following weeks but ultimately these broke down on 29 September 2021. Meanwhile, RockRose paid £33 million in cash on behalf of UKCS8 in order to release the East Brae bonds and ensure that its relationship with the bond providers was not jeopardised.

129. On 26 October 2021, the Claimants and JX issued separate proceedings seeking declarations that the right of forfeiture had been validly exercised. UKCS8 did not file an acknowledgement of service and, following a hearing on 8 April 2022, default judgment

was entered by Mr Charles Hollander QC ordering payment of the unpaid DSA security to the DSA Trustee and payment of the outstanding invoices to the partners. Subsequent court orders authorised the Senior Master to execute the documents necessary to effect the transfer of UKCS8's interest to the other partners.

130. On 29 June 2022, the present proceedings were issued.

131. On 16 December 2022, the Claimants presented a winding-up petition seeking to have UKCS8 wound up in the United Kingdom. The petition was successful and UKCS8 was formally wound up by order of ICC Judge Jones on 8 February 2023. Joint liquidators were appointed on 20 April 2023.

132. According to the most recent liquidators' report, claims in excess of £43 million have been made to date by unsecured creditors while further claims in excess of £100 million are anticipated. On closer inspection, however, it appears that the £43 million is entirely attributable to the claims of the Claimants, save for a small claim of £200,000 by Shell. The further £100 million relates to a claim by the DSA Trustee for the outstanding DSA security. No other creditors have intimated any claims against the estate.

133. RockRose itself continues to invest successfully in the North Sea and to pursue a strategy of investing in aged assets with a view to maximising economic recoveries by extending their life. In addition to the SSE acquisition which completed in October 2021, it also acquired the entire share capital of Hague and London Oil BV, thereby adding significantly to its gas production assets in the Netherlands. In 2021, it also signed an SPA with Britoil to sell its stake in the Foinavon fields for a reverse consideration while retaining liability for the decommissioning costs and guaranteeing those costs. Further acquisition agreements were signed in 2023.

## THE CLAIMS

134. Against this background, the Claimants assert the following claims.

(a) A claim for relief under s. 238 of the Insolvency Act 1986 on the basis that in declaring the dividend on 24 December 2020, UKCS8 entered into a transaction at an undervalue when UKCS8 was either already insolvent or became so in consequence of the dividend.

(b) A claim for relief under s. 423 of the Insolvency Act 1986 on the basis that the declaration of the dividend was a transaction at an undervalue which was entered into by UKCS8 for the purpose of putting assets beyond the reach of its present or prospective creditors or of otherwise prejudicing such creditors.

(c) A claim for unlawful means conspiracy on the basis that RockRose, VEL, VIL, Mr Mazzagatti and Mr Dixit Dominus all conspired together to use unlawful means to injure the Claimants by extracting the amount of the dividend from UKCS8. The Claimants' pleaded case is that the unlawful means were constituted by a breach of fiduciary duty owed by Mr Mazzagatti and Mr Dixit Dominus under Delaware law as managers of UKCS8. It is further alleged that if UKCS8 was insolvent when the dividend was declared then the dividend was unlawful as a matter of Delaware law and that this also amounts to unlawful means for the purpose of the English law tort claim.

135. It was not in dispute that the remedies under the Insolvency Act 1986 are available against a foreign company where, as here, it has been wound up within the jurisdiction.

### Section 238

136. Section 238 provides as follows:

*"**238 Transactions at an undervalue (England and Wales)***

*(1) This section applies in the case of a company where—*
*...*
*(b) the company goes into liquidation;*
*and "the office-holder" means ... the liquidator, as the case may be.*

*(2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.*

*(3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.*

*(4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—*
*(a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or*

*(b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.*

*(5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—*
*(a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and*

*(b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company."*

137. Sections 240 and 123 are also of relevance:

*"**240 "Relevant time" under ss 238, 239***

*(1) Subject to the next subsection, the time at which a company enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into, or the preference given—*

*(a) in the case of a transaction at an undervalue or of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of insolvency (which expression is defined below),*

*...*

*(2) Where a company enters into a transaction at an undervalue or gives a preference at a time mentioned in subsection (1)(a) or (b), that time is not a relevant time for the purposes of section 238 or 239 unless the company—*

*(a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or*

*(b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference;*

*but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company.*

*(3) For the purposes of subsection (1), the onset of insolvency is—*

*…*

*(e) in a case where section 238 or 239 applies by reason of a company going into liquidation at any other time, the date of the commencement of the winding up.*

***123 Definition of inability to pay debts***

*(1) A company is deemed unable to pay its debts—*

*…*

*(e) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.*

*(2) A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities."*

138. It is not in dispute that the underlying objective of s. 238 is to uphold the principle of *pari passu* distribution of the assets of an insolvent company between all its creditors in accordance with a well-established order of priorities in which the shareholders rank last. Unless they can be brought within the statutory defence set out in s. 238(5), transactions entered into by the company at an undervalue can be reversed if they were entered into within a specified time before the onset of insolvency at a time when the company either was insolvent or became insolvent as a result of the transaction. A claim for relief under the section can only be asserted by an officeholder, but in this case the liquidators have assigned any right of action under the section to the Claimants pursuant to an assignment dated 28 July 2023.

139. There are two basic threshold requirements for a claim under the section:

(a) There must have been a transaction at an undervalue (defined in s. 238(4) as a transaction on terms which provide for no consideration or one where the value of the consideration provided is significantly less than that provided by the company);

(b) The transaction must have been entered into at a relevant time as defined in s. 240. This requirement has two separate aspects:

(i) A temporal requirement, in this case that the transaction was entered into within two years prior to the presentation of the winding-up petition; and

(ii) A substantive requirement that either at the time or in consequence of the transaction the company was unable to pay its debts within the meaning of s.123.

140. Where these requirements are satisfied, the company nonetheless has a defence under s. 238(5) to a claim if it can prove that:

(a) the transaction was entered into in good faith;

(b) for the purpose of carrying on the company's business; and

(c) at the time of entering the transaction there were reasonable grounds for believing that it would benefit the company.

The burden of proof under s. 238(5) is on the company.

**Section 423**

141. Section 423 provides in relevant part as follows:

*"423 Transactions defrauding creditors*

*(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—*

*...*

*(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.*

*(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—*

*(a) restoring the position to what it would have been if the transaction had not been entered into, and*

*(b) protecting the interests of persons who are victims of the transaction.*

*(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—*

*(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or*

*(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.*

*...".*

142. This section is likewise aimed at protecting the estate of the insolvent company for the benefit of the creditors as a whole although in this case, the remedy is available to the Claimants in their own right. A claim for relief under s. 423 has the following requirements:

(a) A transaction at an undervalue; which is

(b) Entered into for the purpose set out in s. 423(3).

**Unlawful means conspiracy**

143. In English law, an unlawful means conspiracy requires the following to be established:

(a) A combination or agreement;

(b) An intention to injure the claimant;

(c) Unlawful acts pursuant to the combination carried out as a means of injuring the claimant without just cause or excuse;

(d) Loss to the claimant.

## THE ISSUES

144. There is a substantial legal and evidential overlap between the claims under s. 238 and s. 423. In particular, the requirement for a transaction at an undervalue is identical in both sections. Moreover, identification of the purpose and intent with which the transaction was entered into for the purpose of s. 423 will almost always turn on the same evidence as that required in relation to the statutory defence under s. 238(5). In practical terms, therefore, claims under the two sections are likely to stand or fall together. If the defendant fails to establish a defence under s. 238(5), it cannot succeed under s. 423; conversely, if it does establish such a defence, then the claim under s. 423 will fail. It is, of course, theoretically possible that a claimant is unable to establish a nefarious purpose under s. 423 but that the defendant's statutory defence still fails because there were no reasonable grounds for its belief, or because it lacked good faith for some other reason, but such cases are likely to be rare. There is a similar overlap with the common law claim for unlawful means conspiracy, since where the s. 238(5) defence is made out and/or where a s. 423 claim fails, it is likely to be difficult for a claimant to establish the necessary intention to harm. Accordingly, as the Defendants submitted, the good faith requirement of s. 238(5) is essentially the obverse of the Claimants' burden of establishing bad faith under s. 423 and the common law tort claim.

145. In the present case, it was conceded by the Defendants that the company had entered into a transaction at an undervalue within two years prior to the presentation of the winding-up

petition. It was also conceded that the transaction was with a connected person so as to attract the presumption of insolvency in s. 240(2).

146. However, they took their stand firmly on the following issues, which both sides agreed were key to the entire case:

(a) The Defendants' purpose and intent in concluding the sale to FIOGC and declaring the dividend;

(b) Whether the company was insolvent within the meaning of s.123.

147. It is therefore appropriate to address these matters at the outset before turning to the other specific ingredients of each claim. First, however, it is necessary to deal with two pleading points which were raised by the Defendants. There was also a third but that is relevant only to the claim for unlawful means conspiracy and as it raises an issue of Delaware law, I leave it to one side for the present.

148. The Defendants' first objection was to the suggestion, raised for the first time in the Claimants' written opening, that a default by UKCS8 under the Brae JOA would have had *"catastrophic consequences"* for RockRose and the Viaro group as a whole because it would have triggered cross-defaults across the entire group and risked collapsing its banking facilities. Mr Hubbard, who addressed this point on behalf of the Defendants, submitted that if the Defendants had been given any prior inkling that such a point was to be taken, they would have wanted to call evidence to address it.

149. In response, Mr Venkatesan argued that the point was in fact pleaded by virtue of an assertion that the removal of UKCS8 from the Viaro group would have been to the Defendants' *"financial advantage"*. Despite his eloquence, however, I remain wholly unpersuaded that this is an adequate description of the specific point now being advanced

by the Claimants. The purpose of a pleading is to give sufficient indication of the pleader's case on both the facts and the law to enable the other party to prepare its evidence and arguments in response. In this case, the question of whether a default would have triggered a cross-default and, if so, across which agreements, how, when and with what consequences is by no means a straightforward matter. It would have required scrutiny of all the other agreements to which RockRose and Viaro were party, investigation of what banking facilities they had and how they would have been affected. It is clear beyond peradventure that this is a matter which the Defendants would have wanted to consider and address in evidence.

150. In the absence of any indication at all that this was one of the ways in which the Claimants proposed to make good their case on *"financial advantage"*, I regard it as unrealistic to suggest, as Mr Venkatesan did, that the Defendants waived any right to rely on the pleading point by failing to serve a Request for Further Information. It is for the Claimants to make their own case, not for the Defendants to flush out a case which has not in fact been made.

151. Mr Venkatesan further submitted that the Defendants had waived their right to take the pleading point by failing to raise an objection and seek a ruling from the court before the point was explored in evidence. In support of that submission, he relied on the case of *Eco3 Capital Limited v Ludsin Overseas Limited,* [2013] EWCA Civ 413. However, that was not a case which concerned any failure to plead a material allegation. It rather related to a deemed admission as to the authenticity of a critical diary entry upon which the defendant relied. Although no notice to admit had been served, the claimant indicated in opening that it did not accept the accuracy of the date on the note. The author of the note was cross-examined without objection to the effect that the entry had either been fabricated or intentionally misrecorded events. The trial judge rejected the defendant's submission in

closing that this evidence should be ignored, and held that one or other explanation was made out, albeit without identifying which. Her decision was upheld by the Court of Appeal which held that the defendant had not in any event been prejudiced by permitting the cross-examination and that expert evidence could not conceivably have assisted on verifying the date on which the entry was made.

152. The present is a different situation altogether. In *Eco3,* the diary entry was clearly in issue because it was being relied upon by the defendant. Moreover, it is unclear what further evidence as to its authenticity could have been deployed since only its author could testify as to the date on which it was compiled. By contrast, the allegation which the Claimants now seek to make opens up an extensive new line of enquiry of which no advance notice had been given. In those circumstances, I consider that it would be unfair to permit reliance on the cross-examination of two lay witnesses who had never previously had to consider the point and which raised complex legal questions on which they would undoubtedly have wished to take legal advice.

153. I therefore hold that it is not open to the Claimants positively to advance a case on cross-default beyond that which was accepted by the witnesses, namely a risk of cross-default across the agreements relating to the Brae assets themselves if the original default had not been cured within 60 days.

154. That said, Mr Venkatesan was on stronger ground when he submitted that the pleading point could not be taken in relation to s. 238 where the burden of proof is on the Defendants to make good their case that the company was not insolvent and/or that they could rely on the statutory defence under s. 238(5). He submitted that in that context the Claimants could rely on whatever evidence emerged at trial in order to argue that the Defendants' burden was not satisfied. That is true as far as it goes. However, it does not fully address the point

that any evidence elicited from Mr Mazzagatti and Mr Dixit Dominus in relation to cross-default across the wider group has to be treated with some caution given that the point was not one which they were expecting or prepared to meet.

155. Mr Hubbard's second objection was to the allegation, again raised for the first time in the Claimants' written opening, that the fee structure in the Management Services Agreement amounted to an illegal revenue-sharing agreement.

156. Again, this was not pleaded, although it clearly should have been if it was going to be asserted. Looking at the wording of the Annexure, it is not altogether clear to me that it was in fact a revenue-sharing arrangement and again the allegation opens up a new area of enquiry on which legal advice would have been necessary and which was simply not canvassed in the evidence.

157. The Claimants' failure to plead is particularly egregious in this instance, since they raised the point in pre-trial correspondence and were met with an objection from the Defendants that it was not a pleaded allegation. However, they made no attempt to amend their pleadings and left it until written openings to raise the point unambiguously. The pleaded case by contrast remained limited to an assertion that there was no legitimate commercial purpose for the Management Services Agreement as a whole, which is a rather different point.

158. In the circumstances, I consider that it would be unfairly prejudicial to the Defendants to allow this argument to be run.

## PURPOSE AND MOTIVATION

159. Mr Mazzagatti and Mr Dixit Dominus were the sole managers (directors) of UKCS8 at the relevant time. They were also directors of VEL and RockRose and their intention falls

to be attributed to all three companies. Since they were the relevant persons who, between them, decided to conclude the sale to FIOGC and authorised the declaration of the dividend and the pension write-off, they are the only natural persons whose intention and purpose needs to be scrutinised in this case. As will have become clear from the factual narrative above, however, it is chiefly Mr Mazzagatti whose conduct and statement of mind is relevant, since Mr Dixit Dominus's role was much more limited.

160. It is of course often the case that a purpose or intention has to be inferred since it is rarely made explicit, particularly if it is nefarious. The Claimants assert that the only legitimate inference which explains all the known and admitted facts in this case is that Mr Mazzagatti and Mr Dixit Dominus procured UKCS8 to declare the dividend in order to extract all remaining cash from the company before offloading it on to a third party for no consideration, knowing and intending that it would thereafter default on its obligations. By contrast, the Defendants' case is that Mr Mazzagatti and Mr Dixit Dominus believed that sale to a state-owned entity would enable UKCS8 to satisfy its immediate obligation to provide acceptable DSA security while also providing a realistic longer-term prospect of reaching an accommodation with TAQA which would inure to the benefit of UKCS8 and its creditors. They concluded the sale to FIOGC with the support of the VEL board for that purpose and the dividend was simply a necessary adjunct to the sale, the need for which was only appreciated belatedly and after the SPA had already been agreed.

161. The underlying facts on which the Claimants rely are as follows:

(a) RockRose's financial position deteriorated following the acquisition by Viaro as a result of its surplus cash having been extracted. This is clear from RockRose's cash flow forecasts for 2021 and the fact that RockRose was having to prioritise payments

at the start of that year. It also explains why UKCS8 was having such difficulty in raising DSA security in the latter part of 2020.

(b) By December 2020, when it had still not been possible to raise the full amount of security, Mr Mazzagatti and Mr Dixit Dominus knew that UKCS8 was likely to default and that there was a potential risk of cross-default across other Brae assets agreements.[6]

(c) The prospect of a default prompted Mr Mazzagatti and Mr Dixit Dominus to do a deal with FIOGC whereby FIOGC would take UKCS8 off RockRose's hands, but RockRose would remain responsible for satisfying its obligations as evidenced by Mr Hani Ali's email of 4 August 2021.

(d) There was no legitimate commercial purpose for the sale, as demonstrated by the Management Services Agreement which was designed to allow RockRose to keep managing the company while notionally purporting to sell it.[7]

162. They further argue that the Defendants' explanation is unsustainable for the following reasons:

(a) It does not explain the waiver of cl. 3.2.2 of the SPA. This would have been unnecessary if the Defendants genuinely believed that FIOGC's parent company guarantee constituted valid Alternative Provision and can only be explained on the basis that the Defendants knew that the parent company guarantee would not be accepted but

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[6] I have held above that it is not open to the Claimants to run a positive case that Mr Mazzagatti and Mr Dixit Dominus knew that a default would have "catastrophic consequences" for the entire group as a result of cross-defaults, but it is open to them to rely on evidence that Mr Mazzagatti and Mr Dixit Dominus were aware of a potential risk of cross-default across other agreements relating to the Brae assets.

[7] I have held above that it is not open to the Claimants to rely on an assertion that the Management Services Agreement was an illegal revenue-sharing agreement.

were desperate to offload UKCS8 into the hands of a willing buyer which would allow it to default.

(b) Until the middle of December 2020, Mr Mazzagatti's preferred option was to retain ownership of UKCS8. His sudden *volte face* can only have been because he realised that it was imperative to get rid of the company before it dragged down the rest of the group.

(c) The WhatsApp messages of 23 December 2020 wishing *"Good luck to the TAQA CEO"* and hoping that his head would be first on the line can only be read as reflecting a certain knowledge that UKCS8 would default and expressing a wish for Mr Polo to be fired.

163. I disagree.

164. As explained by Mr Mazzagatti, Viaro's entry into the North Sea upstream oil and gas business was a new venture for him which he undertook as part of a wish to diversify and grow his business interests. His aim, as stated above, was to enter the market and then make further acquisitions so as to grow into a leading mid-sized independent oil producer. His long-term target was to reach production of 100,000 bbl equivalent per day. While hindsight is a wonderful thing, it can at least be said that he has lived up to his word in that respect. RockRose now has extensive long-term interests in fields in the North Sea and elsewhere, including the SSE acquisition, and has acquired its own investment grade rating.

165. Mr Mazzagatti is nothing if not an astute businessman. As a new player in the market without a proven track record and one whose arrival was greeted with some scepticism, it is inherently unlikely that he and Mr Dixit Dominus would have embarked on a course of conduct which could only have served to cast doubt on their bona fides and made their

continued presence much more difficult to sustain successfully. It would have been one thing if RockRose had extracted UKCS8's cash and then exited the market altogether but that is not this case. On the contrary, RockRose has shown that it was in for the long haul and has not only stayed in the market but has consolidated and grown its interests.

166. Part of Mr Mazzagatti's strategy was to invest in ageing assets in order to extend their life and extract as much value from them as possible before decommissioning them. The Brae assets fitted this profile well given the proposed drilling of the Development Wells, but TAQA's objectives were diametrically opposed. Even before Viaro's acquisition of RockRose, it is clear that TAQA had no interest in extending the life of the fields but wanted to accelerate COP with no further investment – motivated in large part by a desire (acknowledged by HHJ Pelling in the Operator litigation) to reduce its decommissioning liabilities across the North Sea by aligning them in a co-ordinated programme. This motivation is further confirmed by Ms Wiseman's email referred to in paragraph 86 above which acknowledged the stark difference of approach between TAQA and RockRose to the Brae assets.

167. Whether or not the Development Wells were pursued would obviously impact, not only on the COP dates for Brae Alpha, but also on the amount of DSA security required for 2021. As described by Mr Anderson in an email dated 22 December 2020, if there was to be no further investment in the Development Wells, then the relevant COP dates would be accelerated, and substantially higher DSA security would be required in December. In turn, the decision to pursue the Development Wells was one which turned on assumptions as to production profiles and price movements. Bearing in mind the mixed success of the West Brae wells and the fact that the world was still in the grip of the Covid pandemic, these were matters which were largely speculative and on which opinions could legitimately

differ. I therefore accept that it was not unreasonable for TAQA to query whether the COP dates of 2027 (potentially even 2030) suggested by RockRose for Brae Alpha were feasible. Spirit, on the other hand, was satisfied of the technical case for proceeding with the Development Wells and its only reservations related to the economic case. For that reason, it wanted to keep the capital expenditure for the Development Wells in the budget (as had been the case the previous year) even if only on a contingent basis, while simultaneously planning for an earlier decommissioning if necessary.

168. Moreover, it was apparent to Spirit that TAQA's proposed 2021 BMP was motivated at least in part by a desire to increase RockRose's DSA security obligation. In an internal Spirit email sent on 17 December 2020, this was described as "disingenuous" and even Ms Wiseman accepted that it was wrong. Both they and Mr Taylor were clear that the amount of security required in any particular year should be a function of the BMP rather than the BMP being driven by any preconception as to the level of security to be posted by other participants. The very fact that such a motivation could be discerned, however, gives some idea of the extent to which the relationship between TAQA and RockRose had broken down.

169. I am satisfied on the evidence that Mr Mazzagatti and Mr Dixit Dominus were unaware until at least July 2020 either of the strength of TAQA's resistance to pursuing the Development Wells or of the amount of DSA security which would be required for Brae Alpha. The Hannam report did not say anything about security for Brae Alpha and I do not accept that Mr Mazzagatti either knew or should have known that a further £110 million would be required in December prior to the acquisition. Most probably he became aware of both these matters sometime after announcement of the acquisition on 2 July 2020 as a result of discussions with the existing RockRose team. Whether this was during

July/August 2020 or only after completion on 2 September 2020 does not much matter. Either way, the news could not have been welcome since, quite apart from the previously unanticipated need to find an additional £110 million DSA security for Brae Alpha by December, he was now faced with an apparently irreconcilable difference as to the strategic plan for the assets. Unless he could persuade TAQA to his point of view or find some other solution, this would mean (i) abandoning the opportunity to continue profitable production from the field (contrary to his business philosophy) and (ii) large amounts of security being provided at a much earlier date than he had originally contemplated.

170. The seriousness with which Mr Mazzagatti viewed this difference of approach with TAQA is confirmed by his introductory call to TAQA and its parent at the end of September 2020. The agenda for the call (see paragraph 60 above) shows that even at this early stage in the relationship he was already considering selling Viaro's interest in the Brae assets to TAQA or buying TAQA's interest or even TAQA itself if a common strategy could not be agreed. It is not therefore the case that a sale of UKCS8 was only conceived in December 2020 in the wake of the undoubted difficulties experienced in raising security. Sale of the company was already in Mr Mazzagatti's mind from as early as September/October on the basis that if RockRose could not find a way of working productively with TAQA, then it would be better for them to go their separate ways, whether by selling UKCS8's interest in the Brae assets or the whole company, or *vice versa.* As Mr Dixit Dominus said in his evidence, the reason RockRose sold UKCS8 was because it wanted to invest more in the North Sea, which it could not achieve through UKCS8 so long as it was constrained by TAQA.

171. This motivation is further confirmed by Mr Mazzagatti's instructions to LEA and his subsequent formal offer to TAQA. Mr Mazzagatti's evidence was that he was surprised

TAQA did not consider this offer more seriously. Since TAQA had been anxious to acquire UKCS8 for itself in 2019, there were reasonable grounds to think that it would still find this an attractive proposition and I have no reason to doubt that he believed it was in TAQA's own commercial interests, particularly in light of the significant tax paid history. On that ground alone, it could not be said that UKCS8 was entirely worthless to a potential purchaser, whatever the state of its balance sheet. However, the offer was simply ignored, whereupon Mr Mazzagatti began to look at selling the company to a third party. Given his strong business connections with the UAE (where he also lived for most of the time and where his family was based), and in view of TAQA's own close links with the Abu Dhabi government, I find it entirely plausible that he saw a possible solution in selling UKCS8 to an entity connected to a UAE government or other Middle Eastern entity which was likely to have more in common with TAQA's way of thinking and had the financial resources to provide such support as UKCS8 required. His experience, confirmed by the Counsel's Opinion subsequently obtained, was that a government backed entity would not be allowed to fail.

172. Thus, the sale of UKCS8 was being contemplated long before it became apparent that RockRose might not be able to raise the DSA security which UKCS8 was required to post in December. As to this, RockRose's perceived financial weakness following the use of its cash to fund the Viaro acquisition undoubtedly contributed to the difficulties in raising security. Indeed the Defendants did not dispute that it was a factor. The Claimants submit, and I agree, that at least part of the reason was because Viaro was not known in the market and had no proven track record. Thus, RockRose was perceived as being a greater credit risk following the extraction of its cash than previously. However, it must not be overlooked that the world was also in the grip of the pandemic, oil prices were depressed, and the outlook in the eyes of most market commentators was generally bleak. Mr

Mazzagatti may have been confident that oil prices would recover but his confidence was not shared by the market generally and it is unsurprising that bond providers were wary about taking on greater risk.

173. Be that as it may, the difficulties in raising security did no more than add impetus to Mr Mazzagatti's plan, already conceived, to sell UKCS8. As he readily admitted, RockRose could have drawn down on the Sheikh Zayed loan but he did not want to do that except as an absolutely last resort because he wanted to keep that facility for the SSE transaction and other income-producing acquisitions, including potentially a purchase of Spirit for which RockRose had already made an offer. Moreover, the interest rate on the facility was very high, the entire amount had to be drawn down and draw down triggered the running of its period of validity. If, on the other hand, he could achieve a sale to a buyer who would be prepared to take over UKCS8's obligations and fund the necessary security, then he could kill two birds with one stone and the problem could be avoided altogether.

174. Mr Mazzagatti believed that a sale to FIOGC offered a real prospect of repairing or at least improving the relationship with TAQA at parent level and the evidence shows that this belief was entirely reasonable. Not only had Mr Hassan Ali expressed confidence that he could forge a better relationship with TAQA potentially culminating in a sale of UKCS8 to TAQA, but Mr Anderson also agreed that having both TAQA and UKCS8 owned by UAE state entities should have improved the situation. It is, moreover, clear that FIOGC was likewise genuinely attempting to do exactly what Mr Mazzagatti had wanted to achieve by the sale. This is borne out by its approaches to TAQA in January and February 2021 (paragraphs 116119123 above) and its repeated attempts to procure acceptance of the parent company guarantee or agreement on some other form of security. If Mr Mazzagatti's evidence about his motivation for the sale was completely untrue, and if FIOGC was simply

entering into a paper purchase in order to get UKCS8 off RockRose's books, there is no obvious reason, commercial or otherwise, why it should have exerted itself in this way. The fact that it did so demonstrates that this was not simply wishful thinking on Mr Mazzagatti's part which lacked any reasonable foundation. It is true that the deal with FIOGC was concluded very quickly and, to western eyes, with a surprising lack of formality and documentation. However, the evidence of both Mr Mazzagatti and Mr Jenkins (the latter of whom at least was accepted by the Claimants as a witness of truth) was that the way of doing business in the Middle East is very different and largely proceeds on the basis of face-to-face meetings and trust.

175. I am further satisfied that when agreeing the sale to FIOGC Mr Mazzagatti and Mr Dixit Dominus neither wanted nor intended UKCS8 to default by failing to post security or to satisfy its operational obligations. This is demonstrated by RockRose's own strenuous efforts to raise security, first from the traditional bond market and then via a bond and parent company guarantee from FIOGC. These efforts continued even after the sale to FIOGC.

176. Taking the bond first, I accept that Mr Mazzagatti and Mr Dixit Dominus initially believed that the FIOGC bond would constitute valid Alternative Provision. They were businessmen not lawyers, and a businessman could reasonably take the view that someone dealing with a wholly state-owned entity was effectively dealing with the government. Their evidence was that they thought an entity which was 100% owned by a stable UAE government was not only good security in itself but was also entitled to benefit from the government's own rating so as to comply with the requirements of the DSA. I do not find this implausible and I accept it. It is, moreover, entirely consistent with the

contemporaneous correspondence asserting Mr Mazzagatti's view (until he was disabused of it in mid-December 2020) that the bond constituted compliant Alternative Provision.

177. Mr Allison submitted that such a belief was inconsistent with RockRose having sought approval of the bond from the Brae partners. He said that if this was Mr Mazzagatti's genuine belief, then approval would not have been necessary. In the light of cl. 7.2 of the DSA which required unanimous approval from the partners as to the form of Alternative Provision, this was a somewhat ambitious submission. In any event, common courtesy would have justified a request for approval for the sake of good order whether or not Mr Mazzagatti thought that it was technically required.

178. Rejection of the bond by the Brae partners on 14 December 2020 added a further imperative to complete the sale to FIOGC as soon as possible so that it could put up a parent company guarantee. The Claimants submitted that Mr Mazzagatti and Mr Dixit Dominus did not genuinely think that the parent company guarantee offered by FIOGC was compliant Alternative Provision any more than the bond had been. However, on the evidence, I accept that they did have such a belief at the time of completion and also that this was a reasonable belief, not least in the light of the Counsel's Opinion which confirmed expressly that:

*"(f) Based on usual practice of the governments in the UAE, when any government owned entity (such as the Guarantor owned by the government of Fujairah) accepts an obligation and there is a valid judgment against the Guarantor the Guarantor will honour its obligations.*

*(g) The Guarantor is 100% owned by the Government of Fujairah and thus has the benefit of the AA rating of the United Arab Emirates Federation.*

*(h) That pursuant to the completion of the SPA, the Company is owned by the Guarantor and is a Qualifying Surety."*

179. At the very least it was reasonable for them to believe that the guarantee would ultimately be accepted by the other partners. Not only had TAQA not rejected the guarantee outright,

but Mr Hutchison's report of his conversation with Mr Mann on 14 December 2020 suggests that he had presented TAQA's main problem as being a formal one (the absence of a UK branch) rather than any doubt about the strength of the covenant itself. This impression could only have been confirmed by his email of 17 December 2020 referred to in paragraph 94 above, which as Ms Wiseman agreed, gave the impression that the guarantee would be acceptable if Counsel's Opinion confirmed that the guarantor had the benefit of the state's credit rating and duly met the definition of Qualifying Surety (as it duly did). That Mr Mazzagatti understood the email in this way is clearly demonstrated by a WhatsApp message that he sent to the Viaro board shortly thereafter, quoting the email and continuing *"If I understand well, if the legal opinion will say that Fujairah is covered by sovereign wealth fund than is acceptable, right?"*

180. The reasonableness of such a belief is further confirmed by the fact that both Spirit and JX were in favour of accepting the guarantee, as also apparently was Neptune (one of the second-tier participants), on the basis that it was in the partners' commercial interests to do so rather than proceeding down the default and forfeiture route. Ms Wiseman, Mr Anderson and Mr Taylor all agreed in cross-examination that Mr Mazzagatti could reasonably have thought that the guarantee might be accepted on a pragmatic basis even if it did not strictly comply with the requirements of the DSA. If so, then it could also reasonably have been supposed that the other second-tier participant would fall in line. It is worth noting that Spirit expressly disavowed having in any way initiated service of the Notice of Default on 29 December 2020, which it described as having been issued unilaterally by TAQA without Spirit having been asked to approve or vote on it. Mr Anderson gave evidence in cross-examination that not accepting the parent company guarantee and failing to resolve the dispute would have been regarded at that time as an *"extreme outcome"*.

181. This substantially answers the further point taken by Mr Allison that if Mr Mazzagatti and Mr Dixit Dominus genuinely thought that the parent company guarantee was valid, then it would not have been necessary to waive cl. 3.2.2 of the SPA (set out at paragraph 90 above. This struck me as a lawyer's point and is in any event wrong because of the chicken and egg problem. FIOGC could not give a parent company guarantee until it became a parent on completion of the SPA and cl. 3.2.2 had to be waived for completion to take place. As I have held above, Mr Mazzagatti and Mr Dixit Dominus reasonably thought that the guarantee would be put in place and so had no concerns about waiving the provision.

182. In my judgment, there was therefore a perfectly legitimate commercial reason to proceed with the sale to FIOGC as soon as could be arranged and both Mr Mazzagatti and Mr Dixit Dominus regarded this as being in the best interests of all concerned - RockRose, UKCS8 and TAQA itself. Indeed, this was a view also supported by the rest of the VEL board.

183. From RockRose's perspective:

(a) It would be released from the shackles binding it to TAQA;

(b) The sale of UKCS8 would take a negative asset off its balance sheet at a time when it was under cashflow pressure, and enable it to pursue its strategy of increased investment in the North Sea; however

(c) Neither UKCS8 nor its creditors would be prejudiced because FIOGC was in a position to cover the provision of DSA security for Brae Alpha and all the decommissioning costs, and had agreed to do so; and

(d) There was every prospect that FIOGC could achieve a better working relationship with TAQA and in due course sell UKCS8 to TAQA at which point RockRose would receive a substantial deferred consideration.

184. From UKCS8's perspective, FIOGC would be providing DSA security and standing behind the company while RockRose continued to manage operations with operating expenditure covered out of revenues, so that it was effectively "business as usual" with no prejudice to either its business partners or creditors. If anything, completion of the sale would be of positive benefit to UKCS8's creditors since they would have the protection of the parent company guarantee.

185. From TAQA's perspective the sale had advantages through the better working relationship and potential acquisition of UKCS8 which Mr Hassan Ali was confident he could bring about. Acquisition of UKCS8 would on TAQA's own calculations result in positive cashflows and was clearly being seriously considered as an option until negotiations finally broke down in September 2021 and it was reasonable for Mr Mazzagatti to suppose that, acting commercially, TAQA would not cut off its nose to spite its face.

186. The contemporaneous evidence amply demonstrates that the declaration of the dividend was very much an afterthought which would not have happened if Mr Slape had not drawn attention to the fact – after the draft SPA had already been circulated – that there was an inter-company balance which needed to be removed in order to achieve a cash and debt-free sale. The question of a dividend was therefore not in anyone's mind until after the sale to FIOGC had been agreed and after instructions had been given to RockRose's solicitors to draft an SPA on cash and debt- free terms. In those circumstances, it is clear that the dividend was never regarded as an end in itself or as a means of damaging creditors but

was simply the administrative method adopted in order to give effect to the SPA which was conceived specifically to allow UKCS8 to continue operating more effectively rather than the reverse.

187. While the Claimants did not put it this way, their case effectively amounts to a complaint that the sale was in fact agreed on cash and debt-free terms at all. However, Mr Jenkins gave evidence that this was a usual practice and it cannot be suggested that there is anything inherently improper in such a sale. Mr Mazzagatti's evidence that, having agreed a sale on these terms, there was no reason for him to gift FIOGC some US$84 million is not only commercially understandable but entirely reasonable.

188. Mr Allison also submitted that nefarious intent could be inferred from the fact that the terms of the SPA only provided for a waiver of debts owed *to* UKCS8 without any corresponding waiver going the other way. However, there was also a waiver of a potential liability on the part of UKCS8 in relation to the pension liability (discussed in more detail below). Furthermore, in disposing of UKCS8, RockRose also gave up a significant asset in the shape of the £1.4 billion tax-paid history and the benefit of the revenue stream from the Brae assets with only the contingent prospect of a deferred consideration. So, in fact, <u>both</u> RockRose and UKCS8 gave up something. This is inconsistent with the Claimants' case that the whole purpose of the transaction was to benefit RockRose to the prejudice of other creditors.

189. Mr Allison also placed reliance on the email sent by Mr Mann on 16 December 2020 (paragraph 95 above), the email from Mr Hani Ali sent on 4 August 2021 (paragraph 126 above) and the *"Good luck to TAQA CEO"* WhatsApp message (paragraphs 108-109 above). As to the first of these, there was some suggestion in the Defendants' evidence that Mr Mann was concerned in these exchanges to dissuade Mr Mazzagatti from selling

UKCS8 because he wanted RockRose instead to sell some of its Dutch assets to Kistos, of which he was a shareholder and of which he is now CEO. Mr Jenkins confirmed that this was the suspicion at the time but, whatever the connection between Mr Mann and Kistos at this stage, I am not prepared to make any such positive finding on the basis of the scant material before me. That said, it is clear that the relationship with Mr Mann was strained and the terms of the email suggest that he may not have been entirely familiar with the detailed negotiations that Mr Mazzagatti had had with Mr Hassan Ali. I therefore regard the email as nothing more than the CEO expressing certain views and concerns to which Mr Mazzagatti responded in a manner entirely consistent with the Defendants' case. Since it is the state of mind of Mr Mazzagatti and Mr Dixit Dominus which is relevant, not that of Mr Mann, it takes the matter little further forward in any event.

190. The Claimants' submission in relation to the Hani Ali email is, in my judgment, based on a misreading of the email. It was sent on 4 August 2021 immediately after and in the context of a Notice of Default in relation to East Brae. In those circumstances, points 2 and 3 of the email are almost certainly referring to the fact that RockRose undertook responsibility under the MSA for all operational payments without the need for any guarantee or letter of credit from FIOGC. This is entirely consistent with the fact that revenues exceeded expenditure on East Brae, and that UKCS8 continued to operate on this basis until the issue of the Notice of Default cut it off from its revenue stream. The closing sentence of the email further confirms this reading, since the reference to outstanding invoices could only have been in relation to East Brae because the other Brae partners had by then already assumed responsibility for operational expenses in relation to Brae Alpha. On any view the assertion by Mr Hani Ali that FIOGC was not responsible for providing a guarantee cannot have referred to the parent company guarantee since Mr Hani Ali himself provided this to the Brae partners in December 2020 (paragraph 113 above). More likely

it was a reference to a letter of credit which had previously been discussed in relation to operational expenses.

191. As for the WhatsApp messages, the Claimants invited me to read these as evidence that Mr Mazzagatti and Mr Dixit Dominus knew that UKCS8 would default and hoped that Mr Polo would be fired as a result. But there is a difference between knowing that a formal notice of default might or will be issued and still believing that the parent company guarantee would eventually be accepted so as to cure that default within the period allowed. And while there was obviously no love lost between Messrs Mazzagatti and Dixit Dominus on the one hand and Mr Polo on the other, the message itself is equally consistent with a belief that Mr Polo would find it harder to threaten FIOGC and the Fujairah government with default than RockRose, and that he might have to pay for things not going as TAQA had anticipated. In the context of all the many other indications pointing the other way, I am not prepared to infer from this brief exchange that Mr Mazzagatti and Mr Dixit Dominus had hatched a plot to dump UKCS8 in the certain knowledge and with the intention that it would irrevocably default.

192. Indeed, if this really was their intention as the Claimants allege, it is difficult to explain why RockRose:

(a) Authorised the extension of the East Brae bonds on 15 December 2020 in circumstances where a default by UKCS8 in relation to Brae Alpha could trigger a draw down of those bonds for which RockRose would ultimately be liable;

(b) Agreed to continue managing UKCS8 after the sale. At the very least this suggests confidence in the company and its future;

(c) Continued to assist FIOGC in its attempts to get the parent company guarantee accepted after the sale;

(d) Offered to repurchase UKCS8 and put up the required security in September 2021 when, if the only desire was to avoid a draw-down of the East Brae bonds, RockRose could simply have put up the cash as it did and left it at that without offering to repurchase the company.

193. The Claimants were not able to offer any convincing explanation for any of this. I accept, of course, as did Mr Mazzagatti, that it was in RockRose's commercial interests to avoid a default by UKCS8 while the company was in RockRose's ownership. Faced with a choice between having a company default while it was a subsidiary and selling it such that any default would be the responsibility of a third party - a third party, moreover, which had undertaken to stand by and support the company - it would be an unusual businessman who did not prefer the latter option. Provided it can be legitimately achieved, there is nothing wrong with that.

194. I also accept that even if Mr Mazzagatti, Mr Dixit Dominus, and RockRose did not have any settled intention from the outset to get rid of the company to avoid a default under RockRose ownership but rather intended that it should comply with its obligations, that in itself is not necessarily inconsistent with them having formed a last-minute intention to get rid of UKCS8 when their strenuous efforts to raise security and subsequently to procure the FIOGC bond and parent company guarantee proved unavailing. However, I do not accept that this was in fact the motivation driving the sale to FIOGC.

195. First, for the reasons already given, I am satisfied that Mr Mazzagatti and Mr Dixit Dominus were trying to avoid any default, hence the repeated requests for an extension of time so that the chicken and egg problem could be avoided. Once the change of control

was approved by the East Brae bond providers, there was no impediment to completion and every reason to proceed as quickly as possible. Secondly, Mr Mazzagatti would reasonably have understood from the correspondence with Ms Wiseman set out at paragraphs 105-107 above that TAQA was reviewing the parent company guarantee and would not take precipitate action before it had given it fair consideration, which Ms Wiseman had said would not be until early January. Thirdly and in any event, for the reasons given above, default was not necessarily the ultimate disaster from which there was no rowing back as Mr Allison's submissions seemed to assume. Mr Mazzagatti's evidence was quite clear that he understood, correctly, that UKCS8 had 60 days to cure any default (potentially longer if an extension was agreed, as in fact it was) and that no forfeiture of UKCS8's interest could take place before then. Meanwhile, he reasonably anticipated that UKCS8 would continue to meet operational expenditure out of revenues and he was given no reason to think that the other partners would start to lift its share of production until this happened without prior warning on 22 January 2021. At the date of completion, therefore, a mere declaration of default would not necessarily have entailed any irreversible consequences for a considerable time.

196. Finally, the fact that RockRose may have derived a commercial benefit from passing the problem to FIOGC is not inconsistent with RockRose having entered into and completed the sale transaction with legitimate motives and with it being for the ultimate benefit of UKCS8 itself to have a strong parent company. Accordingly, the Claimants' case really only gets off the ground if they can show that Mr Mazzagatti and Mr Dixit Dominus not only knew that a default was inevitable, but also that it would not or could not be cured by FIOGC and intended this outcome. However, as I have already found, Mr Mazzagatti and Mr Dixit Dominus neither wanted nor intended this to happen and all their actions post-dating the sale are inconsistent with such an intention. No doubt TAQA acted in what it

perceived to be its own best commercial interests in issuing the Notice of Default, apparently unilaterally, but the fact remains that it was reasonable for Mr Mazzagatti and Mr Dixit Dominus to think that it would not do so at least until an opportunity had been given to resolve the question of the parent company guarantee. And of course if the guarantee had been accepted then the Counsel's Opinion confirmed that it would have been fully enforceable against FIOGC and that the government's usual practice was to honour any judgments against a state-owned entity.

197. In those circumstances, it was entirely reasonable for Mr Mazzagatti and Mr Dixit Dominus to suppose that the guarantee would ultimately be accepted. Indeed, it is perhaps somewhat surprising that it was not, but that is not a question for me. However, had it been made apparent at any time prior to completion that the FIOGC parent company guarantee would not be accepted in any circumstances, I am satisfied that Mr Mazzagatti and Mr Dixit Dominus would have considered drawing down on the Sheikh Zayed loan. I accept Mr Mazzagatti's evidence as to why he was reluctant to use it except as a last resort and wanted to keep it for income-producing acquisitions rather than wasting it on a temporary bridging facility (see paragraph 173 above). But until January 2021, Mr Mazzagatti reasonably believed that the Brae partners could be persuaded to accept the parent company guarantee in which case he would not have needed to draw down on the loan. Mr Jenkins' evidence was that the decision not to draw down on the loan was endorsed by the VEL board. Had the company not been sold, Mr Mazzagatti said that he would not have allowed it to default and this assertion is given considerable credence by the fact that he subsequently stood by the East Brae bonds and provided cash to avoid them being called upon.

198. In short, I am unable to accept that the sale to FIOGC and the declaration of the dividend was a last desperate throw of the dice in order to dump UKCS8 before it defaulted having

first extracted all its assets. On my assessment of the witness and documentary evidence, I find and hold that the sale to FIOGC was agreed for a legitimate commercial purpose, namely, to break the deadlock with TAQA and to enable the provision of the required DSA security. The transaction was not conceived or executed with the intention or purpose of prejudicing UKCS8 or its creditors and the dividend was declared for no other reason than that it was a necessary adjunct to that sale.

**SOLVENCY**

199. This section of the judgment addresses the threshold question of whether, at the date of declaration of the dividend or as a result thereof, UKCS8 was unable to pay its debts within the meaning of s. 123 of the Act, the relevant provisions of which are set out in paragraph 137 above. Subsections (1)(e) and (2) set out alternative tests in this regard, either one of which it is sufficient for a claimant to satisfy. Subsection (1)(e) contains what is commonly referred to as the "cash flow test", which focuses on whether the company is able to pay its debts as they fall due, while subsection (2) sets out a "balance sheet test" requiring a comparison of the company's assets and liabilities at the date of the transaction taking into account contingent and prospective liabilities.

200. It was common ground that:

(a) The presumption in s. 240(2) applied in this case, such that the Defendants can only escape a finding of insolvency if they can prove affirmatively (*"unless the contrary is shown"*) that UKCS8 was not insolvent – both immediately before and after the declaration of the dividend - under <u>either</u> test, the burden of proof being on them: *Re Casa Estates (UK) Ltd,* [2013] EWHC 2371 (Ch) at [86]-[91] (upheld on appeal).

(b) The test for insolvency under s. 123 is objective and the expectations or subjective beliefs of the directors of the company as to its prospects are irrelevant. If the company is insolvent in accordance with the English law test, it cannot be treated as solvent merely because its directors believe it is, however honest that belief may be.

**S. 123(1)(e): the cash flow test**

201. The cash flow test is concerned with a company's ability to pay *"debts as they fall due"*. This includes presently due debts as well as debts falling due from time to time in the reasonably near future. What amounts to "reasonably near future" depends on all the circumstances of the case, but especially the nature of the company's business: *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc,* [2013] UKCS 28; [2013] 1 WLR 1408 at [37]. As pointed out in the passage from *Re Casa (supra)* referred to above, the further into the future one looks, the harder it is for a claimant to establish that a company cannot reasonably be expected to meet its liabilities. Likewise, where the amount of the company's assets or liabilities depends on speculative matters like interest or currency rate movements. The converse is also true where the burden of proof is on the company: the further one looks into the future or the more speculative the valuation of assets or liabilities, the more difficult it is for the company to prove that it <u>will</u> be able to meet its debts as they fall due.

202. In the present case, the Claimants argue that UKCS8 failed the cash flow test on two grounds:

(a) Failure to pay the Provision Invoice issued on 1 September 2020 in the sum of £110 million;

(b) Inability to pay debts falling due in the reasonably near future.

### *The Provision Invoice*

203. It is not in dispute that the Provision Invoice had not been paid as at 24 December 2020 when the dividend was declared. Mr Allison submits that because UKCS8 undoubtedly did not pay, it necessarily follows that it was unable to pay. He relied on *Byblos Bank SAL v Al-Khudairy,* [1987] BCLC 232 at 247d-e, where the Court of Appeal regarded it as "trite law" that if a company fails to settle a debt presently payable due to lack of means, that will normally suffice to prove that it is unable to pay its debts even if an assessment shows there to be a surplus of assets over liabilities.

204. In *Cornhill Insurance plc v Improvement Services Ltd,* [1986] 1 WLR 114, a statutory demand for an admitted debt of some £1000 was served on Cornhill which refused to pay. When a winding-up petition was subsequently presented, Cornhill sought to have it dismissed as an abuse of process, arguing that it could not properly be regarded as insolvent. The evidence unsurprisingly showed that it was not, but Mr Justice Harman held that this was irrelevant. If a rich company chose not to pay, it only had itself to blame if it were thought that it could not pay. He therefore allowed the winding-up petition to proceed. However, the case was only concerned with the presentation of a winding-up petition, not with the making of an actual winding-up order. It therefore stands as authority for the proposition that failure to pay an admitted debt is evidence of inability to pay which is sufficient to support the presentation of a petition so that the latter cannot be regarded as abusive. But the case does not go any further than that, nor does the Court of Appeal decision in *Re Taylor's Industrial Flooring Ltd,* [1990] BCC 44 at 50, which is to like effect.

205. Accordingly, it remains open for the Defendants to prove for the purposes of s.123 that UKCS8 was in fact able to pay its debts and I do not accept that the mere failure to pay the Provision Invoice means without more that the cash flow test is failed.

***Debts falling due in the reasonably near future***

206. It therefore becomes necessary to consider whether UKCS8 was in fact able to pay its debts falling due in the reasonably near future. The Defendants' expert, Mr Fritzsche, adopted a horizon of three years for this purpose whereas the Claimants argued that it should be no more than six months bearing in mind that UKCS8 was an oil and gas trading company with substantial debts falling due each month.

207. Even adopting a three year period, however, Mr Fritzsche agreed that on any of his high, median or low scenarios UKCS8 would be cash flow negative in the first year. This is entirely consistent with the contemporaneous evidence showing that both RockRose and UKCS8 had negative predicted cash flow in 2021 and that RockRose was already having to prioritise payments at the start of the year. Given the cash pooling arrangements whereby any spare cash was passed up to the parent company, it is unlikely that UKCS8 was in any better position. Mr Mazzagatti also accepted in cross-examination that there was a severe liquidity crunch at the time.

208. Each side criticised the assumptions that the opposing expert had made in their calculations of cash flow solvency. The Defendants, in particular, argued that Mr Waghe's assumptions regarding available tax relief, COP dates and production profiles were unrealistic. They submitted that on Mr Fritzsche's more reasonable assumptions, UKCS8 was predicted to return to positive cash flow in 2022, even after payment of the dividend. They further pointed to the fact that Mr Waghe's calculations substantially agreed with Mr Fritzsche's median scenario.

209. Interesting as all this was, it is ultimately beside the point because I agree with the Claimants that if UKCS8 was anticipated to be cash flow negative and unable to pay its debts in year 1, it is irrelevant that it was expected to be cash flow positive in years 2 and 3. Whatever the appropriate period to look at, whether six months as the Claimants argued or three years as the Defendants maintained, in my view the company must be able to pay its debts for the entirety of that period. It seems to me that it is not good enough to say that it will be able to pay towards the end of the period if it cannot cover the debts which are presently due. This would be wholly inconsistent with cases such as *Cornhill* and *Re Taylor's* which hold that failure to pay a presently due debt is evidence of insolvency. By parity of reasoning, it is not permissible to focus simply on present debts and ignore what might be coming down the track in the rest of the period.

210. The Defendants' response to this was that:

(a) The Provision Invoice was not necessarily payable in cash immediately;

(b) Even if it was, UKCS8 reasonably believed that it would have a parent company guarantee in place as soon as the sale to FIOGC completed which was good security whether or not it also amounted to compliant Alternative Provision for the purposes of the JOA. In the last resort, the Sheikh Zayed loan could have been called upon;

(c) Any shortfall in 2021 could and would have been met by VIL/VEL under their guarantee of the company's obligations;

(d) Accordingly, support was available which meant that UKCS8 could reasonably have been expected to meet its liabilities.

211. As to (a), I am quite satisfied that the Provision Invoice created a debt which was due and payable in cash on 15 December 2020. This did not cease to be the case merely because there was a 60-day period to cure a default.

212. As to (b), the Claimants submitted that the parent company guarantee could not in any event be relied upon because it was undated and had not been signed by Law Debenture as required under the DSA. Mr Nash sought to meet this point by arguing that under s. 46 of the Companies Act 2006, the guarantee was presumed to be a valid deed unless the contrary was proved. I do not find it necessary to resolve this question because there is a more fundamental reason why in my judgment the guarantee would not have satisfied the Provision Invoice even if it was otherwise valid and FIOGC was willing and able to stand behind it. This is because of the chicken and egg problem which, as already discussed, meant that the guarantee could not be effective until after the sale completed, by which time the dividend had already been declared. More importantly, the Provision Invoice could only have been satisfied by the provision of compliant Alternative Provision or cash. It is common ground that the parent company guarantee was not compliant Alternative Provision (and in any event was never delivered to the DSA Trustee) so that it could not have discharged the Provision Invoice without the consent of all the partners. Unless and until that happened, the DSA Trustee was entitled to demand payment in cash and the debt remained outstanding and undisputed.

213. The only question, therefore, relates to the existence of parental support and/or the Sheikh Zayed loan. Such support can be taken into account where, for example, the company has a history of receiving support from its parent. Otherwise the relevant test is whether support is immediately available or there is a significant probability that it will be available in time

to enable the company's debts to be paid: *Mac Plant Services Ltrd v Contract Lifting Services (Scotland) Ltd,* [2007] CSOH 158 at [76] per Lord Hodge.

214. I have already found above that the Sheikh Zayed loan could and would have been drawn down if necessary even if Mr Mazzagatti would ideally have preferred to keep it for other uses. I also bear in mind that that burden of proof is on the Defendants and that, strictly speaking, the VIL/VEL guarantee may have been limited to obligations owed to the OGA under UKCS8's operating licence. Nonetheless, the Hannam due diligence report expressly contemplated that parent company support for UKCS8 would be available from Viaro and the cash pooling arrangements were intended precisely to allow funds to be moved wherever necessary. Mr Nurmatov's evidence was that UKCS8 always was and would have been supported and, after the sale, FIOGC as a government-owned entity was also in a position to support it. Since the company was expected to return to positive cash flow after year 1, any funding gap was likely only to be short-term and I am therefore prepared to assume for present purposes that Viaro would have stepped in with parental support for UKCS8, whether via the Sheikh Zayed loan or otherwise, so that UKCS8 was not cash flow insolvent.

**Balance sheet insolvency**

215. Cash flow solvency does not avail the Defendants, however, unless they can also prove that UKCS8 was not balance sheet insolvent at the relevant time and, for the reasons set out below, I am quite satisfied that they cannot.

216. There was no dispute that the balance sheet test only takes account of current assets. Contingent and prospective assets are ignored: *Byblos Bank (supra)* at 247d-g; *Re Rococo Developments Ltd,* [2016] ESCA Civ 660 at [19]-[20]; *Eurosail (supra)* at [37]. It is also the case that a company is not necessarily insolvent every time its liabilities happen to

exceed its assets. A judgment still has to be made as to whether it can reasonably be expected to meet its liabilities looking at its assets and making proper allowance for prospective and contingent liabilities.

217. In *Eurosail*, the court was concerned with very long-term liabilities falling due some 35 years in the future where the amount of the eventual liability depended on interest rate and currency movements and the value of the assets depended on the performance of the economy. All these matters were imponderable and it was in this context that the Supreme Court commented at paragraphs [40]-[42] that the further ahead one had to look, the more difficult it would be to show either a deficiency or the converse.

218. Mr Allison submitted that:

(a) Mr Dixit Dominus had accepted that the sale to FIOGC improved RockRose's balance sheet by around US$200-300 million. RockRose's own balance sheet valued UKCS8 at around -US$127 million. It was therefore obviously a negative asset and could only ever be regarded as a positive asset if account were taken of the directors' expectations as to oil price movements which were (as was common ground) irrelevant to the English law test.

(b) Contemporaneous correspondence suggested that RockRose was balance sheet insolvent following the extraction of its cash to fund the acquisition by Viaro and it was unlikely that UKCS8 was in any better position.

(c) The decommissioning liabilities were inevitable. In so far as the Defendants argued that the ultimate amount of such liabilities was uncertain, there was a mechanism under the DSA for valuing them and in any event any uncertainty worked against the Defendants because of the burden of proof.

219. A disposal note in RockRose's accounts as at 31 December 2020 relating to the disposal of UKCS8 to FIOGC valued UKCS8's assets and liabilities at -US$127 million *"as at the date of acquisition"*. A similar figure appeared in VEL's accounts. There was a lively debate between the parties as to the precise basis of this figure and whether the *"date of acquisition"* referred to the date of the company's acquisition by FIOGC in 2020, or by RockRose in 2019. There was also a dispute as to whether the asset value included in the calculation was the current value of the assets or a carrying value reflecting a fair value assessment at an earlier date.

220. I have no real doubt that the *"date of acquisition"* refers to the acquisition by FIOGC as argued by the Claimants. Nonetheless, I agree with Mr Fritzsche that the purpose of the disposal note was to identify the gain or loss on the disposal for accounting purposes and that this required comparison of the consideration received for the sale with the value of the assets/liabilities as recorded in the books, whatever that might have been. Clearly some of the figures going to make up the -US$127 million were current values; for example, it was agreed that the cash figure represented cash held as at 24 December 2020. However, that does not necessarily mean that the value of the physical assets was also a current value. It could well have been a carrying value as suggested by Mr Fritzsche.

221. Even so, Mr Waghe's analysis showed that UKCS8 was balance sheet insolvent both before and after the declaration of the dividend. Mr Fritzsche accepted that it was balance sheet insolvent *after* declaration of the dividend on all his scenarios but maintained that on his high-end scenario it was solvent *before* the dividend. Each side criticised the assumptions on which the other side's calculations were based but since the Defendants have to show that UKCS8 was balance sheet solvent both before and after the declaration

of the dividend and since Mr Fritzsche conceded that it was balance sheet insolvent on all scenarios at least after declaration, it is unnecessary to discuss those criticisms further.

222. In the end, the Defendants only had one point which survived to closing, namely that any balance sheet insolvency was solely due to the amount of the decommissioning liabilities (as was common ground). However, the evidence showed that the estimated liabilities could fluctuate sharply from year to year. It was therefore not simply a question of the ultimate liability being uncertain (Mr Nash accepted that mere uncertainty could not assist him) but more that the amount of the liability was so inherently uncertain that it told one nothing about the true asset value of UKCS8 and should be ignored altogether.

223. I put it to Mr Nash that this was a bold submission and nothing he said in response dissuaded me from the view that it was not only bold but wrong. In my judgment it is appropriate to take account of the decommissioning liabilities, since on the 2021 BMP these would be falling due – at least in part – in the reasonably near future. As Mr Allison rightly argued, there were established mechanisms in the partnership agreements for predicting those liabilities, not least in order to be able to set the amount of DSA security and issue Provision Invoices. This was an entirely orthodox and reasonable way to value the liabilities and the fact that the figure might be different if calculated at an earlier or later date is neither here nor there. The statute requires the assessment to be performed at the date of the transaction. On that basis, not only have the Defendants failed to displace the statutory presumption of insolvency, but I have no real doubt that UKCS8 was balance sheet insolvent at the date the dividend was declared.

**SECTION 238**

224. In the light of these threshold conclusions, it is now possible to turn to the specific requirements of the claim under s. 238. These have already been set out at paragraphs 139

and 140 above. Given my findings as to insolvency above, there can be no doubt but that the transaction was entered into at a "relevant time" in both the temporal and substantive senses. The remaining issues relate to the identification of the relevant "transaction" and the statutory defence under s. 238(5). These are interrelated since the company's purpose under s. 238(5) has to be assessed by reference to the transaction identified under s. 238(2).

**The transaction: dividend alone or wider arrangement?**

225. The Claimants' case was that the relevant transaction for the purposes of s. 238 was the dividend and that it was both necessary and sufficient for the court to look at this in isolation.[8] The Defendants argued that this was wholly artificial in circumstances where it was plain that the declaration of the dividend was simply a stepping stone towards the implementation of a much larger arrangement. In their submission, the company's purpose had to be assessed by reference to the entirety of that arrangement.

226. S. 436 provides that a transaction includes *"a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly."* There was no dispute between the parties that the transaction must have been entered into by the company itself and therefore required the taking of some step or participation by the company.

227. The lynchpin of the Claimants' case that the court should look only at the dividend was *BTI 2014 LLC v Sequana SA,* [2019] EWCA Civ 112; [2019] 2 All ER 784. That case is undoubtedly authority for the proposition that a dividend is a transaction which, by

[8] As the Defendants pointed out in their skeleton, this raises an interesting question as to whether it must be assumed for this purpose that the dividend was lawfully declared under Delaware law and, if so, how that sits with the Claimants' submission in relation to unlawful means conspiracy that the dividend was in fact unlawful. In the event, I have not found it necessary to resolve this tension.

definition, does not itself provide for any consideration. Accordingly, if all that were in play were an isolated dividend, the Claimants would be on strong ground.

228. The Defendants, however, pointed to the Court of Appeal decision in *Feakins v DEFRA,* [2005] EWCA Civ 1513. In very broad outline, the defendant owned a farm which was subject to a mortgage of £450,000. It was also subject to an agricultural tenancy held by a company owned and controlled by the defendant. There was a second charge over the property in favour of DEFRA. The defendant and his partner (H) devised and implemented an arrangement whereby the bank agreed to sell the farm as mortgagee in possession to H for £450,000, overreaching the DEFRA charge in the process. The defendant then procured his company to surrender the tenancy which increased the value of the farm to £1 million, an increase in value of £550,000 over the £450,000 which H had paid to acquire it. DEFRA brought proceedings against the defendant and H under s. 423 arguing that there had been a transaction at an undervalue. The defendant submitted that it was necessary to identify a single transaction for this purpose and that the only candidates were the sale of the property by the bank and the surrender of the tenancy by the company, to neither of which he was a party. The Court of Appeal, upholding Hart J at first instance, accepted that a "transaction" included an "arrangement". It held that this term was apt on its natural meaning and in the context of the section to include an agreement or understanding between the parties, whether formal or informal and whether oral or in writing. It commented that in some circumstances it might be appropriate to treat a single step in a series of linked dealings as the relevant "transaction", while in others it might not. This clearly calls for a fact-specific assessment in every case.

229. It is fair to point out that in *Feakins,* the defendant's undoubtedly improper scheme would have fallen through the net unless the court were prepared to take a broader view of what

constituted the transaction. Indeed, the court expressly noted that the underlying purpose of the section would be a relevant factor in the court's assessment. Mr Allison accordingly submitted that the critical question is whether the purpose of the statute is best served by aggregating or disaggregating the separate parts of an overall arrangement. While I do not dissent from the broad proposition, it somewhat begs the question. The purpose of the statute is to catch transactions and arrangements which are genuinely objectionable, not simply to catch as many transactions as possible. Accordingly, if a dividend is genuinely an inextricable part of a wider arrangement which is not otherwise objectionable, then the purpose of the statute is not subverted by regarding the wider arrangement as the relevant transaction and judging the company's motives and purpose accordingly. It is all a question of fact in the particular case.

230. Mr Nash submitted that the "transaction" here was the overall arrangement by which UKCS8 was sold to FIOGC, including all the linked steps taken to facilitate the sale and ensure that the company was sold free of cash and debt, including the declaration of the dividend and the release of the inter-company balances between RockRose, UKCS8, UKCS9 and UKCS11. While he accepted that there had to be some step or act of participation in the arrangement by UKCS8, it did not have to have been party to every step in the arrangement, as demonstrated by *Feakins* itself. In the present case, he said, UKCS8 participated in the wider arrangement by performing one of the linked steps, namely by declaring the dividend, for which it received consideration in the form of the pension liability write-off – also as part of the wider arrangement.

231. In the light of my factual findings above, this seems to me an entirely legitimate way of analysing the situation. As I have found, the dividend was never regarded as an end in itself but was merely an afterthought adopted almost at the last minute in order to give

effect to the prior agreement that the sale be cash and debt- free. In those circumstances, I agree with Mr Nash that it would be wholly artificial to regard the dividend as the only relevant transaction in isolation from the wider arrangement to which it owed its very existence and with which it was inextricably entwined.

232. In saying this, I do not disagree with Mr Allison's submission that the dividend does not cease to be a transaction merely because something else may also be a transaction. However, the Defendants did not argue that the dividend was not a transaction at all; rather that for the purposes of s. 238 in this case it was the wider arrangement which was the relevant transaction, in which UKCS8 participated by entering into the narrow transaction and declaring the dividend. I can see nothing in *Sequana* which binds me to hold that where a dividend is paid that is the *only* transaction which can ever be looked at.

233. It follows that consideration can in principle be found in any benefits received by the company as part of the wider arrangement even if there is no express provision to that effect. This proposition is supported by *Phillips v Brewin Dolphin Bell Lawrie Ltd,* [2001] UKHL 2; [2001] 1 WLR 143. In that case, which also concerned s. 238, the company was to receive consideration for the sale of its business under a collateral agreement with a third party. The court held that as long as the company received something in return for the disposition, it did not matter where it came from provided it was sufficiently connected with the disposition. In the words of Lord Scott:

*"The subsection does not stipulate by what person or persons the consideration is to be provided. It simply directs attention to the consideration for which the company has entered into the transaction. The identification of this "consideration" is in my opinion, a question of fact. It may also involve an issue of law, for example, as to the construction of some document. But if a company agrees to sell an asset to A on terms that B agrees to enter into some collateral agreement with the company, the consideration for the asset will, in my opinion, be the combination of the consideration, if any, expressed in the agreement with A and the value of the agreement with B."*

234. It is clear from this broad statement of principle that, although the consideration was to be found in a collateral contract in that case, that is not the only situation where consideration can be looked for more widely. Nor is there anything in *Sequana* to suggest that benefits received by the company must be ignored unless stipulated for in the dividend itself. All that *Sequana* decided was that the declaration of a dividend is a transaction on terms which do not in and of themselves provide for any consideration to be paid to the company. It does not purport to say anything about the appropriate analysis where the relevant transaction is a much wider arrangement – unsurprisingly, since that was not a question which was before the court.

235. This disposes of the Claimants' argument that the only consideration which it is permissible to take into account is that which was provided for the SPA itself, and that since the SPA only contained a one-way waiver of sums owed by RockRose to UKCS8 (and not *vice versa*), the discharge of the pension liability cannot in any event be taken into account. In fact, the significance of the pension liability write-off is not in relation to consideration since it is conceded by Mr Nash that the write-off was of an amount considerably less than the amount of the dividend and that, however one views it, the transaction was entered into at an undervalue. Nonetheless, it is still necessary to grapple with the vexed question of the pension liability as it has a bearing on the statutory defence and, in theory, also on the question of the appropriate remedy.

**The pension liability write-off**

236. The thrust of the Claimants' case was that, on the facts, the discharge of the pension liability did not amount to consideration received *by UKCS8* because it did not discharge any liability owed by UKCS8 or, if it did, it only did so to a much lesser extent than claimed.

237. This submission involves consideration of a convoluted contractual chain. The starting point is that UKCS9 was the statutory PAYE employer of all the RockRose group personnel while UKCS11 was the service company for the group. Both companies were wholly-owned subsidiaries of UKCS8. Pursuant to an Employee Services Agreement between UKCS9 and UKCS11, UKCS9 agreed to provide the services of personnel to UKCS11 as and when requested. Pursuant to an Intercompany Services Agreement between all the group companies, UKCS11 agreed to provide services to other companies in the group as required.

238. Broadly speaking, the effect of these agreements was that UKCS9 recharged its costs of employee remuneration (including pension contributions) to UKCS11, which was then required to reimburse UKCS9. UKCS11 in turn recharged the costs (plus a 10% mark-up) to individual group companies in accordance with time sheets recording how much time a particular employee had spent working for one company or another. For example, Mr Nurmatov spent time working for different group companies and his costs were therefore allocated between them and invoiced accordingly by UKCS11. Each group company was responsible for reimbursing UKCS11 as invoiced.

239. Historically, Marathon had operated a defined benefit pension scheme. As the statutory employer, UKCS9 was the company which administered the scheme and was liable to pay the pension contributions. The scheme was closed before the acquisition by RockRose and was subsequently bought out for a premium of £39 million (equivalent to US$53.7 million) for which UKCS9 was liable. As UKCS9 was not a cash-generating company, the premium was actually settled by RockRose on its behalf and recorded as an inter-company balance under the cash-pooling arrangements. It was therefore common ground that UKCS9 owed

RockRose a debt of £39 million, which RockRose was entitled to recharge to UKCS11 and which UKCS11 was in turn entitled to recharge to the appropriate group companies.

240. The contentious question at trial was exactly how much of the premium was rechargeable to UKCS8. The Defendants argued that the entire premium of £39 million was chargeable by UKCS11 to UKCS8, of which around 54% was rechargeable to the other Brae partners with UKCS8 itself remaining ultimately responsible for the remaining 46%. The Claimants argued that the 54% related to the entirety of the Brae operations and therefore fell to be apportioned between all the partners, including UKCS8 itself, and that the Defendants had not discharged the burden of showing that the remaining 46% was chargeable to UKCS8 rather than to other group companies.

241. This was the subject of detailed cross-examination of, in particular, Mr Nurmatov. It was also covered to some extent by Mr Waghe in his expert report. Having carefully scrutinised the evidence before the court, I agree with the Claimants that 54% was the proportion of the premium which was attributable to the Brae operations as a whole and therefore fell to be apportioned between all the partners, including UKCS8, in proportion to their respective interests. That much is consistent with the judgment of Robin Knowles J in the pensions liability litigation.

242. However, that does not necessarily mean that the remaining 46% falls to be apportioned to companies other than UKCS8. The evidence of Mr Nurmatov, which I accept, was that the pension scheme was set up by Marathon and was almost entirely for the benefit of the employees of UKCS8 which, as operator of the Brae assets, had hundreds of staff. However, only costs referable to the Brae operations as such could be recharged to the other partners and not all the costs of UKCS8's employees were so referable. For example, staff would have worked on matters of corporate administration, such as drawing up accounts.

He stated that Marathon's only other interest was in the Foinaven field which it held through UKCS10. However, this was a non-operated interest which did not require many employees and could not possibly have accounted for 46% of the workforce at the relevant time. He was clear that the 46% remained with UKCS8 specifically and was not referable to any other group companies.

243. Mr Allison invited me to reject this evidence on the basis that it was inherently incredible that as much as 46% of UKCS8's wage bill could be attributable to non-operational expenditure. He pointed to the fundamental principle of 'no gain/no loss' for operators in the oil and gas industry, whereby an operator is entitled to recharge the costs and expenses of all operations under the relevant partnership agreements so that it makes neither a profit nor a loss from its position as operator. He submitted that if I was in any doubt as to the position, I should draw adverse inferences from the Defendants' failure to disclose the invoices issued by UKCS11 under the Intercompany Services Agreement or by UKCS9 under the Employee Services Agreement and the supporting timesheets. The Defendants resisted such disclosure on the basis that it would be disproportionate and I can well see that it would wholly impractical to expect the production of historic timesheets for every single one of many hundreds of employees going back many years. In those circumstances, I decline to draw any adverse inferences.

244. Ultimately, Mr Nurmatov was the only witness with any direct knowledge of the matter. He was accepted by the Claimants to be a witness of truth and I have no reason to disbelieve him. At first blush, it does seem strange that as much as 46% of the liability should have stayed with UKCS8 and not been rechargeable. However, I bear in mind that £39 million was a buy-out premium relating to historical operations over a very long period of time. Moreover, the scheme had been closed before the acquisition of Marathon by RockRose

and therefore could not have related to any interests in other fields held by RockRose through other group companies after the acquisition. I was also informed by Mr Nash that the Pensions litigation before Knowles J proceeded on the basis that the £39 million represented a 100% liability of UKCS8 and that the subject of that litigation was the appropriate proportion which could be passed on to the other partners.

245. This is consistent with paragraphs 3 and 4 of Knowles J's judgment which expressly state that the judgment is concerned with the:

*"costs of staff* ***employed by the Operator****. More specifically the question is whether Participants are liable to meet a share of a proportion of deficit recovery charges ("DRCs") in respect of a defined benefit pension scheme… of which some of* ***those employees*** *were beneficiaries. The reference to a share is to a share of the costs of operations for which Participants were, between them, responsible. A proportion only is involved because the Scheme included* ***some employees*** *who did not work on operations in the Brae fields, and some who worked on operations there for some periods and on other unrelated tasks for other periods."* (Emphasis added.)

246. It is clear from this that, so far as Knowles J was concerned, all the employees to which he was referring were employees of the Operator, i.e., UKCS8. If so, then his judgment starts from the premise that the entire premium is to be borne by UKCS8 and that only 54.7% is referable to operations as such.

247. Mr Nurmatov's evidence (which was not challenged on this point) is also consistent with the fact that some £29.59 million out of the £39 million had already been invoiced down the contractual chain to UKCS8 and an appropriate share recovered from the other Brae partners. That was around 75% of the total premium which is considerably more than should have been the case if (as the Claimants submit) only 54% of the total was attributable to the Brae assets in the first place. The fact that both UKCS9 and UKCS11 were wholly-owned subsidiaries of UKCS8 also suggest that no substantial activities involving personnel were taking place elsewhere in the group when the pension scheme was still open.

248. On that basis and in the absence of any evidence to suggest that the pension scheme covered interests other than those held by UKCS8 and UKCS10 in Brae and Foinaven, I accept that the entire £39 million was ultimately chargeable to UKCS8.

249. Since both UKCS9 and UKCS11 were subsidiaries of UKCS8, the US Dollar equivalent (US$53.7 million) would in the ordinary course have been set off against the inter-company balance owed by RockRose to UKCS8 before the sale so that the ultimate dividend declared would have been only some US$31 million. However, by the time the dividend was declared UKCS8 had already divested itself of both subsidiaries preparatory to the sale to FIOGC and so it was too late. Instead, RockRose simply wrote off the entire amount, thereby relieving UKCS8 of its liability to repay the premium.

250. In summary, I accept that the entirety of the premium was rechargeable to UKCS8 via UKCS11 and that it properly represents a benefit to UKCS8 and thus consideration received by UKCS8 as part of the arrangement of which the dividend formed part. I am also prepared to accept that as part of the process, UKCS11 wrote off a liability of US$26.1 million owed to it by RockRose. However, while that may mean that as between RockRose and UKCS11, the ultimate balance of account was less than US$53.7 million, it does not necessarily mean that the benefit to UKCS8 was thereby also diminished. On that point, there was no evidence one way or the other.

## The statutory defence: s. 238 (5)

251. Drawing the threads together so far, I am satisfied that UKCS8 entered into a transaction at an undervalue and was insolvent either immediately before or as a result of the transaction. The Claimants have therefore established a *prima facie* case for relief under s. 238 subject only to the statutory defence in s. 238(5). This requires the court to consider three matters:

(a) Whether the company entered into the transaction in good faith;

(b) For the purpose of carrying on its business; and

(c) Whether there were reasonable grounds for believing that the transaction would benefit the company.

252. It was not in dispute that the burden of proof in relation to all three matters is on the Defendants and that the first two require a subjective assessment whereas the third prescribes a purely objective test. The Claimants further submitted that a successful defence under s. 238(5) is rare. Even if that is so, it is irrelevant. It is for me to determine on the basis of the evidence before me whether the defence succeeds in this case. Mr Nash submitted that in this context, it is very relevant that one is looking at the wider transaction since the Defendants' purpose must be judged in relation to the transaction as a whole. Indeed, he went further and argued that even if the dividend was the only relevant transaction for the purposes of the section it would be unfair and artificial in the present circumstances to focus on intention in relation to the dividend alone. He pointed out that the Claimants themselves accepted that the broader approach applied in relation to s. 423 and the tort claim and submitted that the same was true here. He may or may not be right about that but since I agree with him that the relevant transaction is the wider arrangement encompassing the sale to FIOGC and all its associated steps, it is unnecessary to dwell further on the point.

253. As is obvious, the premise of the statutory defence is that a transaction at an undervalue has taken place at a time of insolvency. Nonetheless, as Mr Nash pointed out, the very existence of the defence presupposes that such a transaction can be justified in appropriate circumstances, and it cannot therefore be the case that every such transaction must be set aside. He submitted that the scope of the defence is wide enough to allow a decision to be

taken in times of corporate crisis which those directing the company honestly believe on reasonable grounds to represent a good course for the company to get it out of its crisis. This, he said, was just such a case.

254. It was not in dispute that in relation to the subjective requirements it is the state of mind of UKCS8 itself which is relevant, not that of a counterparty or other third party. As Mr Mazzagatti and Mr Dixit Dominus were the managers and thus the directing minds and will of the company, it follows that they are the only two individuals whose intentions need to be scrutinised and in view of my findings as to purpose and motivation above, I can take matters relatively shortly.

***Good faith***

255. Good faith for the purposes of s. 238(5) essentially means that there must be no intention to circumvent the purposes of the law of insolvency. Thus, the defendant must not intend to benefit at the expense of other creditors or collude with the debtor in prejudicing those creditors: see *McPherson & Keay's Law of Company Liquidation (5$^{th}$ ed., 2021)* at §11-042. This is not necessarily the same question as whether Mr Mazzagatti and Mr Dixit Dominus were in breach of fiduciary duty in failing to act in the best interests of the company, although there is plainly an overlap.

256. I am quite satisfied in this case that neither Mr Mazzagatti nor Mr Dixit Dominus acted with any such intention. On the contrary, I accept their evidence that the sale of UKCS8 to FIOGC was conceived and executed as the best way of breaking the deadlock with TAQA and allowing the company to operate in a more benign environment with every prospect of an on-sale to TAQA in the medium term and procuring adequate DSA security and corporate support in the immediate term.

257. Mr Allison submitted that there were a number of indications that Mr Mazzagatti and Mr Dixit Dominus cannot have acted in good faith. However, none of them, whether taken individually or cumulatively, is of sufficient weight to cause me to alter my conclusion. I address each in turn:

(a) The waiver of debts due to UKCS8 from RockRose under cl. 3.4 of the SPA: Mr Allison argued that this could not have been in good faith when Mr Mazzagatti did not even know the amount of the debt. However, I do not find this at all surprising. The existence of the inter-company debt was drawn to his attention at a very late stage and had to be extinguished, whatever its value, in order to achieve a cash and debt-free sale. In those circumstances, it is hardly a criticism that he simply authorised whatever steps were necessary to write off the loan. The Claimants' submission that it was necessary specifically to scrutinise UKCS8's balance sheet before deciding whether the dividend was appropriate presupposes that the dividend itself is the only relevant transaction to be considered but I have already rejected that approach which wholly ignores the role of the dividend in the wider transaction.

(b) Lack of consideration as to whether the proposed dividend was suitable in the light of UKCS8's financial circumstances and obligations: Mr Mazzagatti agreed that he had not personally carried out any analysis or enquiry into the company's financial position but relied on his team in that regard. However, this is really a repackaging of the argument that purpose must be judged in relation to the dividend alone and fails for the same reason. It runs into the further difficulty that neither Mr Mazzagatti nor Mr Dixit Dominus was ever told or contemplated that as a result of paying the dividend UKCS8's liabilities might exceed its assets or that it might be unable to pay its debts. On the

contrary, they fully expected that the parent company guarantee would be accepted and that FIOGC would stand behind the company.

(c) Failure to carry out any due diligence into FIOGC: Mr Allison submitted that Mr Mazzagatti and Mr Dixit Dominus had no knowledge of FIOGC's financial condition beyond the fact that it was supposedly owned by the Fujairah government. No steps had been taken to ascertain whether the government would stand behind it. He submitted that good faith incorporates a duty of enquiry and none was carried out.

(i) In truth, this submission is more an aspect of whether there were reasonable grounds for believing that the sale would benefit UKCS8 (i.e., the third requirement of the statutory defence). In my judgment it would only indicate a lack of good faith if Mr Mazzagatti deliberately refrained from enquiry when he was on notice that there was a need to do so. In support of his submission, Mr Allison relied on *In re Whitestar Management Ltd,* [2018] EWHC 743 (Ch), [2018] Bus LR 1758. However, the main issue in that case was whether the defendant was a bona fide purchaser for value without notice within the meaning of s. 241 of the Act and the circumstances were such that he was on enquiry as to the propriety of accepting the payments in question. I do not read the case as authority for the proposition that a defendant can never satisfy the good faith requirement of s. 238(5) unless it has exercised due diligence.

(ii) In any case, the submission leaves out of account Mr Mazzagatti's personal experience of doing business in the Middle East and his evident connections with high net worth individuals there. Evidence that FIOGC was 100% owned by the Fujairah government was obtained in the form of its licence, which was sent to TAQA on 13 December 2020 and this was further confirmed in the Counsel's

Opinion which also stated that usual practice in the UAE was for governments to stand behind state-owned entities. As this accorded with Mr Mazzagatti's own experience, I do not accept that he failed to act in good faith in not undertaking further enquiries.

(d) Failure by FIOGC to carry out any due diligence into UKCS8: In one sense, it was not for Mr Mazzagatti to worry about whether FIOGC had done sufficient due diligence into the purchase of UKCS8 before agreeing to it. But in any event, Mr Hassan Ali was aware of the problems with TAQA and had expressed confidence that he could ameliorate the situation and achieve a sale of UKCS8 in due course. He was also aware of the need to post DSA security and had agreed to do so, first by way of bond and then in the form of a parent company guarantee. In the absence of any indication that this was not a genuine commitment which FIOGC was willing and able to honour, it is difficult to see why FIOGC's preparedness to conclude the sale without further detailed investigation should cast doubt on Mr Mazzagatti's bona fides. If Mr Hassan Ali was contemplating a sale to TAQA in due course, with RockRose continuing to manage the company and cover operational expenditure out of revenues in the interim, it stands to reason that his main interest would be in the value of the company to TAQA.

(e) Failure to ascertain the views of the OGA: Again, this seems to me to be more relevant to the question of whether there were reasonable grounds for believing that the transaction would benefit UKCS8. In any event, if there were good commercial reasons for the transaction and if Mr Mazzagatti and Mr Dixit Dominus genuinely believed that it was in UKCS8's best interests, as I find they did, it does not cease to be a transaction undertaken in good faith merely because they did not wait for the OGA's response. It was not as if the transaction was concealed in any way from the OGA. On the contrary,

Mr Mazzagatti had asked Mr Mann on 21 December 2020 to notify the OGA and while it is fair to say that its response was hardly enthusiastic, it did not reject the deal outright. There is more than one way to interpret the reference to the deal not being *"clean"* and having the appearance of *"financial engineering"* and in the context of the OGA's query as to why FIOGC did not simply invest in Viaro or RockRose when the latter was continuing to manage the company, it is certainly a possible reading that they were more puzzled by the fact that the sale did not bring about a clean break. I note that Mr Jenkins referred in cross-examination, to a cash and debt-free sale as a way of making a deal as *"clean as possible"*.

(f) Waiver of cl. 3.2.2 of the SPA: The Claimants argued that if Mr Mazzagatti and Mr Dixit Dominus honestly believed that the parent company guarantee amounted to valid Alternative Provision, there was no need to waive cl. 3.2.2. They cannot therefore have held such a belief and their evidence was untrue. I have already addressed and rejected this argument in paragraph 181 above.

258. I am therefore satisfied that when Mr Mazzagatti and Mr Dixit Dominus caused UKCS8 to enter into the transaction, they did so in good faith in the belief that it was in UKCS8's best interests.

***For the purpose of carrying on its business***

259. The Claimants argued that in order to satisfy this requirement, the transaction must have been "necessary" for the purpose of UKCS8's business (not that of RockRose or the wider group), and that this could not be the case unless the Defendants could show that there was no other cheaper means of resolving the situation. Mr Allison submitted that RockRose could have used the Sheikh Zayed loan and the choice not to do so was entirely in the

interests of the wider RockRose group, not of UKCS8. Accordingly, the sale to FIOGC as an alternative was not necessary for the purposes of UKCS8's business.

260. I do not agree with the premise of this proposition. First, there is nothing in the statutory wording which says that the transaction must have been "necessary" for the purpose of the company's business. Mr Allison referred in this context to *Lord v Sinai Securities Ltd,* [2004] EWHC 1764 (Ch); [2005] 1 BCLC 295. This was an application to dismiss a liquidator's claim for relief under s. 238 on the grounds that it had no reasonable prospect of success. The court was therefore only concerned with threshold arguability and held that there was an arguable claim on the basis of the liquidator's submission that the relevant transaction was not "necessary" because the end result could have been achieved more cheaply by another route. As I read the judgment, however, the court simply regarded that as a factor which could be taken into account, not as a rule of law.

261. Secondly, the Court of Appeal has deprecated attempts to read limitations into the equivalent wording in s. 423: see *JSC BTA Bank v Ablyazov,* [2018] EWCA Civ 1176; [2019] BCC 96 at [14] where it was held that it is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, the transaction was within s. 423(3) even if was also entered into for one or more other purposes. In my judgment, the converse must equally be true in the context of s. 238(5). If the transaction is entered into for the purpose of the company's business, it is irrelevant that it may not have been the sole purpose.

262. The Defendants here argue that the sale to FIOGC was entered into in good faith for the purpose of enabling UKCS8 to carry on its business either pursuant to an agreed common strategy with TAQA, or following an onsale to TAQA. They submit that the impasse between RockRose and TAQA could not have been resolved simply by allowing things to

continue as they were and using the Sheikh Zayed loan to put up security. By contrast, the sale to FIOGC was expected to create an environment in which it was entirely likely that the parties could agree a common strategy for the Brae assets or achieve a sale of the company.

263. In my view, this was at the main purpose or at the very least *a* purpose of entering into the overall arrangement.

***Reasonable grounds***

264. Unlike the first two requirements of s. 238(5), this calls for an objective assessment. It is common ground that such an assessment must be made as at the date of the transaction and not with the benefit of hindsight: *McPherson & McKeay (op.cit.)* §11-043. It is also common ground that the requisite benefit must be to the company, i.e., to UKCS8 itself, not to RockRose or other companies in the group.

265. Mr Allison made the forceful point that s. 238(5) only becomes relevant in circumstances where UKCS8 is insolvent. He submitted that it is therefore relevant to consider whether the declaration of the dividend was lawful under Delaware law. If it was not, then although it could have been ratified if the company were solvent, this could not happen once it became insolvent. He submitted that the dividend was in fact unlawful under Delaware law and that this was a knock-out blow to the Defendants because Mr Mazzagatti and Mr Dixit Dominus could not have reasonably believed that the declaration of an unlawful dividend would benefit the company.

266. This submission raised a difficult question of statutory interpretation concerning Section 18-607 of the Delaware Limited Liability Company Act In broad terms, this section provides that a distribution such as a dividend will be unlawful unless, at the time it is made,

the "fair value" of the LLC's assets exceeds its liabilities by an amount in excess of the distribution. While there was almost complete agreement between the experts on most questions of Delaware law, the two issues dividing them were:

(a) whether the directors' expectations as to future commodity prices could be taken into account in assessing the fair value of the company's assets and liabilities under Section 18-607;

(b) whether, in circumstances where the two individuals who had authorised the dividend as representatives of the company's sole shareholder (i.e., Mr Mazzagatti and Mr Dixit Dominus) were also the same individuals who managed the company itself, they could be said to have ratified the dividend by virtue of the authorisation itself.

267. Both experts agreed that there was no clear authority in Delaware law on either issue. Each of them was of considerable experience and standing and gave his evidence fairly and with clarity. It is obviously difficult for me to resolve a question of foreign law where the experts are unable to provide clear guidance, although I was inclined instinctively to prefer Professor Hamermesh's view that there was no ratification on the facts of this case. However, while it might have been necessary to reach a conclusion in the context of the claim for unlawful means conspiracy, it is not a task which it is necessary for me to undertake in the context of the statutory claims. This is for the simple reason that the Defendants' Delaware lawyers were involved in the preparation of the SPA and the Distribution Notice before the dividend was declared but never suggested that there was anything unlawful about proceeding in that way. It cannot sensibly be suggested that either Mr Mazzagatti or Mr Dixit Dominus should have had the finer points of Delaware law on limited liability companies at their fingertips, still less been in a position themselves to form a judgment on a point which was the subject of disagreement between experienced experts.

I therefore find that they had no reason to suspect that the dividend was or might have been unlawful under Delaware law and that in the absence of objection from their own Delaware lawyers, it was reasonable for them to assume that it was lawful.

268. The Claimants nonetheless submitted that there were no reasonable grounds for supposing that the transaction would benefit UKCS8 as opposed to RockRose and/or the wider group. Many of the arguments deployed were substantially the same as those already considered above:

(a) FIOGC was an unproven new entity with no material assets, no separate credit rating and no experience of upstream operations in the North Sea. Mr Allison argued that there were no reasonable grounds for supposing that it would stand behind UKCS8 without an express guarantee from the Fujairah government, only an assumption by Mr Mazzagatti that the government would not let FIOGC default. I reject this submission, essentially for the reasons given in paragraphs 178-180 above. Mr Jenkins also gave evidence that he thought and expected FIOGC to honour its obligations. On my findings, Mr Mazzagatti and Mr Dixit Dominus could and did reasonably believe that FIOGC would be able to resolve the differences with TAQA and that TAQA might eventually acquire UKCS8 itself in order to benefit from its tax paid history. This could only have been to the benefit of UKCS8 as compared with its situation at the time of the sale. Further, they could and did believe on reasonable grounds that the FIOGC parent company guarantee would ultimately be accepted by the other Brae partners and second-tier participants.

(b) The dividend itself was not objectively justified because UKCS8 was insolvent so that removing its cash before sale could not possibly have benefitted the company. This

submission concentrates impermissibly (as I have held) on the dividend to the exclusion of the wider transaction: see paragraph 257(b) above.

(c) It was unnecessary to waive cl. 3.2.2 of the SPA. The reasons given in paragraph 181 above substantially dispose of this suggestion. Moreover, as Mr Mazzagatti pointed out, waiver of cl. 3.2.2. also exposed RockRose who had undertaken liability for the East Brae bonds on behalf of UKCS8.

(d) There were no reasonable grounds to suppose that the OGA would have been willing to approve the sale. Mr Allison drew attention in this context to the fact that the OGA eventually revoked UKCS8's operating licence. However, this was in 2023, long after the default had occurred and UKCS8's interest had been forfeited. It is certainly not what had been intended or foreseen when the sale took place and, in any event, the OGA did not positively object to the transaction at the time despite being notified some days before it was completed.

(e) The Management Services Agreement deprived UKCS8 of 50% of its net revenues. The Claimants asserted that this could only objectively have been in the interests of RockRose rather than UKCS8. However, FIOGC admittedly had no experience in the North Sea and would undoubtedly not have been capable of managing UKCS8 without some assistance. It could reasonably be said that continuing under RockRose management on an interim basis was an obviously sensible measure since it was clearly in UKCS8's best interests to be properly managed after the sale. Mr Mazzagatti explained that he had suggested a percentage rather than a flat fee in order not to penalise FIOGC in months when revenues were low and the Claimants did not adduce any evidence to suggest that the fee charged was unreasonable for the services being provided.

269. More generally, the Claimants' overarching submission was that Mr Mazzagatti on his own admission did not look at UKCS8's interests separately because he regarded its interests as being aligned with those of the wider RockRose group. In my judgment, this argument founders on the fact that there do not cease to be reasonable grounds for thinking that the transaction would benefit UKCS8 merely because there may be reasonable grounds for supposing that it will benefit other group companies as well. Again, there is nothing in the statutory wording to indicate that there must be reasonable grounds for believing that the transaction must benefit the company and only the company. Nor can I see anything in the statutory purpose of s. 238 which requires such a construction to be placed on it.

270. For all these reasons, I am satisfied that the Defendants have discharged the burden of showing that UKCS8 entered into the transaction in good faith and for the purpose of carrying on its business and that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

271. The statutory defence accordingly succeeds and the claim under s. 238 correspondingly fails. It is therefore unnecessary for me to consider what remedy would have been appropriate, and against whom, had the claim succeeded. This raised a number of difficult points on which I do not consider that my *obiter* views would necessarily provide much enlightenment, I therefore prefer to leave them for a case where they arise squarely for decision.

272. I can now deal with the remaining two claims very shortly indeed.

**SECTION 423**

273. The requirements of a claim under s. 423 have been set out in paragraphs 141-142 above. The question of the relevant "transaction" and whether it was at an undervalue have been

considered in the context of s. 238: see paragraphs 224-232 above. The critical question is therefore whether the transaction was entered into for the purpose of putting UKCS8's assets beyond the reach of existing or potential creditors or of otherwise prejudicing those creditors.

274. The burden of proving this is on the Claimants although inferences can be drawn from the evidence as a whole. However, it must be shown that this was a *purpose* of the transaction and not merely a consequence (even if foreseen), although it need not have been the sole or dominant purpose.

275. Since, however, I have found in paragraph 198 above, that Mr Mazzagatti and Mr Dixit Dominus had no such purpose, it follows that this claim too must fail.

## UNLAWFUL MEANS CONSPIRACY

276. For the same reason, and irrespective of whether the Claimants can make good their case on unlawful means, they cannot show that the Defendants acted with an intention to injure them. The claim in conspiracy therefore also fails and it is unnecessary to examine the extent to which the other ingredients of the tort could have been established, all of which were vigorously challenged by the Defendants.

277. In these circumstances, it is also unnecessary to consider the third pleading point referred to in paragraph 147 above and I say no more about it.

278. If the conspiracy claim had remained live and if I had resolved the pleading point in the Claimants' favour, it would have raised a further very interesting (and, as yet, unresolved) point as to whether the English tort of conspiracy should permit a private law remedy to be granted in respect of means which were unlawful only under foreign law and where the sole remedy permitted by the foreign law was a class remedy by the company itself: see,

for example, the comments in *Ablyazov (supra)* at [15] and *Emerald Supplies Ltd v British Airways plc (No.s 1 and 2),* [2015] EWCA Civ 1024; [2016] Bus LR 145.

279. Mr Nash argued that to do so would significantly extend the ambit of the Delaware law provision relied on by the Claimants which, as a matter of Delaware law, constitutes a wrong against the company alone and not its creditors and where the liability of an individual director depends on proving knowledge of unlawfulness. This, he submitted, would distort the operation of the Delaware statue by depriving the Defendants of a defence (lack of standing) which would be available to them under Delaware law.

280. These are powerful points which merit detailed consideration. Since the claim fails anyway, however, they are better left for a case where they can be properly debated and explored.

## CONCLUSION

281. For all the reasons given above, the Claimants' claims fail and are dismissed.