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Case No: 2013 Folio 29

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2015

Before:

MR JUSTICE COOKE

- -

Between:

(1) BG GLOBAL ENERGY LIMITED (FORMERLY BG INTERNATIONAL (NSW) LIMITED) **(2) BG UPSTREAM A NIGERIA LIMITED** **(3) BG EXPLORATION AND PRODUCTION NIGERIA LIMITED**	Claimants
- and -	
(1) TALISMAN SINOPEC ENERGY UK LIMITED (FORMERLY TALISMAN ENERGY (UK) LIMITED) **(2) TALISMAN SINOPEC ALPHA LIMITED (FORMERLY TALISMAN ENERGY ALPHA LIMITED)** **(3) IDEMITSU PETROLEUM UK LTD (FORMERLY PETRO SUMMIT INVESTMENT UK LIMITED)**	Defendants
- and -	
TALISMAN SINOPEC NORTH SEA LIMITED	Seventh Party
- and –	
RIGEL PETROLEUM UK LIMITED	Eighth Party

14th, 15th, 19th and 20th January 2015

- -

John McCaughran QC and Nehali Shah (instructed by Bond Dickinson LLP) for the Claimants
Sa'ad Hossain QC and Emma Jones (instructed by Pinsent Masons) for the 1st, 2nd Defendants and 7th and 8th Parties

Alain Choo Choy QC and Alec Haydon (instructed by Memery Crystal LLP) for the 3rd Defendant

Hearing dates: 14th, 15th, 19th January 2015

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Approved Judgment

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

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MR JUSTICE COOKE

Mr Justice Cooke:

Introduction

1. The Claimants (together, "BG") are part of the BG Group, which is listed on the London Stock Exchange and is a leading participant in the global energy market.

2. Talisman Energy Inc is a global upstream oil and gas company headquartered in Canada. The First Defendant ("Talisman") has since about 17 December 2012 been in a joint venture between Talisman Energy Inc and the Sinopec Group (prior to that Talisman was the principal operating subsidiary of Talisman Energy Inc in the UK). The Second Defendant and the Seventh and Eighth Parties are wholly-owned subsidiaries of Talisman.

3. The Third Defendant ("Idemitsu") is a subsidiary of Idemitsu Kosan Co Ltd, which is primarily an integrated energy company headquartered in Tokyo. Idemitsu is the principal upstream oil and gas subsidiary of Idemitsu Kosan Co Ltd in the UK.

4. The agreed Case Memorandum sets out the subject matter of the dispute in the following way.

5. BG together with Talisman, the Idemitsu and the Seventh and Eighth Parties were at the material time the licensees of production licences relating to the Blake Field, a hydrocarbon accumulation underlying an area covered by Blocks 13/24a, 13/24b and 13/29b on the UK Continental Shelf. The First Claimant (BG International) was at all material times the operator of the Blake Field.

6. The Defendants are the current licensees of production licences relating to an adjoining field, the Ross Field, a hydrocarbon accumulation underlying an area covered by Blocks 13/28a, 13/28c and 13/29a on the UK Continental Shelf. Talisman is the operator of the Ross Field.

7. The owners of the Blake Field and the owners of the Ross Field entered into a Transportation, Processing and Operating Services Agreement dated 22 June 2001 (the TPOSA). Pursuant to the TPOSA, Talisman (as Transporter Operator) on behalf of the owners of the Ross Field (the Transporters) agreed to provide certain transportation, treatment, processing, storage and off-loading facilities to the owners of the Blake Field (the Shippers) to enable (i) production from the Blake Field to be accepted into the floating production, storage and offloading vessel (the Ross FPSO) used to process production from the Ross Field, and (ii) stabilised crude oil (SCO) allocated to the Blake Field to be re-delivered therefrom.

8. The TPOSA obliged BG International (as Shipper Operator), to pay for the services provided under the agreement, initially by way of an oil tariff (in the Initial Term) and then, from 1 January 2007 onwards (the Secondary Term), by way of a contribution to Operating Expenditure. Such contribution was to be on a production rate basis so that BG International paid that proportion of Operating Expenditure which related to the SCO allocated to the Blake Field.

9. The use of the Ross FPSO in developing and producing the Ross Field was initially provided pursuant to an Agreement for the Provision and Operation of a Floating

Production Storage and Offloading Vessel for the Ross Field dated 2 April 1997 (the 1997 FPSO Agreement) between Talisman and Bluewater (Floating Production) Limited (the owner of the Ross FPSO). The 1997 FPSO Agreement was replaced in June 2001 with an agreement (the 2001 FPSO Agreement) that addressed the provision of the services to the Shippers under the TPOSA in respect of the Blake Field, in addition to the services previously provided in respect of the Ross Field.

10. The 2001 FPSO Agreement was replaced with a Bareboat Charter on 30 November 2005 (the Bareboat Charter), pursuant to which Talisman took over operatorship of the Ross FPSO from Bluewater on 1st December 2005 and became duty holder of the vessel.

11. Talisman says that it gave BG International the opportunity to consent to being charged on the basis of the Bareboat Charter. BG International did not consent to the Bareboat Charter either before or after its execution. BG International relies upon the fact that, prior to Talisman entering into the Bareboat Charter, it informed BG International that it did not consider that its consent was necessary and that it would not be seeking its consent, because it would continue to charge during the Secondary Term by reference to the 2001 FPSO Agreement. Talisman relies upon all of the correspondence in relation to the question of consent and the disputed issues regarding the construction of the TPOSA.

12. During the Secondary Term commencing on 1st January 2007, Talisman has charged for a contribution to Operating Expenditure by reference to the 2001 FPSO Agreement. There is an issue between the parties as to whether such charging arrangement was on the basis of a reservation of rights as to what amounts could properly be charged pursuant to the TPOSA.

13. BG claim that on the true and proper construction of the TPOSA, alternatively, by implication, Operating Expenditure thereunder falls to be calculated and invoiced to the Blake Field owners by reference to the 2001 FPSO Agreement. BG contend that, since the commencement of the Secondary Term, Talisman has failed to calculate and render invoices for Operating Expenditure in accordance with the TPOSA, which has resulted in overcharges to BG in an amount currently estimated at £34.5 million.

14. BG's claim is to recover the amount of such alleged overcharges, either as damages for breach of contract or restitution of sums paid pursuant to a mistake and/or for a consideration which failed and/or for monies had and received. BG claim such sums from Talisman (as Transporter Operator, for itself and on behalf of itself and the other Transporters: the Second and Third Defendants), alternatively from each of the Defendants as Transporters.

15. The claim is brought pursuant to a Conflict Management Procedure, dated 16 April 2012, by which the parties agreed that BG would only be entitled to commence proceedings in their capacity as Shippers and, consequently, would only be entitled to claim the amount of the alleged overcharges that corresponded to their aggregate percentage interest in the Blake Field, being 44%.

16. The Defendants deny BG's claim on the basis that: (i) on the true and proper construction of the TPOSA, Operating Expenditure falls to be charged by reference to the costs and expenses actually incurred, irrespective of the agreement under which

they are incurred and, on that basis, BG have been undercharged under the TPOSA during the Secondary Term, as the charges actually incurred under the Bareboat Charter should be taken into account in calculating the Operating Expenditure to which the Blake Field owners are required to contribute, and (ii) even if Operating Expenditure falls to be charged on the basis of the 2001 FPSO Agreement, BG have still been undercharged under the TPOSA during the Secondary Term. Further, Idemitsu denies that BG is entitled to bring a claim against it at all.

17. Each of Talisman (as Transporter Operator) and the Third Defendant (as Transporter) counterclaims against BG International (as Shipper Operator) in respect of sums said to have been wrongfully withheld and also in respect of the alleged undercharges. The Third Defendant claims its 30.82% share of those sums in the alternative.

18. BG deny the counterclaims. In particular, BG contend that, if they are wrong on their case as to the proper construction of the TPOSA, or the implication thereof, as set out above at paragraph 13, the Defendants are estopped from contending that charges can be made in excess of what the charges would have been under the FPSO Agreement and/or they have waived any right to do so. BG also contend that there is no basis for Idemitsu to claim any sums, alternatively to claim any more than its unit share.

19. BG International (as Shipper Operator) has brought a Part 20 Claim against Talisman, Idemitsu and the Seventh and Eighth Parties (i.e. the other owners of the Blake Field) for an indemnity and/or contribution in respect of the First and Third Defendants' counterclaims if, contrary to its primary case, it is found liable (as Shipper Operator) in respect of the alleged undercharges, insofar as they are attributable to Blake Field owners other than BG.

20. The Part 20 Defendants admit that they are required to contribute, in proportion to their interests in the Blake Field, to sums properly incurred by BG International as Shipper Operator under the TPOSA. However, they contend that the commencement of the Part 20 proceedings by BG International was unnecessary and premature as their liability to contribute as Blake Owners had never been disputed.

The Stage 1 Trial

21. This is a Stage 1 Trial of a number of preliminary issues comprising questions of construction of the TPOSA and related contracts, in particular the 2001 FPSO Agreement. To the extent that there is any relevant evidence of factual matrix, it is set out in a Statement of Agreed Facts. The principal question to be decided in the Stage 1 Trial relates to the manner in which Talisman is entitled to charge in respect of the services provided under the TPOSA and the proportionate share of Operating Expenditure, as defined in it. The issue is linked to clause 6.4 of the TPOSA which had the effect of prohibiting Talisman from agreeing to certain types of amendment to the 2001 FPSO Agreement with Bluewater without the prior written approval of BG International, such approval not to be unreasonably withheld.

The List of Issues

22. The Agreed List of Issues is as follows:

"**The meaning of "Operating Expenditure" and the meaning of the "FPSO Agreement"**

1. On the true and proper construction of the TPOSA and/or as a matter of implication, from 30 November 2005, when the 2001 FPSO Agreement terminated and the Bareboat Charter was entered into:

(1) Did Operating Expenditure include all direct and indirect costs in fact incurred by Talisman in connection with the provision of the Services (as defined in the TPOSA), including costs incurred under or in relation to the Bareboat Charter, as alleged in paragraph 21(a) of the Re-Re-Amended Defence and Counterclaim?

Or

(2) Was Operating Expenditure to be calculated as if the 2001 FPSO Agreement remained in place and if so:

(a) Did the references in the definition of Operating Expenditure in the TPOSA to the payments set out in Schedule 5 of the TPOSA, reproducing Schedule D to the 2001 FPSO Agreement, (the "**Schedule 5/Schedule D Payments**") require the First Defendant as Transporter Operator ("**Talisman**") only to charge BG on the basis that the Schedule 5/Schedule D Payments covered all the services to be provided by Bluewater under the 2001 FPSO Agreement (the "**Bluewater Services**") such that Talisman was not entitled to make any additional charge in respect of the Bluewater Services (absent a variation of the TPOSA in accordance with clause 24 thereof), as alleged in paragraphs 11-12 of the Amended Particulars of Claim?

Or

(b) As the Talisman Defendants contend at paras 21(bA) and 22(aA) of the Re-Re-Amended Defence and Counterclaim in the alternative to their primary case, did Operating Expenditure include (subject to the issue at paragraph 9 below):

(i) expenditure incurred by Talisman as a result of arrangements made with Bluewater during the currency of the 2001 FPSO Agreement, the effect of which was that the costs in respect of a particular item were for Talisman's account instead of Bluewater's account?

(ii) expenditure that would have been incurred by Talisman as a result of arrangements that Talisman would have made with Bluewater had the 2001 FPSO Agreement remained in force, the effect of which would have been that the costs in respect of a particular item would have been for Talisman's account instead of Bluewater's account?

(iii) sums that Talisman in fact paid or would have paid to Bluewater for the maintenance and/or operation of the Ross FPSO without making any arrangements with Bluewater?

2. As part of answering question 1 above, the following further sub-issues arise:

(1) Do the references to the Schedule 5/Schedule D Payments in the definition of Operating Expenditure serve as an example of Operating Expenditure at the time the TPOSA was agreed, or are Schedule 5/Schedule D Payments always required to be charged as part of Operating Expenditure; and

(2) Is the Bareboat Charter an "*FPSO Agreement*" under the TPOSA? In particular:

(a) Was the 2001 FPSO Agreement "substituted" by the Bareboat Charter within the meaning of that word in the definition of "FPSO Agreement" in the TPOSA?

(b) If so, in order for it to be a substitution "in accordance with clause 6.4", would Talisman have been required to obtain BG International's prior written approval under clause 6.4 of the TPOSA? [*This will then raise the issues at paragraphs 3-8 below]*

The meaning and effect of clause 6.4 of the TPOSA

Issues 3-8 below arise if the answer to issue 1 is that set out in para 1(1) above and/or also in the context of answering issue 2(2)(b) above.

3. In what circumstances, as a matter of construction of clause 6.4 of the TPOSA, would BG International's prior written approval be required under clause 6.4(i) and/or clause 6.4(ii) of the TPOSA to the termination of the 2001 FPSO Agreement and its replacement with the Bareboat Charter? In particular, on the true and proper construction of clauses 6.4(i) and 6.4(ii):

(1) Was Talisman required to seek or to have sought the prior written approval of BG International if a change to

Talisman's contractual payment obligations in the 2001 FPSO Agreement in fact led to increased Operating Expenditure, or in fact had a material adverse impact on the services provided under the TPOSA (as the Claimants contend in the alternative to their primary case)?

Or

(2) Was Talisman required to seek or to have sought the prior written approval of BG International only if Talisman believed on reasonable grounds alternatively if it was more likely than not, at the relevant time, that the proposed change to Talisman's payment obligations in the 2001 FPSO Agreement would increase Operating Expenditure or have a material adverse impact on the services provided under the TPOSA (as the Talisman Defendants contend in paragraph 46C(a) of the Re-Re-Amended Defence and Counterclaim and as Idemitsu contends)?

4. If Talisman was required to seek or to have sought BG's approval under clause 6.4 but did not do so, is it relevant to consider whether it would have been unreasonable for BG International to withhold its approval?

5. Under clause 6.4 of the TPOSA, upon whom does the burden of proof lie? In particular:

(1) does the burden lie on the Transporters/Transporter Operator to show that the Shipper Operator's withholding of approval was or would have been unreasonable? Or

(2) does the burden lie on the Shippers/Shipper Operator to show that the Shipper Operator's withholding of approval was or would have been not unreasonable?

6. If, as Talisman contends, it is relevant to consider whether it would have been unreasonable for BG International to withhold its prior written approval and it would have been unreasonable for BG International to withhold its prior written approval, is BG International to be treated as having given its prior written approval (as alleged in paragraph 4(c) of the Reply to Defence to Counterclaim)?

7. If BG International's prior written approval was required, and it is not to be taken as having been given for any reason, what effect, if any, would this have on BG International's obligation to contribute to Operating Expenditure on a Production Rate Basis? In particular, would the effect of clause 6.4 of the TPOSA in that situation be:

(1) that the changes to Talisman's contractual payment obligations under the FPSO Agreement would be ineffective as between the Shippers and the Transporters, if and to the extent that they resulted in any increases to the Operating Expenditure, such that Talisman would not be entitled to charge BG International for that increase in Operating Expenditure?

Or

(2) that BG International would have a claim in damages against Talisman for breach of clause 6.4 of the TPOSA, which would entitle it to recover loss and damage suffered by BG International?

8. If (on the hypothesis set out in the first three lines of para 7 above) BG International has a claim in damages against Talisman for breach of clause 6.4 of the TPOSA as set out at paragraph 7(2) above:

(1) Would the value of that claim be the value of the additional contribution BG International would be liable to make in respect of Operating Expenditure pursuant to clause 6.2 of the TPOSA as a result of that breach?

(2) Would BG have a defence of set-off to a claim by Talisman for the increased Operating Expenditure and/or a defence of circuitry of action and/or a defence based on the basis of the principle that no person may take advantage of his own wrong?

(3) In any of the above cases, what difference (if any) would it make to BG International's claim and/or defence based on that breach of clause 6.4 if it were shown that it would have been unreasonable for BG International, in that situation, to delay or withhold giving its approval?

9. How does clause 6.4 operate (if at all) in circumstances where the 2001 FPSO Agreement has not remained in place, in respect of Talisman's charges for a contribution to costs that would have been additional to Schedule 5/Schedule D Payments had the 2001 FPSO Agreement remained in place, where

(1) such charges are in respect of services that would have formed part of the Bluewater Services?

(2) such charges are in respect of services that would not have formed part of the Bluewater Services?

(3) it is unclear whether or not such charges are in respect of services that would have formed part of the Bluewater Services?

[*The questions of construction identified in [3-8] above may also be relevant in considering issue 9.*]

Operating Payments

10. On the true and proper construction of paragraph 11.8 of Schedule D of the 2001 FPSO Agreement, was Talisman liable to pay Bluewater £2,375 after the initial 12 months of the agreement if Talisman and Bluewater reviewed whether the two additional operator positions were still required at the conclusion of the initial 12 months and reasonably concluded that the two additional operator positions were still required after reviewing the matter, as alleged in paragraph 52(d) of the Re-Amended Defence and Counterclaim?

11. Would Talisman have required BG International's consent under clause 6.4 of the TPOSA before reaching any conclusion as to whether the two additional operator positions were required after the initial 12 months, as alleged in paragraph 57(c) of the Re-Amended Reply and Defence to Counterclaim?

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12. On the proper interpretation of clauses 18.2 and 6.2 of the TPOSA, are the costs attributable to repairs or replacement of the water injection riser used for both the Ross and the Blake Fields to be shared on a Production Rate Basis, as the Talisman Defendants contend in paragraph 57(c)(iii) of the Re-Re-Amended Defence and Counterclaim, or equally as between the Shippers and the Transporters, as the Claimants contend in paragraph 43 of the Amended Particulars of Claim, during the Secondary Term of the TPOSA?

Parties

13. On the true and proper construction of the TPOSA, including the provisions of clauses 13 and 15 thereof, and the Conflict Management Procedure dated 16 April 2012:

(1) Are the Claimants permitted to sue Talisman as Transporter Operator in respect of 100% of their claims (i.e. their claims to recover 44% of the overpayments by the Blake Owners), on the grounds that Talisman is liable for those alleged overpayments both on its own behalf and on behalf of each of the other Transporters?

(2) If not, are the Claimants as Shippers permitted to sue all the Defendants as Transporters in respect of their several shares of the liability in question?

(3) Is Talisman, as Transporter Operator, permitted to bring a claim or counterclaim against BG International, as Shipper Operator, in respect of the entire Blake Field's contribution or, as BG contends, is Talisman limited to claiming 44% of the Blake Field's contribution (representing BG's collective interest in the Blake Field)?

(4) Is the Third Defendant, as Transporter, permitted to bring a claim or counterclaim against BG International as Shipper Operator, in respect of the same amounts being counterclaimed against BG International by Talisman?

(5) If BG are correct in their argument that they can claim against the Transporters directly, is Talisman permitted, as Transporter Operator, to sue BG as Shippers, pursuant to its counterclaim?

14. If and to the extent that BG International is found liable in its capacity as Shipper Operator to Talisman and/or Idemitsu in relation to any of their counterclaims brought against BG International, it is common ground that BG International should be able to bring a claim for a contribution in respect of that liability against any party that was a Blake Owner and not a member of the BG group of companies (a "non-BG Blake Owner") at the time the relevant liability was incurred (the "Relevant Time"); and that in each case the amount of that liability should be derived by multiplying the figure representing 100% of that liability by the percentage figure representing the Unit Interest in the Blake Field owned by that non-BG Blake Owner at the Relevant Time. Despite that common ground, however, there are issues between the parties as to whether the obligation on each non-BG Blake Owner to contribute in such a scenario would be contingent upon:

(1) BG International first discharging the liability to Talisman and/or Idemitsu; and/or

(2) Any claim for such a contribution made by BG International being brought pursuant to the terms of, and the procedures set out in, the Blake UUOA.

Paragraph 11(c) of the Particulars of Claim

15. On the proper construction of the TPOSA, is Talisman required to invoice only in respect of sums properly due, as alleged in paragraph 11(c) of the Particulars of Claim?

> 16. If not, should a term to that effect be implied into the TPOSA, as alleged in paragraph 12 of the Particulars of Claim?"

23. At the hearing it was agreed between the parties that Issues 13-16 should not be resolved at the Stage 1 trial and should be deferred for future consideration, a course to which I agreed.

Principles of construction

24. The principles of construction were not the subject of dispute between the parties. They were summarised by BG in the following manner:

> "(1) *To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties*": **BCCI v Ali** [2001] UKHL 8; [2002] 1 AC 251 (Lord Bingham) at [8].
>
> (2) The "*ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant*": **Rainy Sky S.A. and others v Kookmin Bank** [2011] UKSC 50; [2011] 1 WLR 2900, [14] (Lord Clarke).
>
> (3) The "*relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*" (*ibid*).
>
> (4) Where "*the parties have used unambiguous language, the court must apply it*" (*ibid*, [23]).
>
> (5) However, "*the language used by the parties will often have more than one potential meaning… If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and reject the other*" (*ibid*, [21]).
>
> (6) Resolving an issue of interpretation is "*an iterative process, involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences*" (*ibid*, [28]).
>
> (7) The correct approach has been described by Lord Mance in **Lloyds TSB Foundation for Scotland v Lloyds Banking**

Group Plc [2013] UKSC 3; [2013] 1 WLR 366 (at [21]) as "*contextual and purposive*".

25. There is little difference between the parties on the question of the test for implication of terms but as the question of implication only arises in relation to issues 15 and 16, I need say no more in relation to that.

Operating Expenditure

26. The TPOSA contains, in clause 1, a series of definitions which are critical in the context of the disputes between the parties but before setting out these and other terms of the TPOSA, the Recitals assist in showing the purpose for which the TPOSA was brought into existence. So far as relevant, they provide:

> "(A) The Transporters have developed the Ross Field and have acquired an interest in certain transportation, treatment, processing, storage and off-loading facilities on the Ross Field;
>
> …
>
> (D) The Shippers wish to use, and the Transporter Operator on behalf of the Transporters is willing to provide, certain of the transportation, treatment, processing, storage and off-loading facilities referred to above, to enable Blake Production to be accepted at the Entry Point and SCO allocated to the Blake Field to be re-delivered at the SCO Delivery Point, pursuant to the terms and conditions of this Agreement;
>
> (E) The Operators entered into Heads of Terms for the construction and tie-in of the Blake Field to the Ross FPSO on 7 January 2000 (the "CTA Heads"), which CTA Heads continue to be effective at the date hereof;
>
> (F) This Agreement, based upon the principles contained in the Heads of Terms for the Transportation, Processing and Operating Services Agreement between the Operators dated 7 January 2000 ("Heads of Terms"), supersedes and replaces those Heads of Terms in their entirety."

27. Recital D, in referring to the Entry Point and the SCO Delivery Point (where SCO means Stabilised Crude Oil) draws on the terminology set out in clause 1 of the TPOSA where the Entry Point and the SCO Delivery Point are defined by reference to the Ross FPSO. The Ross FPSO is itself defined as "the floating, production, storage and off-loading vessel, which for the time being is the Bleo Holm, forming part of the Transporter Facilities", where the latter facilities are themselves described as "all of the production processing, quality control, treatment, storage and transportation facilities necessary for the oil, gas and water from the Blake Field to be processed, stored and transported from the Entry Point to the Delivery Point". The Entry Point is defined as the flanged connection between the Blake Production pipelines and the riser connected to the Ross FPSO, whilst the SCO Delivery Point is defined as the

outer flange of the loading facility of the shuttle tanker to which the off loading hose from the Ross FPSO is attached.

28. There is no doubt that the Ross FPSO, a production and storage vessel, is essential to the operations envisaged by the TPOSA, although it is clear that the TPOSA did envisage that the vessel constituting the Ross FPSO could change from time to time and that the FPSO Operator, named as Bluewater in the TPOSA, could also change from time to time. There remains however the necessity for a floating production, storage and off-loading vessel for the TPOSA to work.

29. The services to be provided by Talisman are set out in Clause 4 as follows ("the Services"):

> "4.2. From the Blake Firm Service Date until the termination of this Agreement, the Transporter Operator shall provide the Services to the Shippers. The obligations of the Transporter Operator to provide the Services to the Shippers pursuant to this Clause 4.2 and Clause 4.3 require it to ensure that each of the Service Facilities is utilised to the fullest extent possible and, if necessary, to make a downward adjustment to production from the Ross Field such that the Ratio (as hereinafter defined) set out in Clause 4.7 is maintained.
>
> The Services are as follows and the Transporter Operator shall be obliged:
>
> (a) subject to the combined quantity of Blake Produced Oil and Blake Produced Water not exceeding a total of 100,000 Barrels of fluid per Day, to accept a maximum quantity of Blake Produced Oil, as shown in the Blake Profile on each Day that there is no Constraint. However, on each Day that there is a Constraint then the maximum quantity of Blake Produced Oil that is required to be accepted as part of the Service shall be reduced in the proportion that the Actual Productivity bears to the Full Oil Facilities Production Capability (as demonstrated in Schedule 6 Part A) save that where the Oil Facilities are unable to accept such reduced quantity due to a Constraint in the Blake Dedicated Facilities then the maximum quantity of Blake Produced Oil that is required to be accepted as part of the Service shall be that quantity which the Blake Dedicated Facilities are capable of accepting;
>
> (b) to process, store and transport the Blake Produced Oil and to deliver in a separate or commingled stream as appropriate to the Shippers at the SCO Delivery Point quantities of Blake SCO as determined in accordance with SCOAAA, provided that the Shippers shall be responsible for obtaining all and any consents in respect of the flare gas relating to Blake Field production, whether or not flared in the normal course of processing Blake Production;

(c) to accept Blake Produced Gas meeting the Entry Specification at the Entry Point consistent with a total maximum Gas Handling Facilities capability of 37 MMSCFD on each Day that there is no Constraint and the Transporters shall take title to and risk in such Blake Produced Gas at the Entry Point from the Shippers free of charge;

(d) to deliver Blake Lift Gas at the Blake Lift Gas Delivery Point consistent with a total maximum Gas Handling Facilities capability of 37 MMSCFD on each Day that there is no Constraint. Further, subject to any limitations in the capability of the Gas Handling Facilities the quantity of Blake Lift Gas which the Transporter Operator is obliged to deliver hereunder on any Day shall never exceed the quantity of Blake Produced Gas delivered to the Transporter Operator on that Day.

However, on each Day that there is a Constraint then the total maximum quantity of Blake Produced Gas required to be accepted as part of the Service and the Blake Lift Gas required to be delivered as part of the Service shall be reduced in the proportion that the Actual Productivity bears to the Full Gas Handling Facilities Capability (as demonstrated in Schedule 6 Part B);

(e) subject to the combined quantity of Blake Produced Oil and Blake Produced Water not exceeding a total of 100,000 Barrels of fluid per Day, to accept a maximum quantity of 95,000 Barrels per Day of Blake Produced Water at the Entry Point on each Day that there is no Constraint.

However, on each Day that there is a Constraint then the maximum quantity of Blake Produced Water that is required to be accepted as part of the Service shall be reduced in the proportion that the Actual Productivity bears to the Full Produced Water Handling Facilities Capability (as demonstrated in Schedule 6 Part C);

(f) process and dispose of the Blake Produced Water at the Blake Produced Water Discharge Point;

(g) to deliver Blake Injection Water at the Blake Injection Water Delivery Point up to a maximum quantity of 105,000 Barrels per Day on each Day that there is no Constraint.

However, on each Day that there is a Constraint then the maximum quantity of Blake Injection Water that is required to be delivered as part of the Service shall be reduced in the proportion that Actual Productivity bears to the Full Water

Injection Facilities Capability (as demonstrated in Schedule 6 Part D);

(h) to measure, sample, meter, conduct laboratory analyses for, allocate, apportion and report (in accordance with Clause 5 and Schedule 4 hereunder and with SCOAAA) all relevant hydrocarbons, non hydrocarbons and produced water streams. The Transporter Operator shall provide the data for calculating allocation and apportionment under SCOAAA and such data shall be sufficient and of suitable standard to ensure that each allocation and apportionment calculated is equitable and in accordance with the terms of SCOAAA;

(i) to provide a chemical injection service at the Chemical Injection Delivery Point in accordance with Schedule 3, Part D. In the event that it is recommended by either Operator that any of the chemicals specified in Schedule 3, Part D be changed or, pursuant to a change in legislation, a change of chemical is required to be made, the Operators shall use their reasonable endeavours to reach agreement on any such changes and an equitable sharing of any additional costs that may result therefrom;

(j) to operate the Blake Subsea Controls System in accordance with the instructions of the Shipper Operator given in accordance with the procedures agreed from time to time and use reasonable endeavours to adhere to the reservoir management plan provided by the Shipper Operator to the Transporter Operator from time to time. Such services shall include twenty-four (24) hour per day monitoring, changing well/production flowrates and remote start-up of the Blake Field Facilities;

(k) to provide standby and supply vessels, helicopters and logistic services, including an onshore logistics base and emergency response for the Ross FPSO;

(l) to provide laboratory chemicals and related consumables;

(m) to provide all chemicals in accordance with Schedule 3, Part D (except those subsea injected production chemicals listed in Table I of Schedule 3, Part D and the scale inhibitor in Table 2 of Schedule 3, Part D, which will be supplied by the Shipper Operator at the cost of the Shippers, which the Transporter Operator will then transport at the cost of the Transporters on its supply vessels (in accordance with the Transporter Operator's prevailing supply vessel schedule or as otherwise agreed between the Operators)) to the Ross FPSO at the cost of the Transporters;

(n) to provide production and reservoir data (to include well testing operations) and reports, the content of which reports shall be agreed between the Operators. Data shall be provided on a continuous basis and as specific daily reports generated every 24 hours. The Transporter Operator shall prepare the daily report material and deliver it, unless otherwise advised by the Shipper Operator, to the Shipper Representative for compilation and issuance by him by fax or e-mail to the Shipper Operator. The continuous data transfer system shall be configured so that

(i) the production and reservoir data relating to the Blake Field is transferred to the Shipper Operator's Headquarter Offices and to no other location without the prior written approval of the Shipper Operator and

(ii) it will collect production and reservoir data and transfer it through the existing telecommunications links back to the Shipper Operator's Headquarter Offices;

(o) to provide voice, fax and e-mail communications between the Ross FPSO and the Shipper Operator's Headquarter Offices;

(p) to provide the Shipper Representative with share accommodation and office facilities on the Ross FPSO with the Transporter Representative;

(q) to operate safety systems and associated emergency shutdown valves (ESDVs) on the Blake Field Facilities;

(r) to restart the Blake Field Facilities following shutdowns as more particularly detailed in accordance with procedures agreed or to be agreed between the Operators;

(s) without prejudice to Clause 4.2(n), to provide such information to the Shipper Operator as is required under the relevant operating procedures agreed between the Transporter Operator and the Shipper Operator from time to time;

(t) to provide to the Shipper Operator such process information as is agreed from time to time between the Shipper Operator and the Transporter Operator (such agreement not to be unreasonably withheld or delayed);

(u) to provide initial response to and preliminary investigation (but only from the Ross FPSO topsides) of breakdowns of the Blake Field Facilities in accordance with agreed operating procedures;

(v) to provide an initial response in respect of accidents or incidents including the provision of investigation reports to the Shipper Operator;

(w) to operate communication and shutdown systems to effect an emergency shutdown of the Blake Field Facilities;

(x) to carry out the environmental sampling and associated reporting on all produced water discharges within a 500 metre radius of the Ross FPSO;

(y) to amend and revise where necessary all procedures and other relevant documentation as may be reasonably required in connection with the Services;

(z) to inform the Shipper Operator of any inspection, certification, maintenance, replacement, modification or repair required in respect of the Blake Field Facilities of which the Transporter Operator or the FPSO Operator becomes aware and which is not the responsibility of the Transporter Operator under this Agreement;

(aa) to procure that the FPSO Operator complies with all applicable statutory requirements in relation to the day to day operation of the Transporter Facilities and the Blake Field Facilities, including the FPSO Operator acting as "Duty Holder" as defined in the Offshore Installations and Pipeline Works (Management and Administration) Regulations (SI 1995/738);

(bb) to provide to the Shipper Operator such data and information as it may reasonably need from time to time for the purposes of making applications to the Secretary to obtain consents for gas flaring under the terms of the Blake Field Production Licences. The Transporter Operator shall use its reasonable endeavours to provide the Shipper Operator with as much advanced warning as is practicable of any potential breach of a flare consent;

(cc) provide to the Shipper each Day a report in the form of the Daily Reporting Proforma for the previous Day's operations (the Transporter Operator shall endeavour to provide such report by midday on each Day);

(dd) in respect of each Year, to inform the Shipper Operator in writing of any planned shutdown, maintenance or outages of the Transporter Facilities by 30 November of the preceding Year or if not known by 30 November of the preceding Year as soon as the Transporter Operator is aware and to keep the Shipper Operator informed of any revisions

to the scope or timing of such planned shutdowns, maintenance or outages; and

(ee) unless otherwise advised by the Shipper Operator to notify the Shipper Representative as soon as reasonably practicable of any Constraint."

30. Clause 4.2 thus requires Talisman to procure the outcomes set out in the sub-clauses and to provide the Services there mentioned, some of which involve specifically the use of the Ross FPSO but do not refer at any point to the FPSO Agreement. There is no need on the face of Clause 4 for Bluewater to provide any of the Services at all. Talisman must ensure that each of the Service Facilities is utilised to the fullest extent possible but the definition of Service Facilities, when broken down, covers any and all facilities required for delivery of the Services, with express reference in some cases to the Ross FPSO.

31. The two critical definitions in clause 1 are those which explain the meaning of Operating Expenditure and the FPSO Agreement. They are important by reason of the terms of clause 6.2 and 6.4 of the TPOSA, which I set out below:

"6.2 During the Secondary Term the Shipper Operator shall pay the Transporter Operator for the Services by way of a contribution to Operating Expenditure. Such contribution to Operating Expenditure shall be on a Production Rate Basis, such that the Shipper Operator pays that proportion of Operating Expenditure which relates to SCO allocated to the Blake Field, as set out in a monthly invoice prepared by the Transporter Operator.

…

6.4 The Transporter Operator has not since 7 January 2000 (save for (i) the Heads of Terms of 14 January 2000 between Talisman and Bluewater (Floating Production) Limited the material extracts of which have been provided to the Shipper Operator and (ii) the terms of the letter from Transporter Operator to the Shipper Operator dated 20th June 2001) made any changes and shall not agree to any changes:

(i) to the contractual payment obligations in the FPSO Agreement which will result in increases to the Operating Expenditure; nor

(ii) in the terms of the FPSO Agreement which would have an adverse material impact on the Services or any other obligation of the Transporters or Transporter Operator under this Agreement

without obtaining the prior written approval of the Shipper Operator, such approval not to be unreasonably delayed and/or withheld."

32. As can readily be seen, under clause 6.2, BG International was bound to pay Talisman in the relevant period for the Services provided under clause 4 of the TPOSA on the basis of a contribution to Operating Expenditure. The contribution was to be calculated on a Production Rate Basis which meant by reference to the allocated proportion of daily SCO produced respectively by the Blake and Ross Fields.

33. As can also be seen from clause 6.4, which contains the only other reference to the FPSO Agreement apart from the definition of it in clause 1, Talisman warranted that no changes had been made to the FPSO Agreement save for those specified in the sub-clause itself. It further agreed that it would not, without the prior approval of BG International, agree to any future change to the contractual payment obligations in the FPSO Agreement which would result in any increase in Operating Expenditure nor to any change to the terms of that agreement which would have an adverse material impact on the Services to be provided under clause 4 of the TPOSA or on any other obligations of Talisman or the other Transporters under that agreement. BG International however was not entitled unreasonably to delay or withhold consent to any requested changes.

34. It is clear from these provisions and the definition of Operating Expenditure that the TPOSA on the one hand and the FPSO Agreement on the other were seen as closely linked and that it was envisaged at the time the TPOSA was concluded that payments due under clause 6 of the TPOSA would include some costs incurred by Talisman in making payment under the FPSO Agreement to Bluewater or the FPSO Operator at the relevant time.

35. With these points in mind I set out the first of the two critical definitions:

> ""Operating Expenditure" means all direct and indirect costs and expenses, including repair and replacement costs related to the maintenance and operation of the Ross FPSO, including, but not limited to, Base Day Rate Payments, Tariff Payments, Force Majeure Payments, Operating Payments, Offloading Payments and Dry Dock Payments all as defined in Schedule D of the FPSO Agreement (a copy of which is set out in Schedule 5) together with costs of standby and supply vessels, helicopter and logistics services (including onshore logistics base), of diesel, of chemicals and other relevant onshore casts, all as provided by the Transporter Operator, together with any reasonable incremental costs associated with the provision of the Services. Such costs and expenses shall not include shuttle tanker costs or wells, subsea and field management costs relating specifically to either the Ross Field or the Blake Field."

36. If the wording of the definition of Operating Expenditure is taken in isolation, there can be no doubt that the introductory words are of a general and all-embracing nature. The costs and expenses referred to as "Operating Expenditure" must be taken to relate to the provision of the Services, as the final words of the first full sentence indicate, when referring to "any reasonable incremental costs associated with the provision of the Services", as well as to the maintenance and operation of the Ross FPSO, as set out at the end of the first inclusio. Four categories of costs and expenses are detailed,

each preceded by the words "including" or "together with". The definition specifically included as "direct and indirect costs and expenses":

i) "repair and replacement costs related to the maintenance and operation of the Ross FPSO";

ii) a series of 6 particular forms of payment that were set out in Schedule D to the FPSO Agreement (as exhibited in Schedule 5 to the TPOSA) which would be payable by Talisman to the FPSO Operator, which for the time being was Bluewater;

iii) the costs of standby vessels, logistical services and the like and consumables " all as provided by [Talisman]";

iv) "reasonable incremental costs associated with the provision of the Services" by Talisman.

37. Although BG accept that the definition includes costs payable to Talisman for Services provided by it which fall outside the FPSO Agreement altogether and for Services for which Talisman itself was responsible under the FPSO Agreement, it is BG's case that the services which Bluewater was to provide to Talisman under the FPSO Agreement (which for convenience it refers to as "the Bluewater services"), when constituting part of the Clause 4 Services provided by Talisman to BG International under the TPOSA, could only be charged for in accordance with Schedule D of the FPSO Agreement and in no other way. The effect is to contend that not only did the definition include payments which might be made under Schedule D to the FPSO Agreement, but that it was mandatory that such payments be made for those types of work or services involved. In other words, for the Bluewater services, Talisman could only charge BG International on the basis set out in Schedule D to the FPSO Agreement. Thus the costs and expenses referred to in the definition of Operating Expenditure had to include the FPSO Agreement Schedule D types of payment to which reference was made in it and no other payments for the Services covered by those payment types (e.g. Base Day Rate Payments, Tariff Payments etc) would fall within the definition at all. This contention is unsustainable.

38. The definition specifically *includes* these types of cost and expense but does not on its own wording require that such types of cost and expense be incurred at all or exclude other costs and expenses in respect of the provision of those services by others for which different charges might apply. There is an explicit exclusion in the definition, as it goes on to exclude shuttle tanker costs and subsea and field management costs which relate specifically to the individual fields, but no exclusion of any costs of any other kind. There is no reference to the Services set out in Schedule C of the FPSO Agreement, which is not exhibited to the TPOSA, for which the Schedule D charges are payable to Bluewater. In clause 1.2 of the TPOSA, the Interpretation clause, it is specifically stated that the word "including" should not, unless otherwise stated, be construed as a limitation. As the definition specifically uses the word "including but not limited to" the types of payment set out (and as themselves defined in Schedule D of the FPSO Agreement) it is clear (as is accepted by BG) that the specified types of payment are not exhaustive in setting out the direct and indirect costs which constitute Operating Expenditure.

39. It is also clear that Talisman is not, in consequence of the definition, obliged to charge BG International on the basis of Schedule D charges as set out in the FPSO Agreement regardless of whether or not they were incurred. If Bluewater chose to waive payment of one of the types of Schedule D charges or reduced the amount below that specified in Schedule D, there would be no basis for Talisman to charge BG International for a contribution to an unpaid item nor any need for any change to the definition of Operating Expenditure.

40. Schedule D of the FPSO Agreement itself includes "Miscellaneous payments" which Talisman was liable to pay Bluewater and which it is accepted that Talisman could charge BG International, even though those payments (in respect of the removal of sand and wax from the FPSO system introduced by Blake Field production) were not expressly referred to in the Operating Expenditure definition. There are other types of costs outside Schedule D which are specifically included in the definition as the twice repeated words "including" and "together with" demonstrate. Each of the four categories of cost/expense are subordinate to the opening words of the definition and there is nothing in the wording of the definition to restrict those opening words to any of these categories or any of the types of payment within them.

41. On the wording of this definition alone, any direct or indirect costs and expenses which relate to the Services to be provided by Talisman fall within it (subject to any limitations imposed by Clause 6.4). It is the TPOSA Services provided by Talisman whether directly or indirectly for which payment is made and Talisman is entitled to provide those Services itself or to procure their provision by others. Clause 13.5 of the TPOSA expressly provides that "a party shall be entitled to discharge any of its obligations by procuring that they are performed on its behalf by another person", even though, with limited exceptions, it remains responsible for the due performance of those obligations and for any failure in performance or non-performance by such a person, just as if it had itself failed to perform. Talisman was entitled to perform all the Services itself, to subcontract them all, or to procure performance by any combination of these methods.

42. Although the expression "Bluewater services" is a convenient shorthand used by the parties in argument, the TPOSA knows of no such terminology. The TPOSA referred to Schedule D but not to Schedule C of the FPSO Agreement which set out the Contractor Services to be provided by Bluewater. The relevant terms of the 2001 FPSO Agreement are as follows:

> "(B) The Company with the consent of the Contractor has agreed to provide certain transportation, processing and operating services to the Blake Owners using the FPSO to facilitate the development of and production from the Blake Field;
>
> (C) The Contractor wishes to enter into this agreement as contractor for the provision of FPSO services;
>
> …
>
> (u) "Contractor Facilities" means all property provided or owned by the Contractor, its Affiliates and Sub-contractors, for

the purpose of performing the Contractor Services, including all equipment to be utilised or intended to be utilised in Production, and the delivery of SCO and Natural Gas to the respective Delivery Points, including but not limited to the FPSO and all related equipment as further defined in Schedule C and for the avoidance of doubt includes the Blake Modification Works;

…

(x) "Contractor Services" means the construction or suitable modification, installation, maintenance, mobilisation, transportation, preparation and hook-up at the Site of the Contractor Facilities as necessary for the commencement and continuation of Production, including the extraction, production, process, storage and offloading of Petroleum and disposal of related substances including SCO, Natural Gas and effluents from the Fields, providing necessary information to the Company Operations Representative and other appropriate Company Personnel, decommissioning of the Contractor Facilities upon cessation of Production in accordance with Schedule C and any other service added as a Contractor Service pursuant to the Change Order Procedure;

…

3. CONTRACTOR AND COMPANY SERVICES

3.1 The Contractor shall provide the Contractor Services as a Reasonable and Prudent Operator and in compliance with this Agreement.

3.2 The Company shall provide the Company Services and shall comply with this Agreement.

…

10. CHANGE ORDER PROCEDURE

10.1 Amendments to the Contractor Services or the Company Services shall be effected in accordance with the Change Order Procedure and the relevant aspects of Schedule D.

10.2 The Contractor shall notify the Company forthwith of all things which, in the opinion of the Contractor, appear to be deficiencies, omissions, contradictions or ambiguities in this Agreement or which conflict with Legislative Requirements. Changes to the Contractor Services shall be dealt with in accordance with the Change Order Procedure and the relevant aspects of Schedule D.

11. PAYMENT

11.1 The Contractor shall receive payment for the performance of its obligations under this Agreement in accordance with Schedule D. The Company shall receive payment in certain circumstances as provided in Schedule D.

…

SCHEDULE B

…

1.6. The Company shall provide helicopter services, supply boat services, onshore supply base facilities, craneage and stevedoring, handing of equipment, supplies and waste, standby vessel, and shuttle tankers.

…

SCHEDULE C

…

1.1 The Contractor shall provide the Contractor Facilities and the Contractor Services in compliance with the specifications set out in this Schedule C and the Legislative Requirements. The Contractor shall consult regularly with the Company, with a view to optimise the economics and safety of the Field.

1.2 Subject to section 1.7, the Contractor Services shall consist of five cumulative and indivisible obligations, that is to say that the Contractor shall perform in accordance with the Agreement:

- the provision of the FPSO

- the operation of the FPSO

- the management of the interface between the FPSO and the subsea facilities located in the Ross Field and Blake Field.

- the operation of the said subsea facilities via the subsea control systems aboard the FPSO.

- the de-commissioning of the Contractor Facilities and, if requested by the Company, the said subsea facilities.

1.3 The Contractor shall provide a facility which shall be capable of taking all produced fluids from the Ross Field and Blake Field in accordance with Schedule A and conditioning them in accordance with Schedule C."

43. Thus, as between Talisman and Bluewater, the latter agreed to provide and operate the FPSO, but as between Talisman and BG International there was no such agreement, and BG International was not in privity with Bluewater. How Talisman chose to perform the TPOSA Services, was a matter for its own choice. Although both parties knew of the terms of the FPSO Agreement, there is no way of identifying from the TPOSA itself which of the Clause 4 Services to be provided under it, were to be provided by Talisman and which by Bluewater, save by reference to the inclusory wording of the forms of payment from Schedule D to the FPSO Agreement. As is recognised by all parties, the effect of Schedule B and the matrices which appear in Attachment C1 to Schedule C of the FPSO Agreement is that various elements of the Clause 4 TPOSA Services, including some repair and maintenance costs relating to the Ross FPSO, fell to Talisman to perform itself at its expense, and for which it would charge BG International as direct costs or expenses.

44. The definition of Operating Expenditure in the TPOSA includes (immediately following the general wording) repair and replacement costs related to the maintenance and operation of the Ross FPSO. Nothing in those provisions however requires that the Ross FPSO be maintained or operated by Bluewater. The definition of the Ross FPSO is "the floating, production, storage and offloading vessel which for the time being is the Bleo Holm, forming part of the Transporter Facilities". There was no limitation on the identity of the FPSO, nor on the identity of the provider or operator of it, even though there are, as would be expected, a good number of provisions in the TPOSA which refer to the FPSO Operator and envisage it as different from the Transporter Operator (e.g. clauses 3.3.2, 3.4.3, 4.2(aa), 4.11, 11, 14.2(b) and 17.4) which was the position at the time of its conclusion. Clause 24 of the FPSO Agreement itself does however set out circumstances where Talisman would be entitled to take control of the services which Bluewater had agreed to provide under the FPSO Agreement, albeit only where Talisman terminated the FPSO Agreement on grounds set out (where the Ross FPSO became an actual or constructive total loss, where Bluewater failed to remedy notified breaches, or where Bluewater became insolvent). Without any such limitation on the identity of the FPSO Operator, there is no reason (leaving aside Clause 6.4) why Talisman should not take over the maintenance and operation of the Ross FPSO, which could be terminated on 3 months' notice in any event, and itself provide the Services directly that Bluewater had previously provided to it, and which it had therefore previously provided indirectly to BG International. There is no provision which prohibits Talisman from becoming the FPSO Operator and there is no reason, as a matter of construction of the contract, why Talisman, which is responsible overall for the TPOSA Services when performed by others, should not take over the actual provision of those Services itself.

45. The effect of BG International's argument is that, whatever costs may actually be incurred by Talisman in providing the Services, the definition of Operating Expenditure requires that particular types of service be subcontracted to a third party FPSO Operator and that the payments for those Services have to be in accordance with Schedule D to the FPSO Agreement. That is not what the TPOSA provides. Clause 6.2 provides for cost sharing of the relevant expenditure on a pro rata basis and for invoicing on a monthly basis. The clause provides for the apportionment of actual costs incurred on the Production Rate Basis set out in the TPOSA. Clause 10.5 provided for the parties to agree to a mutually acceptable payment mechanism to

cover payment of BG International's contribution to the Operating Expenditure. This was never agreed but the sub-clause provided that the principle for agreeing that mechanism should be that "the timing of payment by [BG International] should coincide as closely as reasonably possible with the time that the corresponding expenditure payment is made by [Talisman]."

46. The TPOSA clearly provides for sharing on the Production Rate Basis of costs and expenses actually incurred by Talisman, not on the basis of notional costs in accordance with Schedule D of the FPSO Agreement, if those costs are not actually incurred. There is no room for deeming Schedule D costs to be incurred where they are not. The whole basis of payment is that of contribution and cost sharing of what is actually expended. This would not be the case if cost sharing proceeded on a notional or deemed basis when different expenditure was actually incurred. Moreover the definition must hold good both for the Blake Field Owners and the Ross Field Owners for sharing of costs under the TPOSA.

47. At one point in the course of argument, BG submitted that if consent was sought to a change in the FPSO Agreement but was justifiably refused by BG International but, in fact, contrary to expectation, it turned out that Operating Expenditure reduced, Talisman could continue to charge at the previously agreed figures, though not incurred, without taking into account the diminution in cost actually expended. Such an approach is wholly uncommercial and there is no basis for this in the TPOSA, in the light of the cost sharing provisions.

48. There is therefore no basis in the definition of Operating Expenditure for saying that direct or indirect costs incurred by Talisman in the provision of the Services, specifically in the operation, maintenance, repair or replacement of items relating to the Ross FPSO under the Bareboat Charter, as opposed to costs and expenses incurred in respect of the FPSO Agreement, do not fall within the definition of Operating Expenditure. Whilst it is doubtless true to say that, at the time of the conclusion of the TPOSA, it was envisaged that the specified payments in the definition, "all as defined in Schedule D of the FPSO Agreement", would constitute a major element of the costs relating to the maintenance and operation of the Ross FPSO, it cannot be said that, if none of those payments were made because the FPSO Agreement ceased to exist, other forms of direct and indirect costs which related to the Ross FPSO, its operation, maintenance, or repair do not fall within the definition.

49. The effect of BG's submission is that an inclusive provision is turned into an exclusive provision in relation to the TPOSA Services to which the Schedule D payments relate and the words "whether or not the FPSO Agreement remains in place" have to be read into that part of the definition. There is no warrant for so doing. There is no suggestion in the wording of the definition that the Schedule D payments were regarded as mandatory components of Operating Expenditure nor that TPOSA Services currently covered by Schedule D payments could not be provided in a different way. Nothing in that wording distinguishes between Services which are currently chargeable under Schedule D and those which are not. Talisman remained free to provide the Services as it thought fit (subject only to Clause 6.4).

50. The effect of BG's argument is that Talisman was bound to charge on the basis of Schedule D, whether or not that cost was incurred by it, which runs counter to the terms of Clauses 6, 10 and the definition of Operating Expenditure, as set out above.

Some of the Schedule D payments are variable by reference to circumstances which necessitates factual enquiry, such as Force Majeure Payments and Dry Dock Payments. Moreover, if Schedule D payments were reduced by agreement with Bluewater, the suggestion that Talisman could go on charging at the Schedule D rates is commercially absurd in the light of the opening words of the definition which plainly directs the reader to actual costs and expenses incurred.

51. In my judgment, it is clear that expenditure incurred by Talisman in the maintenance and operation of the Ross FPSO, whether under the FPSO Agreement or under the Bareboat Charter, whether by payment to Bluewater or as costs incurred directly itself, falls within the definition of Operating Expenditure to which the payment obligations in Clause 6.2 apply.

The definition of the FPSO Agreement

52. The definition is as follows:

> ""FPSO Agreement" means the Agreement for the Provision and Operation of a Floating Production Storage and Offloading Vessel for the Ross Field dated 2 April 1997 between Talisman Energy (UK) Limited and Bluewater (Floating Production) Limited as amended to incorporate the provision of the Services to the Blake Field, as same may (in accordance with Clause 6.4) be amended, supplemented, substituted and/or novated from time to time."

53. The terms of this definition suggest wide scope for change, subject to the consent requirement of the sub-clause, because they allow for amendment, supplementation, substitution or novation of the FPSO Agreement. As Talisman points out, if consent was obtained there would be no reason why Schedule D to the FPSO Agreement could not be removed altogether nor why any other amendment could not be made to it. There would be no need to amend the TPOSA or the definition of Operating Expenditure to achieve that result. This represents an additional reason why Schedule D payments cannot represent a mandatory component of the definition of Operating Expenditure.

54. The definition of the FPSO Agreement, whilst referring to the agreement of 2nd April 1997 between Talisman and Bluewater, goes on to refer to its amendment to incorporate the provision of Services to the Blake Field which, it is common ground between all the parties, in practice means the 2001 FPSO Agreement which, although not actually executed at the date of the TPOSA was agreed in form but executed a week later. It is however the concluding words of this definition, which refer to clause 6.4, which give rise to an issue between the parties. The definition must, as is accepted on all sides, be taken as referring to the Agreement for the Provision and Operation of a Floating Production, Storage and Off-loading Vessel for the Ross Field and Blake Field dated 29th June 2001, as that might, in accordance with clause 6.4, be amended, supplemented, substituted and/or novated from time to time.

55. BG contends that the Bareboat Charter dated 30th November 2005, cannot constitute the FPSO Agreement for the purposes of this definition because it is not sufficiently similar to the 2001 FPSO Agreement to amount to an amendment to, a supplement to,

or a substitution for that Agreement. In that context, it is said that the word "substituted" must be taken as referring only to an agreement of a similar kind where the responsibility for the provision and operation of the FPSO Vessel remained with a third party, such as Bluewater, and did not fall upon Talisman itself as was the case with the Bareboat Charter. An agreement whereby Bluewater provided the vessel but Talisman operated it was of an altogether different character to the 2001 FPSO Agreement and did not therefore fall within this definition.

56. I can see no basis for the limitation put forward by BG in relation to the last words of the definition. An agreement can be amended or supplemented to a greater or lesser extent but the wording of this definition does not suggest that only minor amendments or supplements fall within that which is envisaged. Equally, an agreement can be substituted by an agreement of a similar or entirely different kind and the definition allows for this. Plainly the TPOSA required the existence of the Ross FPSO – a floating production storage and off-loading vessel which formed part of the Transporter Facilities – and there had to be some agreement which governed the provision and operation of it, since, without that, the arrangements between the Ross Field owners and the Blake Field owners could not work nor could oil, gas and water be extracted from either field. Changes of responsibility in relation to the provision and operation of the FPSO vessel, of whatever kind, in my judgment would not prevent a replacement agreement being a substituted FPSO Agreement and the Bareboat Charter clearly falls within the meaning of the words "FPSO Agreement", as set out in the definition, by reference to the final wording of it.

57. To my mind however, regardless of the question whether or not the Bareboat Charter could be seen as an FPSO Agreement in substitution for the 2001 FPSO Agreement, the real issue which arises in that context is a factual one, and relates to clause 6.4 of the TPOSA, since the definition of the FPSO Agreement refers effectively to the 2001 FPSO Agreement as amended, supplemented or substituted "in accordance with clause 6.4". The question is therefore whether or not the Bareboat Charter was substituted in accordance with clause 6.4, namely with the consent of BG International or whether such approval was unreasonably withheld when sought. For the purposes of this Stage 1 trial, that issue remains to be decided - whether approval was sought and whether or not it was unreasonably withheld.

58. Whether or not the Bareboat Charter is seen as a substitute FPSO Agreement, I have held that the terms of the definition of Operating Expenditure are apt to include direct and indirect costs and expenses arising from the replacement of the FPSO Agreement by the Bareboat Charter. The question whether or not the Bareboat Charter is a substitute FPSO Agreement has significance only because of the argument made by BG International that clause 6.4 would not apply to the Bareboat Charter itself, if it was not a substitute FPSO Agreement and the bearing that this might have on the wider arguments which arise in relation to the way in which clause 6.4 is to be interpreted and the effect of any non-compliance with it.

Clause 6.4 of the TPOSA

59. It is worth noting the terms of Clause 3.3.1 of the TPOSA by which BG International (and the Shippers) agreed with Talisman to act safely and to perform their respective duties and obligations under the TPOSA as a "Reasonable and Prudent Operator and subject to and in accordance with the terms and conditions of this Agreement". In the

case of Talisman (and the Transporters) by clause 3.4.1, their obligation so to perform is qualified, in accordance with clause 13.5 referred to above, by the words "to perform or to procure the performance of their respective duties and obligations under this Agreement as a Reasonable and Prudent Operator and subject to and in accordance with the terms of this Agreement." Should therefore Talisman act otherwise in the maintenance or operation of the Ross FPSO, or in agreeing to pay, or in paying, "direct or indirect costs and expenses" falling within the definition of Operating Expenditure, it would be open to BG International to found a claim for loss for breach of this requirement. If Talisman therefore reached an Agreement with Bluewater or anyone else for the provision of equipment or services which a Reasonable and Prudent Operator would not have done, it would expose itself to a claim from BG International. Clause 6.4 however provided specific protection in relation to attempts to change certain aspects of the FPSO Agreement as defined (which meant the 2001 FPSO Agreement) in a way which would increase the Operating Expenditure to be charged under the TPOSA or have a material adverse effect on the Services or other obligations to be performed by Talisman under the TPOSA.

60. It is noteworthy that all increases of costs outside Schedule D charges under the FPSO Agreement do not engage clause 6.4 at all. This is so, whether the cost is directly incurred by Talisman or paid by it to a third party other than Bluewater or the FPSO Operator at the relevant time. The protection of clause 6.4 extends only to particular types of payment, whilst, in respect of all others, Talisman must act as a Reasonable and Prudent Operator.

61. Ordinarily one might expect any such change to be brought about by the use of the Change Order procedure of the FPSO Agreement, as provided in Clause 10 and as set out in Schedule G, which provided for either Talisman or Bluewater to request such a change and, in the case of a change sought by Bluewater, a requirement that Bluewater specify the effect on the sums payable under Schedule D. Schedule G provided for no such change to be approved by Talisman if the proposed change in services was within the scope of the existing services which Bluewater had agreed to provide, or within Bluewater's existing obligations under the FPSO Agreement, or was the result of a prior breach of the FPSO by Bluewater.

62. The terms of Clause 6.4 appear above but, for ease, I repeat them here:

> "6.4 The Transporter Operator has not since 7 January 2000 (save for (i) the Heads of Terms of 14 January 2000 between Talisman and Bluewater (Floating Production) Limited the material extracts of which have been provided to the Shipper Operator and (ii) the terms of the letter from Transporter Operator to the Shipper Operator dated 20th June 2001) made any changes and shall not agree to any changes:
>
> (i) to the contractual payment obligations in the FPSO Agreement which will result in increases to the Operating Expenditure; nor
>
> (ii) in the terms of the FPSO Agreement which would have an adverse material impact on the Services or any other

obligation of the Transporters or Transporter Operator under this Agreement

without obtaining the prior written approval of the Shipper Operator, such approval not to be unreasonably delayed and/or withheld."

63. Clause 6.4 is key to the dispute between the parties. There are a number of different issues which arise in relation to it, as appears from paragraphs 3-9 of the List of Issues. In essence, the central issues relating to it are as follows:

i) In what circumstances is BG International's prior written approval required under clause 6.4?

ii) What is the effect of a failure to seek prior written approval before agreeing a change for which consent is required?

iii) If relevant, on whom does the burden of proof rest in relation to the reasonableness or unreasonableness of refusing consent?

64. As already mentioned earlier in this judgment, the language of clause 6.4, on its face, falls into two distinct parts, namely a warranty in respect of the position at the time of the conclusion of the TPOSA and a promise for the future in relation to changes in the FPSO Agreement falling into two particular categories.

i) By the first part of clause 6.4, Talisman warrants that it has not since 7th January 2000 made any changes to the FPSO Agreement save for those which appear in the Heads of Terms of 14th January 2000 and the letter from Talisman to BG International dated 20th June 2001. No suggestion is made as to any breach of this warranty.

ii) Under the second part of the clause Talisman undertakes not to agree to any changes in the FPSO Agreement which will have the effect set out in sub-paragraphs (i) and (ii) of clause 6.4, without the prior written approval of BG International, which is not to be unreasonably delayed or withheld.

65. The purpose of this clause was the subject of debate but, to my mind, it is designed to avoid any changes to the FPSO Agreement of the kind specified to which BG could reasonably object or, more accurately, could not unreasonably object. The parties work on the basis that the other will adhere to the contractual obligations undertaken.

When is prior written approval required?

66. BG submitted that the obligation on Talisman was not to agree to any change in the Schedule D payments which had the effect in fact of resulting in an increase in Operating Expenditure (sub-clause 1) or agreeing to any change in the terms of the FPSO Agreement which in fact turned out to have adverse material impact upon the Services or other obligations of Talisman under the TPOSA. Talisman submitted that the effect of the clause was not to prevent changes which it reasonably believed at the time that the changes were made would not result in such an increase or would not have such an adverse material impact. Idemitsu contended that prior approval was

required under clause 6.4 if it could objectively be determined at the time of the changes that it was more likely than not that the Operating Expenditure would increase as a result of the changes or that there would be such an adverse material impact on the services.

67. In my judgment BG is correct in its submission and both the construction advanced by Talisman and by Idemitsu require a re-writing of the clause by reading in words such as "if Talisman reasonably believes that the change in the contractual payment obligations will result in increases to the Operating Expenditure" or if "it is more probable than not that the changes will result in increases to the Operating Expenditure" for the purposes of sub-clause 1, with corresponding wording in relation to the adverse material impact, for the purposes of sub-clause 2.

68. The main point taken by Talisman and Idemitsu related to the supposed difficulty in knowing, at the time of seeking or agreeing changes in the FPSO Agreement, whether in fact the changes would result in increases to the Operating Expenditure or have an adverse material impact on the Services or other obligations of Talisman. It was submitted that Talisman could reasonably take the view that the changes would not have the effect outlined in 6.4(i) or 6.4(ii) at the time but that, years later, it might emerge that this was the effect. It was further submitted that, if the enquiry was simply a factual one as to whether such increase or such material impact had occurred, it was impossible to know over what period that was to be determined and that, in reality, it would only be possible to ascertain the position when the 2001 FPSO had run its course.

69. To my mind, these points do not carry any weight. Clause 6.4 contains, on its wording, an obligation on Talisman not to agree to changes which have the effect outlined, save with the prior written approval of BG International and the obviously reasonable and practical approach of a Reasonable and Prudent Operator would be to seek such approval if it could not be said with any certainty at the time of seeking a change in the FPSO Agreement that clause 6.4(i) and (ii) would not bite. It is clear that if there was to be a reduction in either the Base Day Rate Payments, or the Force Majeure Payments, Operating Payments, Offloading Payments or Dry Dock Payments set out in Schedule D of the 2001 FPSO Agreement, the clause would not bite. In circumstances where the effect of any change was uncertain, Talisman would be expected to seek BG International's consent and, if it chose not to do so, it would bear the risk that the changes did turn out to have the effect described in clause 6.4(i) or (ii), whenever that result emerged. In many cases the point would be obvious at the time of the first monthly payment after the change.

70. In short, there is nothing in clause 6.4 to suggest that approval is required only in circumstances where Talisman reasonably believes, or it is objectively more likely than not, that, at the time of the proposed changes to the FPSO Agreement, the changes will have the effect described. The obligation, as it appears on the wording of clause 6.4, is to seek approval prior to the changes being made if those changes had the effect in question. The language of "will result in increases" and "would have an adverse material impact" simply reflects the situation which applies when consent is being sought, because prior approval is required before any such change takes place. The changes are therefore prospective for the future at the time of seeking consent.

71. If the change sought is obviously one which has the effect of reducing Operating Expenditure, then no consent is required unless it results in reduced services under the FPSO Agreement, but the intention is that Talisman should seek prior approval to any change which will have the effects for which clause 6.4(i) or (ii) provide, which means in practice seeking prior approval for any change which could have that effect. If Talisman fails to seek such approval, it does so at its peril.

The effect of a failure to seek prior approval

72. The authorities to which I was referred show that, if consent is not sought at all, the question of whether approval could or could not have reasonably been withheld is irrelevant to the issue of breach of contract. The authorities are at one in saying that there can be no withholding of consent if consent is not sought, let alone an unreasonable withholding of consent. If there is a failure to do what the clause requires in seeking consent, the issue of reasonableness or unreasonableness in withholding consent simply does not arise.

    i) In *Eastern Telegraph v Dent* [1899] 1 QB 835, all three members of the Court of Appeal were clear on this point at pages 838-839 in the context of a breach of covenant in a lease in failing to obtain consent to underlet.

    ii) In *Hendry v Chartsearch Ltd* [1998] C.L.C. 1382, the relevant clause provided that each of the parties should not be entitled to assign the benefit of the contract without the prior written consent of the other. It is clear that both Henry LJ and Millett LJ agreed that prior consent which is never sought can never be withheld or refused, whether reasonably or otherwise. "Consent is not withheld if it is not asked for; and if it is not withheld, it cannot be said to be unreasonably withheld".

73. On the face of the wording of the clause therefore, the question of breach is, in my judgment, concluded against Talisman unless it did seek the consent of BG International.

Does clause 6.4 provide for a condition precedent?

74. The question is whether such a failure to comply with the prior approval requirements of claim 6.4 operates simply as a breach of contract which sounds in damages or operates as a failure to observe a condition precedent to the liability of BG International to pay any increases in Operating Expenditure which result from changes to Talisman's contractual payment obligations under the FPSO Agreement (i.e. its Schedule D liabilities).

75. In this connection there was argument in relation to the authorities which dealt with prohibitions on assignment of leases and contracts without the prior consent of one party and where the contract or lease provided that such consent could not be unreasonably withheld.

76. In *Hendry v Chartsearch* (*ibid*.) Millett LJ (as he then was) stated that, because a lease created a legal estate in land and one of the incidents of ownership was the right to dispose of it, with the consequence that a condition against alienation attaching to the estate was repugnant, it was not possible in law to deprive a lessee of his ability to

make an effective assignment. The effect however of a covenant against assignment and the reservation of a power of re-entry for breach of it was that an assignment in breach of covenant was effective to vest the legal estate in the assignee but the assignee would only take a defeasible interest which was liable for forfeiture for breach of covenant. By way of contrast, an ordinary commercial contract consists of obligations rather than property rights and there was therefore no objection to making the benefit of a contract non-assignable. Such a clause would take effect according to its tenor. In such circumstances an assignment which was made without the prior written consent of the other party would be effective as between the assignor and assignee, but ineffective as between the assignor and the other party to the original contract. "The making of such an assignment did not put the assignor in breach of the contract, let alone in repudiatory breach: it simply did not affect the other contracting parties' legal position and could be disregarded by them with impunity. … The assignment does not constitute a breach of contract and is without legal effect so far as the other party to the contract is concerned." A provision stating that the contracting party "shall not be entitled to assign … without the prior written consent" of the other party therefore took effect as a condition precedent to the validity of such an assignment rather than constituting a promissory obligation for breach of which a claim would sound in damages. Henry LJ agreed, citing the authority to which I next refer.

77. In *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, Lord Browne-Wilkinson analysed the position in a way with which the other members of the House agreed, as accepted by Henry LJ in *Hendry*, when agreeing with Millett LJ. At pages 108-109, Lord Browne-Wilkinson said:

> "Therefore the existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights I regard the law as being satisfactorily settled in that sense. If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition viz., to ensure that the original parties to the contract are not brought into direct contractual relations with third parties.
>
> As to the analogy with leases, I was originally impressed by the fact that an assignment of the term in breach of covenant is effective to vest the term in the assignee: *Williams v. Earle* (1868) L.R. 3 Q.B. 739, 750: *Old Grovebury Manor Farm Ltd. v. W. Seymour Plant Sales and Hire Ltd. (No. 2)* [1979] 1 W.L.R. 1397. However Mr Kentridge in his reply satisfied me that the analogy is a false one. A lease is a hybrid, part contract, part property. So far as rights of alienation are concerned a lease has been treated as a species of property. Historically the law treated interests in land, both freehold and leasehold, as being capable of disposition and looked askance at any attempt to render them inalienable. However, by the time of Coke covenants against the assignment of leases had been held to be good, because the lessor had a continuing interest in the identity of the person who was his tenant:

> *Holdsworth, A History of English Law*, 2nd ed., vol. III. p. 85 and vol. VII, p. 281. The law became settled that an assignment in breach of covenant gave rise to a forfeiture, but pending forfeiture the term was vested in the assignee. In contrast, the development of the law affecting the assignment of contractual rights was wholly different. It started from exactly the opposite position viz. contractual rights were personal and not assignable. Only gradually did the law permitting assignment develop: *Holdsworth*, vol. VII, p. 520-521 and 531 etc. It is therefore not surprising if the law applicable to assignment of contractual rights differs from that applicable to the assignment of leases.
>
> Therefore in my judgment an assignment of contractual rights in breach of a prohibition against such assignment is ineffective to vest the contractual rights in the assignee. It follows that the claim by Linden Gardens fails and the *Linden Garden* action must be dismissed."

78. In *CEP Holdings v Steni AS* [2009] EWHC 2447 (QB) Gloster J (as she then was), relying on both the two authorities to which I have just referred, stated that where an assignment of contractual rights is prohibited without the prior consent of the other contracting party, such consent not to be unreasonably refused, there can be no valid assignment until written consent has been granted or the court has declared that the consent has been unnecessarily refused.

79. The law is therefore clear in relation to prohibitions on assignment of contracts without consent, where such consent is not to be unreasonably withheld. Consent operates as a condition precedent to the validity of such an assignment. BG submits that prohibitions of other kinds where consent is required operate analogously and that clause 6.4 takes effect in this way. In consequence, BG contends that under clause 6.4(i) consent is a condition precedent to the change in the FPSO Agreement payments becoming effective as between it and Talisman, even though, if agreed between Talisman and Bluewater, they are effective as between those two entities.

80. To hold good, this argument would have to apply to clause 6.4(ii) as well because, as a matter of construction, it is inconceivable that consent could operate as a condition precedent to 6.4(i) but as a promissory undertaking in relation to clause 6.4(ii). To work in this way, in relation to clause 6.4(ii) consent would have to take effect as a condition precedent to the effectiveness of change in the terms of the FPSO Agreement which would have an adverse material impact on the Services or other obligations of Talisman under the TPOSA. It is again accepted by BG that the type of change referred to in 6.4(ii), as with the change in payment obligations in clause 6.4(i) would be effective as between Talisman and Bluewater.

81. There are a number of reasons why I cannot accept that the prohibition in clause 6.4 against making the referenced changes to the FPSO Agreement operates as a condition precedent but as a promissory obligation. The first is the ordinary meaning of the language used in clause 6.4 itself. It is prohibitory in itself, without setting out the effect of making a prohibited change in the FPSO Agreement on the obligations of

the parties under the TPOSA. It is not on its face the language of condition precedent. No language of ineffectiveness is used.

82. It is true to say that, in the prohibition against assignment cases, not much appears to turn on the language used, whether the words are "such assignment shall not be effective without the prior written consent", "shall not be entitled to assign" or simply "shall not assign without the prior consent". Assignment and its effects are however different in character from prohibitions of the kind found here. Where there is a prohibition against assignment without consent, the only effective remedy for breach is ineffectiveness so far as the other contracting party is concerned, because the prohibition goes to the fundamental issue of the identity of the parties entitled to benefit from the contract. The history of such prohibitions in leases and contracts gives rise to special considerations, as set out by Lord Browne-Wilkinson in *Linden* (*ibid.*) The prohibition against assignment can only properly be given effect by rendering it ineffective if consent is withheld in the case of contractual rights whilst special rules applied to assignments in breach in landlord and tenant cases, as the authorities show. Other prohibitions in contracts should however be read on their own terms. Clause 6.4 is the language of warranty in respect of the past and promise in respect of the future. The words "shall not agree" are prima facie the language of obligation which gives rise to breach in the event of a failure. It is not like an assignment where the only effective remedy is to make the assignment ineffective.

83. Second, the language of clause 6.2 militates against such a conclusion because it is mandatory both in relation to payment ("shall pay") and to the basis of payment ("by way of a contribution to Operating Expenditure" (as defined)). The obligation to pay on this basis in clause 6.2 is not expressed to be subject to the terms of clause 6.4.

84. Third, if an agreement made to change the terms of the FPSO Agreement without consent is to operate as a failure to comply with a condition precedent, it must operate as such for both clause 6.4(i) and 6.4(ii), as the parties accept. It cannot be a condition precedent in one situation but not the other. In my judgment there is a problem as to how this condition precedent would operate in relation to clause 6.4(ii). It is accepted that any agreed change in the terms of the FPSO Agreement is effective between Talisman and Bluewater but it is hard to see how the need for consent can render ineffective the effect of changes which have an adverse material impact on the Services to be performed under the TPOSA, when the adverse effect is that of diminution in quality of those Services or simply makes it more difficult for those Services or obligations owed under the TPOSA to be performed, when the TPOSA obligations remain unamended.

85. Fourth, it is to my mind clear that a failure to obtain consent to a change caught by clause 6.4(ii) could not operate as a failure to comply with a condition precedent to payment of Operating Expenditure under clause 6.2, and I did not understand this to be argued. Since the effect of the condition precedent alleged in relation to clause 6.4(i) is said to have that effect, the difference between the two sub-clauses highlights the difficulty in specifying the condition precedent for which BG contend.

86. Fifth, it is in fact hard to see how the condition precedent would work in relation to clause 6.4(i) also. Consent is, on its face, not a condition precedent to the payment obligation under clause 6.2 in respect of Operating Expenditure which, as defined (see above) covers all direct and indirect costs and expenses related to the provision of

Services and the maintenance and operation of the Ross FPSO. The payment obligations under clause 6.1 during the Initial Term cannot be affected by any such failure to obtain consent to a change in the contractual payment obligations in the FPSO Agreement and it is not contended that they are. During the Secondary Term however, clause 6.2 specifically mandates, by the use of the words "shall pay" by way of a contribution to Operating Expenditure and "such contribution … shall be on a Production Rate Basis", that sums payable are to relate to the actual Operating Expenditure as defined. If approval operates as a condition precedent to payment of increases, the cost sharing basis of contributions to actual expenditure is destroyed. To so construe clause 6.4 would be to create an inconsistency with clause 6.2.

87. Counsel for BG submitted, as I suppose he had to, as a matter of logic, that if approval to a change was sought on the basis that clause 6.4 was engaged and was not unreasonably refused, but it turned out that, after the change was made, in fact the effect was to reduce Operating Expenditure, Talisman would be entitled to charge the higher figures derived from application of the un-amended Schedule D, not the actual cost incurred. This flies in the face of the basis of payment as a contribution on the Production Rate Basis to expenditure actually incurred and is commercially insensible and contrary to the definition of Operating Expenditure. The suggestion again militates against the argument for a condition precedent.

88. I cannot see therefore how the requirement for consent can be said, when looking at clause 6.4 as a whole, in the context of clause 6.2 and the definition of Operating Expenditure, to operate as a condition precedent to payment for the Services under clause 6.2.

89. A failure to obtain consent therefore is a breach of contract which sounds in damages. This tallies with the way in which clause 6.4 is framed by reference to the effect which such changes actually have on Operating Expenditure and the Services or other obligations of Talisman under the TPOSA. As Talisman contends, it may not always be easy at the time of seeking to make changes to the FPSO Agreement to ascertain whether or not the effect of those changes would have an adverse material impact on the Services or other obligations of Talisman under the TPOSA nor whether wholesale changes to the contractual payment obligations in the FPSO Agreement would result in increases in Operating Expenditure. To construe the requirement of consent as a condition precedent to the payment of the contribution to Operating Expenditure under clause 6.2 would present much greater difficulty and uncertainty for the parties in conducting their affairs under the TPOSA than construing it as a promissory undertaking.

90. It is clear that the practical approach of a Reasonable and Prudent Operator in the position of Talisman would be to seek consent from BG to any changes which might fall within clause 6.4(i) or 6.4(ii). If consent was sought and obtained for changes which might or might not result in an increase in Operating Expenditure or an adverse effect on the Services or obligations, and prior written approval was given, then there would be no breach by Talisman if the changes had the effect referred to in either clause 6.4(i) or (ii). If consent was withheld unreasonably, there would be no breach once the unreasonableness was established. If no consent was sought or it was sought and reasonably withheld or, more accurately, not unreasonably withheld, damages would then fall to be assessed over the whole of the relevant period when the breach operated to ascertain the loss caused to BG International by Talisman agreeing such

changes with Bluewater without consent. This is no more than a conventional form of assessment of loss and damage.

The application of clause 6.4 to the Bareboat Charter

91. In support of their submissions that the requirement of prior written approval in clause 6.4 is a condition precedent to payment of increases in the Operating Expenditure caused by changes to the contractual payment obligations in the 2001 FPSO Agreement, BG points to the definition of the FPSO Agreement and the requirement that any amendment, supplementation or substitution envisaged is to be "in accordance with clause 6.4". Even if therefore, contrary to its contention but, as I have found, the Bareboat Charter is capable of constituting an amendment to the FPSO Agreement, a supplement thereto or a substitution therefore, if no prior written approval is given under clause 6.4, the amended, supplemented or substituted contract for the FPSO Agreement cannot constitute the FPSO Agreement for the purpose of the definition. In such circumstances clause 6.4 would not apply to any further changes to the Bareboat Charter because the Bareboat Charter would not, in itself, constitute "the FPSO Agreement" to which clause 6.4(i) and 6.4(ii) refer.

92. As a matter of construction, BG's submission on this point is, in my judgment correct inasmuch as clause 6.4 can only bite on a contract which falls within the definition of the FPSO Agreement. This does not however carry weight in the context of the argument as to whether or not the requirement of prior approval is a condition precedent to payment of increases in Operating Expenditure falling within clause 6.4(i) because of the way in which a court would assess loss and damage flowing from any breach of clause 6.4.

93. If the Bareboat Charter was agreed without seeking and/or obtaining the prior written approval of BG International, then Talisman breached clause 6.4 and is liable for losses flowing from the relevant breach. The loss and damage would consist of the difference in what is payable under clause 6.2 as a contribution to Operating Expenditure (or what has actually been paid, if less) and what would have been payable had there been no breach, whatever that breach might be.

94. If the breach was in failing to seek prior written approval, the counterfactual against which payments actually made is to be compared is the situation where such prior consent had been sought. At that point the question would arise as to whether BG could not unreasonably refuse consent and would in fact have not unreasonably refused consent.

95. If consent could not properly have been withheld, then the counterfactual would proceed on the basis that consent was deemed to have been given for the purpose of assessing damages. The Bareboat Charter would then be the substituted FPSO Agreement to which the provisions of clause 6.4 would apply in the future. Any further changes to the Bareboat Charter (whether real or hypothetical for the purpose of assessing damages) would result in the same factors coming into play in deciding any issues arising in relation to them – namely would consent have been sought, would it have been given or refused and if so would it have been unreasonably refused.

96. If consent could reasonably (or more accurately, not unreasonably) be withheld then the counterfactual would proceed on the basis of the original (2001) FPSO Agreement and any changes thereto which would have been sought by Talisman and agreed by BG International, together with any changes to which BG International would have agreed and any changes to which BG would unreasonably have objected. This involves an hypothetical factual inquiry where the same factors fall to be considered in deciding, on this counterfactual, what the parties would have done and whether BG International would have withheld and would have been entitled to withhold consent to the fresh changes sought.

97. The Bareboat Charter in such circumstances could not constitute the FPSO Agreement as defined because the new arrangements would not have been made in accordance with clause 6.4 and any later changes to the charter could also constitute further breaches of clause 6.4 insofar as they impacted upon the original payment obligations or services under the (2001) FPSO Agreement, if they had an effect which fell within clause 6.4(i) or (ii).

98. BG International had a separate point which was that, even if the Bareboat Charter became the substitute FPSO Agreement by virtue of compliance with clause 6.4 or the court deeming compliance, clause 6.4 could not operate, or could not operate effectively, in respect of the Bareboat Charter itself because there are no contractual payment obligations in it for Operating Payments, which could result in increases to the Operating Expenditure under the TPOSA. The effect of the Bareboat Charter was that responsibility for the provision of the vessel remained with Bluewater but responsibility for its operation lay with Talisman. Bluewater charged hire for the provision of the vessel which was broadly equivalent to the Base Day Rate (but without adjustment by reference to the Operating Percentage), the Force Majeure Payments and the Tariff Payments provided for in Schedule D of the 2001 FPSO Agreement. Insurance payments also appear to have been broadly the same. As, however, Talisman now operated the vessel, no Operating Payment fell to be made to Bluewater, as was previously the case under clause 11 and Schedule D of the 2001 FPSO Agreement. Talisman became responsible for all maintenance and operation of the vessel and became the Duty Holder of it so that it took over responsibility for observation of all health and safety and environmental requirements of the relevant authorities.

99. It is said that a considerable element therefore of the Schedule D payments referred to in the definition of Operating Expenditure in the TPOSA has thus been taken out of the ambit of clause 6.4 in its application to the Bareboat Charter because it is only "the contractual payment obligations" in the FPSO Agreement (as substituted by the Bareboat Charter on this hypothesis) to which clause 6.4 can apply.

100. There is in my judgment nothing to this point because, if consent should have been given to the substitution of the 2001 FPSO Agreement by the Bareboat Charter, then the parties are taken to have agreed to the limited application of clause 6.4 to the Bareboat Charter, as the substituted FPSO Agreement.

101. Furthermore, any further changes sought to the arrangements made in the Bareboat Charter would be subject to the obligation of Talisman to act as a Reasonable and Prudent Operator so that BG International would not be wholly unprotected should

there be a breach of that obligation in making changes which affected the direct and indirect costs forming part of the definition of Operating Expenditure.

The Alghussein Principle

102. In *Alghussein Establishment v Eton College* [1988] 1 WLR 587, Lord Jauncey (with whom each of the other Law Lords agreed) said: "It is well established by a long line of authority that a contracting party will not in normal circumstances be entitled to take advantage of his own breach as against the other party." In *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180, Lord Diplock stated that it was not an absolute rule of law and morality which prevented a party taking advantage of its own wrong whatever the terms of the contract. He expressed no doubt that the weight of authority favoured the view that in general, the principle was embodied in a rule of construction rather than in an absolute rule of law. Subsequently, there have been many decisions where this principle has come into play in the context of construing the contract in question. Essentially, unless the contract otherwise provides, a party cannot take advantage of his own breach of contract.

103. Relying upon this principle, BG submit that even if clause 6.4 does not make prior written approval a relevant change in the 2001 FPSO Agreement a condition precedent to payment of a contribution in respect of any increase in Operating Expenditure resulting from an unapproved change, the effect of the *Alghussein* principle is that Talisman cannot take advantage of its own wrong in agreeing to change the 2001 FPSO Agreement without approval and thereby increase the Operating Expenditure to which BG International is bound to contribute.

104. The short answer to this point is that Talisman cannot take advantage of its own wrong to the extent that it is shown that there is an increase in Operating Expenditure which represents the loss and damage caused by a breach by Talisman of clause 6.4. Such a breach of clause 6.4 gives rise to a right of equitable set off in respect of loss and damage caused thereby which operates in respect of payments due under clause 6.2. I did not understand Talisman or Idemitsu to challenge this. Thus a claim under clause 6.2 for a contribution to Operating Expenditure on a Production Rate Basis in circumstances where the Bareboat Charter exists could be met by the defence of equitable set off in respect of any element of that contribution which constitutes loss and damage, properly analysed, caused by a breach of clause 6.4.

105. This amounts to no more than saying that a claim under clause 6.2 can be met by a defence of breach of clause 6.4 which is, I think, common ground between the parties. If BG International is confined to set off in respect of damages suffered from breach of clause 6.4, this does not render the requirement to seek prior consent nugatory but merely properly reflects that which the parties have agreed in the TPOSA.

The burden of establishing unreasonableness in refusing consent

106. Clause 6.4 requires Talisman to obtain the consent of BG International to any change to which the clause refers. As a matter both of law and procedure, the burden must rest upon Talisman to show that any consent sought was unreasonably delayed or unreasonably withheld.

107. There are a number of authorities which support this in other contexts, upon which BG relied. In *Porton Capital Technology Funds & ors v 3M Holdings Ltd* [2001] EWHC 2895 (Comm), the claimants had sold shareholdings in a company to 3M on terms which included an entitlement to an Earn-out payment based on the company's net sales. The agreement between them included a provision that the company should not cease to carry on business without the written consent of the vendors, such consent not to be unreasonably withheld. Hamblen J, after referring to the landlord and tenant cases where the requirement for consent not to be unreasonably withheld is a matter of frequent debate, held that the principles which applied to establishing unreasonableness in those cases were applicable in a commercial context. He said:

> "222. In support of the applicability of such cases to commercial agreements, the Claimants relied upon the case of *British Gas Trading Limited v Eastern Electricity*, The Times, 29 November 1996, which concerned a long-term gas supply contract which required the customer's consent to any assignment of the supplier's rights and obligations under the contract, such consent not to be unreasonably withheld. The question for the Court was whether it was reasonable for the customer to withhold its consent, in circumstances where the supplier was undergoing a reorganisation (following a report by the Monopolies and Mergers Commission Report) and the resulting change in control would entitle the customer to terminate the contract in any event, unless the contract was first assigned. At first instance, Colman J made extensive reference to the landlord and tenant authorities and concluded that, in the circumstances of that case, consent to the assignment was being unreasonably withheld. That decision was upheld on appeal: [1996] EWCA Civ 1239.
>
> 223 The Claimants submitted that of particular importance in this case are the following principles, to be derived from the above authorities:
>
> i) First, the burden is upon 3M to show that the Claimants' refusal to consent to the cessation of the Acolyte business was unreasonable.
>
> ii) Second, it is not for the Claimants to show that their refusal of consent was right or justified, simply that it was reasonable in the circumstances.
>
> iii) Third, in determining what is reasonable, the Claimants were entitled to have regard to their own interests in earning as large an Earn Out Payment as possible.
>
> iv) Fourth, the Claimants were not required to balance their own interests with those of 3M, or to have any regard to the costs that 3M might be incurring in connection with the ongoing business of Acolyte.

…

> 228. 3M disputed the applicability of principles derived from landlord and tenant cases to a commercial agreement such as the SPA. However I accept, as Colman J did in the *British Gas Trading Limited v Eastern Electricity* case, that they provide some assistance and that the approach set out in paragraph 223 is appropriate in this case."

108. To similar effect, in *Falkonera Shipping v Arcadia Energy PTE Ltd* [2012] EWHC 3678 (Comm), Eder J said at paragraph 85:

> "… as to the burden of proof, there was some debate as to whether this lay on the Owners to show that they acted reasonably in withholding approval; or whether it fell on the Charterers to prove that the Owners' approval was unreasonably withheld and therefore a breach of the charter. Both as a matter of principle and in light of the authorities, it seems to me that the burden of proof fell on the Charterers; and I proceed on that basis …"

109. Given these authorities, the nature of the clause which requires prior written approval from BG International and the way in which the matter would ordinarily progress in litigation, the burden of showing unreasonableness must rest upon Talisman. Talisman would need to rely upon the definition of Operating Expenditure and establish the costs and expenses which it had incurred. BG International would then assert the breach of clause 6.4 in agreeing the variations in the 2001 FPSO Agreement without its consent. Talisman would then need to assert that it had sought consent and that such consent had been unreasonably withheld or, in the context of any hypothetical situation relevant in assessing damages, as appears below, that had the need for such consent arisen and had it been sought, it would have been unreasonable for consent to have been refused.

Clause 11.8(b) of Schedule D to the 2001 FPSO Agreement (issue 11)

110. Clause 11.8 of Schedule D provides:

> "11.8 (a) The Contractor shall provide an additional marine technician position during any periods when production exceeds 40,000 bbl per day.
>
> (b) For the first 12 months of this Agreement from the Effective Date the Contractor shall be entitled to provide two additional operator positions for the plant onboard the FPSO. The Parties agree to review whether the two additional operator positions will be required after the initial 12 months and both Parties shall act reasonably when considering this matter.

> (c) The Contractor shall be entitled to provide three additional maintenance positions to maintain the Blake Modification Equipment.
>
> (d) The total costs for the provision of the additional positions in paragraphs (a), (b) and (c) of this section plus the costs associated with any spare parts which Contractor is required to provide during the period of this Agreement shall be £2,375.00 per day for the initial twelve (12) months of this Agreement and thereafter the sum shall reduce to £1,825.00 per day for the remaining period of this Agreement (pending first year production evaluation, as indicated in paragraph (b) of this section)."

111. The issues of construction on this clause, in the light of the Heads of Agreement between Talisman and Bluewater dated 14th January 2000, which was comparatively recently disclosed, have been conceded by BG. It is accepted that Bluewater is entitled to charge Talisman £2375 per day in respect of the two additional operators if Talisman and Bluewater carried out the relevant review after the initial 12 month period and reasonably concluded that the two additional operator positions were required. It is not contended that BG International's prior approval was necessary under clause 6.4 because the charge referred to was a continuing charge rather than the imposition of a new charge. The issues which arise here are therefore issues of fact for another day, namely was there a review, when did it take place, was there agreement that the two operators' positions were necessary and was that conclusion, if reached, reasonable in all the circumstances.

Clauses 18.2 and 6.2 of TPOSA (issue 12)

112. Clause 6.2 has been set out earlier in this judgment and provides for payments to be made by BG International for the Services provided by Talisman in accordance with the Production Rate Basis. Clause 18.2 of the TPOSA provides:

> "In the event that the Shipper Operator requests to deliver higher volumes of Blake Production than are shown in the Blake Profile, and the Transporter Operator agrees to accept such higher volumes, then the Shippers shall be liable for all future costs attributable to repairs or replacement of the risers that are used solely for the Blake Field and the Shippers and the Transporters shall share equally all costs attributable to the risers which are used for both the Ross Field and Blake Field".

113. It is said by Talisman that the application of clause 18.2 is subject to clause 6.2 and the sharing of Operating Expenditure on the Production Rate Basis during the Secondary Term. As defined in the TPOSA, the Services included the delivery of Blake Injection Water at the Blake Injection Water Delivery Point which is located subsea and therefore necessarily included delivery though the water injection risers and Operating Expenditure included repair and replacement costs related to the maintenance and operation of the Ross FPSO and any reasonable incremental costs associated with the provision of the Services. Operating Expenditure expressly excluded subsea costs relating specifically to either one of the adjoining two fields,

which would also include repair and replacement costs of certain of the risers associated therewith.

114. It is said that applying these provisions, and leaving aside clause 18.2, any costs attributable to risers used solely for the Blake Field were not covered by the payment provisions in clause 6.2 and were to be borne by the Blake Field, whereas any costs attributable to repair and replacement of the shared risers, including the water injection risers, were to be shared between the Ross and Blake Fields on a Production Rate Basis. The definition of Operating Expenditure is not expressed to be subject to clause 18.2 and there was no exclusion for it from anything save costs referable only to one or either field.

115. Talisman says that there is tension between clause 18.2 and clause 6.2 and the definition of Operating Expenditure. It is then said that clause 18.2 applies only to the Initial Term when payment was made on the oil tariff basis as opposed to the Production Rate Basis. In the initial term, it is said that the tariff was set on the basis of estimates of the quantities of SCO to be produced from the Blake Field and clause 18.2 applies where the Blake Maximum Estimates are by consent, exceeded. In those circumstances a greater contribution would be required in the initial term but this would not be required in the Secondary Term during which costs are automatically shared proportionately by reference to the Production Rate Basis.

116. I am unable to accept these submissions. Clause 18.2 is a specific provision that governs charging in respect of "all costs attributable to the risers which are used for both Ross Field and Blake Field". There is absolutely nothing in clause 18.2 which suggests that it is only to apply during the Initial Term. The Blake Profile is relevant both to the Initial Term and the Secondary Term and there is no dispute between the parties that BG did request the delivery of higher volumes of Blake Production than those shown in the profile and that Talisman agreed to accept them in the Secondary Term. In those circumstances, clause 18.2 which is a specific provision dealing with this situation must be given its full weight and BG International and Talisman are liable to share equally in all the relevant costs attributable to the risers used for both the Ross Field and the Blake Field.

Answers to the List of Issues

117. Reference should be made to the List of Issues set out at paragraph 22 of this judgment.

Issues 1 and 2

118. In setting out my conclusions in this judgment as to the proper construction of the TPOSA, I have held that Operating Expenditure included all direct and indirect costs in fact incurred by Talisman in connection with the provision of the Services (as defined in the TPOSA), including costs incurred under or in relation to the Bareboat Charter. I have concluded that Operating Expenditure was not to be calculated as if the 2001 FPSO Agreement remained in place. Consequently the questions set out in issue 1(2)(a) and (b) do not arise, although they resurface to some in extent in different form in the context of questions relating to loss and damage under issue 9. I have held that Talisman could charge BG as part of Operating Expenditure, for what are conveniently described as the Bluewater Services, whether or not such services

were provided under the 2001 FPSO Agreement or otherwise, subject to any defence or equitable set-off based upon breach of clause 6.4. There would be no need to vary the TPOSA because the definition of Operating Expenditure was wide enough to include "all direct and indirect costs and expenses incurred in connection with the provision of the Services". Because Operating Expenditure, as defined, proceeds on the basis of actual costs and expenses and not deemed costs and expenses, I need say no more about issue 1.

119. As to issue 2(1) I have held that the references to the Schedule 5/Schedule D Payments in the definition of Operating Expenditure serve as an example of Operating Expenditure at the time the TPOSA was agreed and that they are not always required to be charged as part of Operating Expenditure. I have also held that the answer to issue 2(2) is that the Bareboat Charter is a substitute "FPSO Agreement" under the TPOSA if BG International's prior written approval was sought and if that prior approval should have been given because a failure to give it would be unreasonable.

Issue 3

120. As a matter of construction of clause 6.4 of the TPOSA, BG International's prior written approval was required for the termination of the 2001 FPSO Agreement and its replacement with the Bareboat Charter if a change to Talisman's contractual payment obligations in the 2001 FPSO Agreement in fact led to increased Operating Expenditure or in fact had a material adverse impact on the services provided under the TPOSA. Neither of the formulations put forward by Talisman or Idemitsu, Talisman's subjective belief or an objectively reasonable view at the time of seeking prior written approval of the change in question to the 2001 FPSO Agreement, represent the proper construction of clause 6.4. Talisman's reasonable belief at the time as to whether the changes would increase Operating Expenditure or have a material adverse impact on the services provided under the TPOSA is irrelevant as is an objective assessment as to whether or not on the balance of probabilities, the changes would have that effect.

Issue 4

121. Talisman was required to seek BG's prior written approval under clause 6.4 and if it did not do so, it is irrelevant to the question of breach by Talisman whether it would have been reasonable or unreasonable for BG International to withhold its approval. The question is however relevant to assessment of damages flowing from a breach of clause 6.4.

Issue 5

122. Under clause 6.4 of the TPOSA, if the point arises, the burden lies upon Talisman to show that BG International's withholding of approval was or would have been unreasonable.

Issue 6

123. In the context of ascertaining whether Talisman was in breach of clause 6.4, if it failed to seek prior written approval from BG International to a relevant change, BG International is not to be treated as having given its prior written approval even if it

would have been unreasonable for it to withhold it, had it been asked. If Talisman did ask BG International for its prior written approval and BG International unreasonably refused to give it, then it is to be treated as having given its prior written approval.

Issue 7

124. If BG International's prior written approval was required and was not unreasonably refused BG International would be obliged to contribute to Operating Expenditure on a Production Rate Basis in accordance with the definition of Operating Expenditure which is apt to include costs and expenses incurred under or in relation to the Bareboat Charter. The effect of clause 6.4 of the TPOSA is not to render the unapproved changes to Talisman's contractual payment obligations under the FPSO Agreement ineffective as between itself and BG International to the extent that they resulted in any increases to the Operating Expenditure, but BG International would have a claim in damages against Talisman for breach of clause 6.4 which would entitle it to recover loss and damage suffered for such breach and to an equitable set-off in such amounts.

Issue 8

125. In the circumstances outlined in issue 7, BG International would have a claim in damages against Talisman for breach of clause 6.4 of the TPOSA and:

i) The value of that claim would be the value of that additional contribution BG International would be prima facie liable to make in respect of Operating Expenditure pursuant to clause 6.2 of the TPOSA as a result of the breach.

ii) BG International would have a defence of equitable set off to the claim by Talisman for the increased Operating Expenditure caused by such a breach and/or a defence of circuity of action for that increased amount and/or a defence based on the basis of the principle that no person may take advantage of his own wrong.

126. If Talisman was in breach in failing to seek BG International's prior written approval but it could be shown by Talisman that it would have been unreasonable for BG International to refuse consent to the changes proposed to the 2001 FPSO Agreement, BG International's claim for breach of clause 6.4 and/or defence based upon that breach would have no value because it would only be entitled to nominal damages in respect of the failure to seek consent.

Issue 9

127. In assessing loss and damage for a breach of clause 6.4, the comparison has to be made between the actual Operating Expenditure under the definition of Operating Expenditure, including costs and expenses incurred under or in relation to the Bareboat Charter, with a situation where there was no relevant breach. In the hypothetical counterfactual of no breach it has to be assumed that the 2001 FPSO Agreement remained in place but factual enquiries are necessary to ascertain what changes would have been made to it in the light of the parties' obligations under clause 6.4. Talisman's act in terminating the 2001 FPSO Agreement does not disable itself from relying upon the machinery of clause 6.4 in ascertaining what would have

been the position had there been no breach. The court would thus have to consider what changes would have been proposed and agreed to and/or whether consent would have been unreasonably withheld in relation to such changes. There is therefore no bar to taking into account costs that would have been additional to Schedule 5/Schedule D payments under the existing 2001 FPSO Agreement in respect of Services that would have formed part of the Bluewater Services, in respect of Services that would not have formed part of the Bluewater Services or in circumstances where it is unclear whether or not such charges fell into one category or another. Clause 6.4 applies in any situation where there were or would have been changes to the contractual payment obligations in the 2001 FPSO Agreement and after termination of it, consideration must be given as to what would have happened in relation to that clause, necessitating findings of fact on the counterfactual.

Issue 10

128. On the true and proper construction of paragraph 11.8 of Schedule D of the 2001 FPSO Agreement, Talisman was liable to pay Bluewater £2,375 after the initial 12 months of the Agreement if Talisman and Bluewater had reviewed whether the two additional operator positions were still required and reasonably concluded that they were.

Issue 11

129. Talisman did not require BG International's consent under clause 6.4 of the TPOSA before reaching any conclusion as to whether the two additional operator positions were required after the initial 12 months.

Issue 12

130. On the proper construction of clauses 18.2 and 6.2 of the TPOSA, the costs attributable to repairs or replacement of the Water Injection Riser used for both the Ross and the Blake Fields are to be shared equally as between the Shippers and the Transporters.

Conclusion

131. I trust that I have answered all of the questions posed in the List of Issues to the extent required but if I have failed to do so, no doubt the parties will draw that to my attention and I can, as necessary issue an addendum to the judgment.

132. I have found for Talisman and Idemitsu on the construction of the definition of Operating Expenditure. I have also upheld their submissions that the requirement of prior consent in clause 6.4 did not represent a condition precedent to payment of any increase in Operating Expenditure caused by a change to the 2001 FPSO Agreement without prior written approval, but instead gave rise to a claim for damages. I have found for BG International in relation to the trigger which brings clause 6.4 into play. I have also found, in accordance with BG's submissions, that the burden of proof in showing unreasonable refusal of consent to any changes in the 2001 FPSO Agreement rests on Talisman. On the other issues, there is relatively even success and failure. The question arises as to how issues of costs should be dealt with in what is merely a Stage 1 trial where future facts remain to be determined which could render some of

the points of construction irrelevant. My inclination is to reserve costs for further consideration after other issues have been determined.

133. It may be that the parties are able to agree the consequential orders which should be made following this judgment but if not, I will determine any issues which arise although, if there is to be any extensive argument, I would benefit from the production of short skeleton arguments.