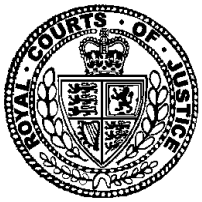

Neutral Citation Number: [2023] EWHC 1345 (Comm)

Case No: CL-2022-000573

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 23RD June 2023

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

APACHE NORTH SEA LIMITED **Claimant**

- and -
(1) NEO ENERGY CENTRAL NORTH SEA LIMITED
(2) ESSO EXPLORATION AND PRODUCTION UK LIMITED
(3) SHELL U.K. LIMITED
(4) BP EXPLORATION OPERATING COMPANY LIMITED

Defendants

- -
- -

David Allen KC and **Michael Ryan** (instructed by **Clyde & Co LLP**) for the **Claimant**
The First Defendant did not appear and was not represented.
Michael Fealy KC and **Michael Watkins** (instructed by **Norton Rose Fulbright LLP, CMS Cameron McKenna Nabarro Olswang LLP** and **Herbert Smith Freehills LLP**) for the **Second to Fourth Defendants**

Hearing dates: 3-4 April 2023

- -

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.

.....

HIS HONOUR JUDGE PELLING KCSITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the expedited trial of various issues of contractual construction that have arisen in claims and counterclaims between the claimant on the one hand and the second to fourth defendants ("defendants") on the other concerning the true construction and effect of a Decommissioning Security Agreement ("DSA") dated 1 February 2019, under which the claimant and first defendant are obliged to provide security for the anticipated future costs of decommissioning the Forties and Brimmond Fields ("Field" or "Fields") to be held in trust for the benefit of the defendants. The first defendant did not appear and was not represented, having indicated that it is content to abide by the conclusions reached in these proceedings.

2. The commercial purpose of the DSA is relatively straightforward. Each of the defendants sold their respective interests in the Field to the claimant and first defendant but remains jointly and severally liable for the costs of decommissioning part of the Field under s.29 of the Petroleum Act 1998. The purpose of the DSA is to require the claimant and first defendant to provide security to cover the future costs of decommissioning to which otherwise the defendants would be exposed. The defendants' commercial interest lies therefore in ensuring that proper security is provided by the claimant and first defendant so as to eliminate or minimise the defendants' decommissioning liabilities for the Field whereas the commercial interest of the claimant and first defendant lies in minimising the amount of security that they must provide under the DSA. Mr Fealy KC submits on behalf of the defendants and I agree that this conflict in commercial interests is important context when considering the role of the Expert when carrying out expert determinations in accordance with the terms of the DSA, because expert determination is the parties' agreed means of resolving disputes concerning determinations by the claimant of what is to be provided by way of security. Unsurprisingly, given this commercial context, the claimant seeks to confine the scope of expert determinations in a manner that the defendants maintain is unsupportable as a matter of construction of the DSA. That is an issue I turn to in detail much later in this judgment.

3. The amount of security which must be provided each year by the Unit Owners (the claimant and first defendant) for the benefit of the second to fourth defendants is the "*Provision Amount"* which is to be calculated applying a formula set out in clause 6.1 of the DSA – that is in summary (X x Y) - (Z + F +TR), where X is the estimated Net Cost (as defined in the DSA) of decommissioning the Fields as set out in the Decommissioning Plan for the Relevant Year; Z is the estimated Net Value (as defined in the DSA) in terms of commercially extractable oil or gas as set out in the Decommissioning Plan for the Relevant Year; F is the amount of any existing provision already held on trust in accordance with the terms of the DSA; and TR is the tax relief then available to the defendants. Y is a constant with no impact on the issues under consideration. It will be apparent from this summary, that this formulation treats Net Value as part of the security that is available to the defendants. The defendants do not accept that this is correct as a matter of fact but nothing turns on that point for present purposes and so I say no more about it.

4. It follows broadly that as long as the sum of Net Value, any available accumulated security and tax relief exceeds the Net Cost multiplied by the constant, the claimant does not have to provide security for the Relevant Year but it must do so once Net Cost multiplied by the constant exceeds the sum of Net Value, accumulated security currently available and tax relief as defined. The defendants' case is that the claimant has misconstrued the detailed provisions of the DSA in a way that has led to it misstating the amount of security that must be provided for 2023 and will do so for future years if the same approach is adopted.

5. As will be obvious, arriving at estimates for Net Cost is highly judgmental since it involves estimating the costs likely to be incurred some years in the future and reaching a judgment as to when those costs are likely to be incurred, which depends on the date when the commercial recoverability of oil and gas will have come to an end. Likewise significant judgments have to be made in order to arrive at a current Net Value of the reserves that remain in the Field, which in turn will inform the judgment as to when commercial recoverability is likely to end. These judgments depend on assumptions as to what may happen in the future. The DSA established detailed and complex provisions as to how that exercise must be carried out including by setting out in Appendix 5 certain assumptions that have to be made when arriving at the relevant estimates. In essence this dispute is concerned with how these provisions within the DSA are to be construed.

6. The DSA contains procedural machinery for the resolution of disputes between the parties concerning how these issues are to be resolved, which involves expert determination if agreement cannot be reached between the parties. It will be necessary to consider the machinery in more detail below but, broadly, it requires the claimant as Operator to submit a draft plan for decommissioning the Fields that contains an estimate of the Net Value of the Field (taking account of future operating costs and capital expenditure) and the Net Cost of Decommissioning the Field from which the security can then be calculated applying the formula set out above. The defendants are entitled to make written recommendations in respect of the draft plan and in default of those being agreed, are entitled to refer those aspects of the draft plan with which they do not agree for resolution by expert determination. For the Relevant Year 2023, the claimant has submitted a draft plan, in respect of which the defendants have made four recommendations that are not acceptable to the claimant. The defendants exercised their right to refer the dispute for expert determination. There is a dispute as to how the Expert should be appointed and more importantly and as I have said already, how the Expert should approach the expert determination he is mandated to carry out.

7. The claimant commenced these proceedings because, it maintained, the issues all turn on the proper construction of the DSA, those issues have been left by the parties' agreement to be determined by the court rather than the Expert and it wished to have those issues resolved once and for all for the purpose of ensuring that the Expert resolves the issues left to him applying what the claimant maintains is the correct construction of the DSA. The defendants dispute whether that is a correct analysis of the dispute resolution provisions within the DSA - an issue I determine below - and whether many of the issues that arise are construction issues at all, but in the event have agreed for the issues to be resolved by the court ahead of the Expert embarking on the expert determination, whilst reserving the right to submit that certain of the issues that arise are not properly issues of construction for the court but are for determination by

the Expert applying the standard of a Reasonable and Prudent Operator as that concept is defined in the DSA.

8. There is a dispute between the parties as to the correct approach to be adopted in determining the issues for determination in these proceedings. The claimant has prepared a list of 24 issues, a number of which are divided into sub issues. The defendants maintain that many of the issues are repetitive, overly general or relate to matters that are not in dispute or are properly for the Expert rather than the court to resolve.

9. This is unfortunate because the Commercial Court Guide makes clear that the List of Issues is meant to be a neutral document for use as a case management tool which should not be drafted " … *in terms which advance one party's case over that of another*." In this case, an agreed document expressed in the way it should have been and confining itself to the issues that arise without repetition would have provided a short agenda for this trial. I do not consider myself to be required to determine each issue identified in the List of Issues given the way it has been caveated by the defendants. After the parties have received this judgment in draft, I direct the parties to use best endeavours to agree the terms of an order giving effect to the conclusions in this judgment. In default of agreement being reached, the terms of the declaration required will be settled at the hearing at which this judgment is handed down, applying the well-established general principles that apply to the grant, scope and formulation of declaratory relief.

Agreed Facts

10. The trial proceeded on the following agreed facts:

> "The Parties
>
> 1. The Claimant is the current operator of a hydrocarbon-producing field in the North Sea (detailed below) and, together with the First Defendant, hold a production license, covering their past and future development. The Claimant and the First Defendant are Unit Owners under the DSA.
>
> 2. The Second, Third and Fourth Defendants are previous Unit Owners, and Second Tier Participants under the DSA.
>
> The fields
>
> 3. The Forties Field, the Brimmond Field, the Tonto Field and the Maule Field are each oil and gas fields within (variously) UKCS Blocks 21/10, 21/9, and 22/6a, under Production Licences P.057, P.246, P.084 and P.255, and any substitute licence.
>
> The UOA
>
> 4. The operation and development of the Forties Field was subject to a Unit Operating Agreement dated 15 October 1985

and, in relation to the Brimmond Field, a joint operating agreement dated 11 June 1996, in each case as amended or supplemented and/or novated from time to time (the "UOA").

The Decommissioning Security Agreement

5. On 19 February 2019, the Parties entered into a Decommissioning Security Agreement (the "DSA"). The DSA relates to the Forties Field and the Brimmond Field (the "Field").

The RY2022 Decommissioning Plan

6. The Proposed Plan for Relevant Year ("RY") 2022 was agreed without challenge as the Decommissioning Plan for the RY2022.

7. The Decommissioning Plan for RY2022 provided as follows:

(a) that annual oil production was forecast to gradually decline from 8.0 million barrels in 2022 to 1.7 million barrels in 2045;

(b) that there would be approximately £238 million of capital expenditure between 2022 and 2029; and

(c) that the Field would cease production in 2037, the last year in which the net operating cash flow was forecast to be a positive value.

8. The Claimant did not take into account the effect of inflation on decommissioning costs for the purposes of identifying the date when the Field would cease production.

The RY2023 Proposed Plan

9. The Proposed Plan model for RY2023 differed from the Proposed Plan model for RY2022.

10. The Proposed Plan for RY2023 (the "RY2023 Proposed Plan") provided as follows:

(a) that annual oil production would decline from 7.1 million barrels in 2023 to 1.0 million barrels in 2040;

(b) that approximately £9 million of capital expenditure would be invested in the Field between 2023 and 2030; and

(c) that the Field would cease production in 2026.

11. The Claimant purported to take into account the effect of inflation on decommissioning costs at Row 72 for the purposes of identifying the date when the Field would cease production. The total figure of £779 million, being the sum of the Claimant's calculation at Row 72 through to 2040, is not an agreed figure.

12. The rate of inflation calculated in accordance with paragraph 3.1 of Appendix 5 and used in the RY2023 Proposed Plan was 4.53%. The Discount Rate calculated in accordance with the DSA and used in the RY2023 Proposed Plan was 1.83%.

13. For the Relevant Years since execution of the DSA, the (i) inflation rates, and (ii) Discount Rates calculated by the Claimant, were respectively:

(a) for RY2020, (i) 2.84% and (ii) 2.51%;

(b) for RY2021, (i) 1.67% and (ii) 2.05%;

(c) for RY2022, (i) 1.52% and (ii) 1.76%, and

(d) for RY2023, (i) 4.53% and (ii) 1.83%.

The UK Energy (Oil and Gas) Profits Levy 2022

14. The UK Energy (Oil & Gas) Profits Levy Act 2022 (the "EPL") was announced in Parliament on 26 May 2022. A draft Bill was published for technical consultation on 21 June 2022, which closed on 28 June 2022.

15. On 5 July 2022, the draft Bill was introduced to Parliament, which included a number of amendments from the version previously published. The first reading in the House of Commons was held on 5 July 2022, the 2nd reading on 11 July 2022, and the 3rd reading on 11 July 2022. Further to 1st, 2nd and 3rd readings in the House Lords between 12 and 13 July 2022, the Bill was passed by Parliament on 13 July 2022 and received the Royal Assent on 14 July 2022. It took effect retrospectively from 26 May 2022.

The Expert Determination

16. On various dates between 25 and 29 August 2022, the Second, Third and Fourth Defendants objected to certain parts of the RY2023 Proposed Plan and made written recommendations (in summary) as follows:

(a) The plan ought to be revisited to include the EPL.

(b) The production profiles and capital expenditure plans should be in line with those contained in the RY2022 Proposed Plan.

(c) Additional modelling added by the Operator for RY 2023 in relation to the effect of inflation on decommissioning costs should be removed.

> (d) The rate of tax for income received on funds held under trust should be 45%, not 40%.
>
> 17. Following the Claimant and the Second, Third and Fourth Defendants being unable to reach an amicable resolution in respect of the written recommendations, by written notices dated 5, 6 and 7 October 2022, the Second, Third and Fourth Defendants referred their written recommendations to expert determination under clause 4.3 (although the Claimant disputes their entitlement to do so) (the "Expert Determination").
>
> 18. After a temporary stay of the Expert Determination, and under reservation by the Claimant and the First Defendant, Mr Jonathan Fuller was selected as the Expert by the parties on 20 January 2023.
>
> 19. The parties have all agreed to extend the date for appointment of Mr Fuller until 7 business days after judgment has been handed down (not including any appeal)."

I summarise in further detail below, the legal principles that apply to the construction of the DSA. However, it is helpful to note one elementary point at this stage. It is common ground that in construing a contract a court is obliged to construe it in its relevant factual matrix and that includes all facts or circumstances known or reasonably available to both parties providing that they existed at the time that the contract was agreed. The legal basis for this well-established proposition is set out below. It follows that events occurring thereafter are immaterial for construction purposes. How the parties have agreed a contract should be interpreted after it is agreed is also irrelevant in the absence of an assertion of novation, variation, waiver or estoppel, none of which are relied on in this dispute. All that being so, I accept Mr Allen KC's submission on behalf of the claimant (to the extent there is a dispute about it) that in this case the parties' operation of the DSA after it was executed is neither relevant nor admissible when determining issues of construction. It follows that paragraphs 6-8 and paragraphs 13(a) to (c) are relevant only as background and (possibly) for the purpose of carrying into effect the true construction of the DSA but not for the purpose of reaching a conclusion as to its true construction.

The DSA

11. The DSA contains 15 clauses running to 68 pages and 11 appendices running over a further 93 pages. I set out below the critical provisions of the DSA. However it is to be borne in mind, as emphasised by Mr Allen in the course of his submissions, that in construing a contract it is necessary, indeed fundamental, that the document must be read as a whole – see the principles summarised below. I have adopted this approach in reaching the conclusions set out below concerning the proper construction to be given to the provisions in dispute.

12. It is common ground that the claimant was the or an "*Operator*" and the defendants were "*Second Tier Participants*" for the purposes of the DSA. With that common ground in mind, the defined terms used in the DSA are set out in clause 1 of the agreement. They include:

"**Decommissioning**" means the decommissioning and/or dismantling and/or demolition and/or removal and/or disposal of the Field Property or any part thereof including any operations carried out in connection with or in contemplation of the foregoing (including planning, acquiring long-lead items and maintenance of the Field Property following cessation of production but pending the commencement of decommissioning operations under the Decommissioning Plan), together with any necessary site reinstatement …

"**Decommissioning Plan**" means the decommissioning schedule and budget in respect of the Field approved, or deemed approved, pursuant to Clause 4; …

"**Field Property**" means property owned, leased or otherwise provided by the Unit Owners jointly pursuant to the UOA, or, where there is no longer an operating agreement in force in respect of the Field, property owned, leased or otherwise provided by the remaining Unit Owner which pertains to the Field, but excluding any infrastructure and installations forming part of the FPS; …

"**Net Cost**" means the aggregate of the relevant pre-tax costs of Decommissioning calculated on the following basis:

(a) allowance shall be made for reasonably and prudently estimated salvage value of plant and equipment arising from the Decommissioning Plan;

(b) no account shall be taken of tax allowances available to any of the Unit Owners;

(c) each cost and receipt shall be expressed initially as if such costs and receipts were incurred or received at the mid-point of the Relevant Year and then inflated from the end of the Relevant Year to the dates when such costs and receipts are expected to be incurred or received (as set out in the approved Decommissioning Plan) and then discounted at the Discount Rate from such dates back to the end of the Relevant Year;

(d) the assumptions established in accordance with the provisions of Appendix 5 shall apply to the above calculations; and

(e) only those pre-tax costs and receipts, if any, which arise after the start of the Relevant Year shall be taken into account;

"**Net Value**" means the aggregate of:

(a) the sales value of petroleum forecast to be produced and delivered from the Field;

(b) the anticipated proceeds of the sale of any surplus Field Property to be sold prior to Decommissioning; and

(c) the value of any tariffs or other income (but only to the extent that such income derives from a send or pay obligation) receivable by the Unit Owners (in their capacity as such) prior to Decommissioning from other fields under transportation, processing and other agreements actually concluded as of the relevant calculation date;

calculated on the following basis:

(i) allowance shall be made for the costs attributable to such aforementioned items, including operating and capital costs (other than of Decommissioning) and sales costs;

(ii) allowance shall be made for Tax, but taking account of tax allowances and any Government grants, allowances or other assistance given or expected to be given in relation to Field Operations or Field Property (other than any Decommissioning Relief or any anticipated payments pursuant to a Decommissioning Relief Deed);

(iii) each of the costs and receipts shall be expressed initially as if such costs and receipts were incurred or received at the mid-point of the Relevant Year and then inflated from the end of the Relevant Year to the dates when such costs and receipts are expected to be incurred or received (as set out in the approved Decommissioning Plan), and shall then be discounted at the Discount Rate from such dates back to the end of the Relevant Year, subject always to Paragraph 3.2 of Appendix 5 in respect of the treatment of prices where published prices of petroleum are used which are expressed in nominal terms;

(iv) the assumptions established in accordance with the provisions of Appendix 5 shall apply to the above calculations;

(v) only those receipts and costs, if any, which arise after the start of the Relevant Year shall be taken into account; …

"**Operator**" means:

(a) the Person from time to time appointed under the UOA as operator of the Field being, at the date of this Agreement, Apache or, to the extent that the UOA shall have terminated as a result of a

> single Unit Owner becoming holder of 100% of the equity in the Field, then such Unit Owner; or
>
> (b) any Person holding a letter signed by the Secretary of State confirming that the Secretary of State is reasonably satisfied such Person has been appointed as Operator for the purposes of this Agreement by the Second Tier Participants pursuant to Clause 8.5.3; or
>
> (c) any Person holding a letter as described in Clause 8.6.4 …
>
> "**Reasonable and Prudent Operator**" means a Person seeking in good faith to perform its contractual obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking in the UK Continental Shelf under the same or similar circumstances or conditions, and the expression "**standard of a Reasonable and Prudent Operator**" shall be construed accordingly;…
>
> "**TR**" has the meaning given to it in Clause 6.1
>
> …
>
> "**Unit Operating Agreement**" or "**UOA**" means: (a) the Unit Operating Agreement in relation to the Forties Field dated 15 October 1985 and having an effective date of 1 January 1984 between the Unit Owners; and (b) in respect of the Brimmond Field only, the joint operating agreement in relation to the Brimmond Field dated 11 June 1996 between the Unit Owners, in each case as amended and/or supplemented and/or novated from time to time
>
> … ;".

By clause 1.9:

> "References in this Agreement to a document being "substantially in the form of" another shall mean a document in identical form to such other, subject only to minor changes that may clarify or enhance its terms but do not, in any event, amend the overall principles, effect or enforceability of such other document."

13. The commercial purpose of the agreement is identified as described above in Recital C and confirmed by clause 3.1, which provides:

> "The object of this Agreement and the Trust Deeds to be entered into pursuant to its terms is to make provision for the costs of Decommissioning and to provide security for the performance of obligations under a Statutory Decommissioning Programme for the purposes of section 38A of the Act. Accordingly each Unit Owner

> shall place monies in trust and/or make Alternative Provision for the benefit of all other Unit Owners and the Additional Beneficiaries, in respect of its Unit Equity Share of the costs of Decommissioning in accordance with, and subject to the terms of, this Agreement."

These provisions reflect what I have said already concerning the commercial purpose of the DSA and are critical to an assessment of what constitutes commercial context for contract construction purposes, because provisions such as Recital C and clause 3.1 help define what was known and understood by the parties at the date when the DSA was executed.

14. The operative provisions relevant to this dispute start with clause 4.1 and provide as follows:

> "4.1 The Operator shall submit to the Parties by 30th June in each Year a proposed Decommissioning schedule and budget (the "Proposed Plan"), which shall substantially follow and be based on Oil & Gas UK's "Guidelines on Decommissioning Cost Estimation" with additional detail to specify the base assumptions used to quantify the constituent elements and sub-elements including duration of activities, resource requirements and associated rates, and covering:
>
> 4.1.1 a geological/reservoir review of the Field including the Operator's life of Field production estimates prepared in accordance with Paragraph 7.9 of Appendix 5;
>
> 4.1.2 an estimate of the dates on which Decommissioning will commence and be completed;
>
> 4.1.3 an estimate of the Net Cost during the immediately following Year (such immediately following Year being the "Relevant Year");
>
> 4.1.4 an estimate of the Net Value during the Relevant Year;
>
> …
>
> 4.3 Simultaneously with the submission of the Proposed Plan by the Operator to the Parties under Clause 4.1, the Operator shall notify each Unit Owner and Second Tier Participant in writing (a "Demand") that it must respond within the sixty (60) day period set out in this Clause 4.3. … Each Second Tier Participant shall give notice to the Operator within sixty (60) days of the Demand whether it has any written recommendations. Any such Second Tier Participant which fails to provide any written recommendations within such sixty (60) day period shall be deemed to have made no written recommendations. If any Unit Owner objects to the Proposed Plan (an "Objecting Unit Owner"), or if any Second Tier Participant makes written recommendations then all Parties shall meet promptly to discuss those objections or consider the written

recommendations and shall attempt to reach an amicable resolution. If no amicable resolution has been reached within ninety (90) days of submission of the Proposed Plan by the Operator, then any Objecting Unit Owner or any Second Tier Participant shall be entitled to refer the matter for Expert determination pursuant to Clause 11 within ten (10) days of the end of the said ninety (90) day period, any such referral to be promptly notified to the other Parties. If no Unit Owner objects in accordance with this Clause 4.3 and there is no such referral following consideration of written recommendations from any Second Tier Participant, the Operator's Proposed Plan, as may have been amended pursuant to this Clause 4.3, shall be deemed approved. Where the Proposed Plan is referred to an Expert, the Expert shall be required to confirm that those elements of the estimates of Net Cost or Net Value or PRT Relief which have been the subject of objections or written recommendations (as applicable) have been calculated in accordance with this Agreement. Where the Proposed Plan has been objected to by an Objecting Unit Owner or where written recommendations of a Second Tier Participant have not been incorporated in a revised Proposed Plan pursuant to this Clause 4.3 and the Proposed Plan has been referred for Expert determination pursuant to Clause 11, any Unit Owner or Second Tier Participant shall be entitled to be involved in such referral as a Relevant Party in accordance with Clause 11.1 and make its own independent submissions to the Expert accordingly. If the Expert determines that those estimates are not in accordance with this Agreement (including, in particular, Appendix 5), the Expert shall determine the estimates which should have been so made and the Operator shall incorporate the Expert's determinations into the Proposed Plan. The Proposed Plan, as adjusted if applicable, shall then be deemed to be approved and shall become the Decommissioning Plan for the Relevant Year. [Emphasis supplied]

4.4 Without prejudice to Clause 4.3, the Operator shall in accordance with Clause 11 periodically refer its estimates of Net Cost and Net Value and PRT Relief to an Expert who shall be asked to confirm that the estimates of Net Cost and Net Value and PRT Relief have been made in accordance with this Agreement,

...

4.5 If the Expert determines that the estimates referred to the Expert pursuant to Clause 4.4 have not been made in accordance with this Agreement (including, in particular, Appendix 5), the Expert shall determine the estimates which should have been so made and the Operator shall incorporate the Expert's determinations into the Proposed Plan (or the Decommissioning Plan as the case may be). The Proposed Plan (or the Decommissioning Plan as the case may be) as adjusted in accordance with the Expert's determination shall

then be deemed to be approved by the Unit Owners and shall become the Decommissioning Plan for the Relevant Year.

4.6 If at any time the Operator (i) fails to submit a Proposed Plan pursuant to Clause 4.1 or (ii) fails to refer its estimates of Net Cost and Net Value and PRT Relief to an Expert in accordance with Clause 4.4, any Party shall be entitled to serve ten (10) Business Days' notice on the Operator requiring it to do so and if it fails to do so within such ten (10) Business Day period, any Party may refer to an Expert in accordance with Clause 11 the determination of Net Cost and Net Value and PRT Relief or such matter as aforesaid, and the Proposed Plan or the estimates determined by the Expert shall become the Decommissioning Plan for the Relevant Year (if any) or be incorporated into the Decommissioning Plan for the Relevant Year (if any) as applicable and deemed approved by the Unit Owners and shall be used as the basis of the calculation in Clause 6 for the Relevant Year.

…

5.2 Subject to Clause 7, each Unit Owner undertakes to pay to the relevant Trustee the Provision Amount calculated as being payable by that Unit Owner in accordance with Clause 6 for each Relevant Year.

…

6.1 The Provision Amount in respect of each Unit Owner in respect of each Relevant Year (provided such Relevant Year or any part thereof is within the Run-Down Period) shall be calculated by the Operator in accordance with the following formulae, and determined in accordance with Clause 6.2:

Pre-Tax Provision Amount = (X x Y) – Z – F

Post-Tax Provision Amount = (X x Y) – TR + $R_{Bridge}((8/12)TR_{PRT}+(9/12)TR_{RFCT\&SC})$ – Z – F

Where:

X = such Unit Owner's Unit Equity Share of the estimated Net Cost as set out in the Decommissioning Plan for the Relevant Year;

Y = a risk factor which shall be [redacted] during the Initial Run-Down Period and [redacted] during the Later Run-Down Period;

Z = such Unit Owner's Unit Equity Share of the estimated Net Value as set out in the Decommissioning Plan for the Relevant Year provided that, if Net Value is negative or if only one Unit Owner (or more than one Unit Owner where all such Unit Owners are Affiliates) remain(s), Z shall be deemed to be zero (0);

F = the amount of any existing provision (in cash and/or Authorised Investments and/or by way of Alternative Provision) made by such Unit Owner hereunder and which will remain in force throughout the Relevant Year and for this purpose the value of any funds held by the Trustee under the Trust Deed executed by such Unit Owner shall be taken as at, and any Authorised Investments shall be valued at, the mid-market closing price of such Authorised Investments as quoted in the Financial Times (or, if not so quoted, by Bloomberg) on the 1st September preceding the Relevant Year or, if 1st September is not a Business Day, on the next following Business Day (or if no such value is quoted then the value of those Authorised Investments at that time in the reasonable opinion of the Operator, or, where the Unit Owner is the Operator or is an Affiliate of the Operator, the Substitute Operator) and the value of any Alternative Provision that is to remain in force throughout the Relevant Year shall be the maximum amount realisable under its terms;

TR = the amount in respect of such Unit Owner calculated in accordance with Paragraph 6 of Appendix 5;

TR_{PRT} = the Allowed PRT Relief in respect of such Unit Owner calculated in accordance with Paragraph 6 of Appendix 5;

$TR_{RFCT\&SC}$ = the Allowed RFCT & SC Relief in respect of such Unit Owner calculated in accordance with Paragraph 6 of Appendix 5; and

R_{Bridge} = an annual rate of bridging finance equal to LIBOR as quoted on the preceding 31st March (or if 31st March is not a Business Day, on the next Business Day) + [redacted].

6.2 The Operator shall no later than 1st October preceding each Relevant Year advise all Parties of the amounts resulting from the computations set out in Clause 6.1 for the Relevant Year on both the Pre-Tax Basis and the Post-Tax Basis. The Provision Amount to be provided by each Unit Owner shall be the Post-Tax Provision Amount unless otherwise provided pursuant to Clause 2.

…

6.6 If any assumption used to calculate the Provision Amounts in accordance with Appendix 5 (for example, oil prices, rig rates, etc.) changes since the last calculation, then the Operator (or, where the Operator is the sole Unit Owner or where all Unit Owners are Affiliates of the Operator or where the Operator or any of its Affiliates is a Defaulting Unit Owner, the Substitute Operator) shall calculate the effect of such change on the Provision Amount in respect of each Unit Owner for the Relevant Year if it were to be used in the calculation in Clause 6.1,

…

6.7 If at any time a Unit Owner or Second Tier Participant is of the opinion that any assumption in Appendix 5 has changed since the last calculation, the effect of which would be to increase the Provision Amount for any Unit Owner by more than one million Pounds (£1,000,000), such Unit Owner or Second Tier Participant shall be entitled to refer the matter to an Expert in accordance with Clause 11 in order for the Expert to determine the change in Provision Amount for the Relevant Year if it were to be used in the calculation in Clause 6.1

…

11.1 If any dispute, difference or matter of any kind arises which, under this Agreement, is required or permitted to be referred to an Expert for determination, then the relevant Party (or, in the case of Clause 9.13.4, the Third Tier Participant), who, being so entitled, wishes to refer the matter may serve notice on the other Parties (or Third Tier Participants as aforesaid) entitled to be involved in such referral (each, together with the referring Party or Third Tier Participant, a "Relevant Party") requiring the matter to be so determined in accordance with this Clause 11.

…

11.3 If the Relevant Parties have not agreed upon the identity of the Person to be appointed as the Expert within ten (10) Business Days of service of the notice under Clause 11.1, any Party may apply to the President for the time being of the Energy Institute ("Independent Appointer") to appoint an individual to act as the Expert in the reference, identifying all the experts nominated by the Relevant Parties under Clause 11.2 and requesting that the selection from the nominations made by the Relevant Parties be made within five (5) Business Days of receipt of the application.

11.4 The "Selection Date" shall be the day on which the Expert is selected either by the Relevant Parties or by the Independent Appointer. The Operator shall notify the Expert of its selection within two (2) Business Days of the Selection Date. The "Appointment Date" shall be the date on which the Expert signs the agreed contract of appointment which shall be no more than thirty (30) Business Days after the Selection Date. Prior to the Appointment Date, the Expert and the Relevant Parties shall enter into an agreement substantially in the form of the pro-forma agreement attached hereto as Appendix 10.

…

11.7 The Expert shall establish the procedure of the Expert determination so as to ensure the fair, expeditious and economical determination of the matter referred for determination.

> …
>
> 11.9 The Expert shall reach its decision on such basis as is fair and reasonable, taking into account the terms of this Agreement (in particular the assumptions in Appendix 5 as may have been varied by agreement of the Parties) and the objectives of the Parties in entering into this Agreement, compliance with Legislation, good oil and gas industry practice and its duty of care to all Parties and Third Tier Participants.
>
> …
>
> 11.10 The final decision of the Expert shall be binding on all the Parties to this Agreement (and, in the case of Clause 9.13.4, those Third Tier Participants which have served an Additional Beneficiary Notice) except in the case of fraud, mistake of law, or manifest error. The Expert shall act as expert and not as arbitrator. The Expert shall apply, and adhere to, the law, provided that the Expert shall not interpret or construe the law, such interpretations and construction being reserved for decisions in accordance with Clause 15.9.
>
> …
>
> 15.9 … This Agreement and any disputes or claims arising out of or in connection with its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the laws of England. Each Party irrevocably agrees to submit to the exclusive jurisdiction of the courts of England over any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes and claims) …"

15. The Appendix that is most material for the purposes of this dispute is Appendix 5, which is headed "*Assumptions*" and starts by recording the claimant's obligation by 30 June to " … *set out the assumptions in respect of the matters referred to in Paragraphs 1 to 8 for use in the calculation of Net Cost and Net Value and TR. Such assumptions shall be subject to review by the Parties*." The Appendix continues that "… *(u)nless otherwise decided by all the Parties, the Operator shall apply the following assumptions, where applicable, in any calculation of Net Cost or Net Value and TR …"*. Although the reference to "… *Paragraphs 1 to 8 …"* is obscure, there can be no real doubt that it was intended to refer to Clause 4.1 because (1) clause 4.1 requires that the claimant set out in the proposal to which that clause relates "… *the base assumptions used to quantify the constituent elements and sub-elements* …" within the proposal and (2) because the proposal to which that clause refers requires the proposal to include (a) "*… an estimate of the Net Cost during* …" the Relevant Year and (b) "… *an estimate of the Net Value during the Relevant Year* …". It is noteworthy too that there is nothing within the agreement generally or Appendix 5 that requires the claimant as Operator to apply only the assumptions set out in Appendix 5.

16. In so far as is material the default assumptions include:

"3.1 The annual rate of inflation shall be equal to one third of the sum of the annual percentage changes in the Producer Price Index over the three (3) Year period ending on 31 March in the Year of calculation,

…

5 … in calculating Net Value, all references to Tax and other Government take (either combined or independently) in this Agreement shall be those computed using the following assumptions: …

5.3 The applicable law shall be the Legislation in existence at the time of the completion of the assumption statement under this Appendix 5 or (in the event of a major change of tax legislation brought into force after the completion of each assumption statement) the Legislation in existence as at the end of the Year.

…

6.1 TR will be calculated separately for each Unit Owner, and shall be expressed in Pounds.

…

7. Operating Assumptions

7.1 It shall be assumed that offshore sea-bed Field Property (other than pipelines and well casings cut below the mud line in accordance with statutory obligations) will be required to be removed, and that pipelines will be required to be flooded (unless guidelines issued by the Secretary of State or applicable law require otherwise).

…

7.4 The assumptions to be used for future market prices of crude oil shall be those published by Wood Mackenzie Limited for "UK Brent" within the " Key Valuation " on the "Upstream Oil and Gas" subsection of the Methodology and Assumptions" section of its website … for the period of January to March inclusive last falling prior to the time of calculation of the Net Value hereunder (the "Q1 Price")

…

7.9 The production profiles for petroleum utilised for calculations of Net Cost and Net Value under this Agreement shall be the life of Field production profiles based on Proved Reserves plus Probable Reserves in respect of all reservoirs within the Field as prepared by

the Operator to the standard of a Reasonable and Prudent Operator, provided that:

7.9.1 in any case where a reference has been made to an Expert pursuant to Clause 4.3 or Clause 4.4, in determining whether an estimate of Net Cost or Net Value has been made in accordance with this Agreement and in determining an estimate which should have been so made, the Expert shall use such production profiles based on Proved Reserves plus Probable Reserves as he considers would have been prepared by a Reasonable and Prudent Operator; and

7.9.2 the production profiles for petroleum utilised for calculations of Net Cost and Net Value under this Agreement shall include production of Proved Reserves and Probable Reserves anticipated to arise as a consequence of capital expenditure in the Field regardless whether the relevant budget has been proposed or approved at the date such calculations.

For the purposes of this Paragraph 7.9, the following shall be defined as per section 2.2.2 of Society of Petroleum Engineers (and others) Petroleum Resources Management System document (2007) and are:

"**Proved Reserves**" are those quantities of petroleum which, by analysis of geoscience and engineering data, can be estimated with reasonable certainty to be commercially recoverable, from a given date forward from known reservoirs and under defined economic conditions, operating methods and government regulations. If deterministic methods are used, the term reasonable certainty is intended to express a high degree of confidence that the quantities will be recovered. If probabilistic methods are used, there should be at least a 90% probability that the quantities actually recovered will equal or exceed the estimate.

"**Probable Reserves**" are those additional reserves which analysis of geoscience and engineering data indicate are less likely to be recovered than Proved Reserves but more certain to be recovered than possible reserves, and where it is equally likely that actual remaining quantities recovered will be greater than or less than the sum of the estimated Proved plus Probable Reserves (2P). In this context, when probabilistic methods are used, there should be at least a 50% probability that the actual quantities recovered will equal or exceed the 2P estimate.

7.10 The operating costs and capital expenditures utilised for calculations of Net Cost and Net Value under this Agreement shall be (i) those approved at the time of such calculation by the Operating Committee under the UOA; and (ii) any additional operating costs and capital expenditures set out in the life of Field production estimates referred to in Paragraph 7.9 above, and

> prepared to the standard of a Reasonable and Prudent Operator, provided that in any case where a reference has been made to an Expert pursuant to Clause [4.3] or Clause [4.4], in determining whether an estimate of Net Cost or Net Value has been made in accordance with this Agreement and in determining an estimate which should have been so made, the Expert shall use such estimates of costs and expenditures as he considers would have been prepared by a Reasonable and Prudent Operator.
>
> …
>
> 7.13 It shall be assumed that the commencement, execution and completion of Decommissioning in respect of each item of Field Property shall take place at such times as would be determined by a Reasonable and Prudent Operator; provided that:
>
> > (i) it shall be assumed that the process of Decommissioning shall commence as soon as reasonably practicable after the permanent cessation of production from the Field; and
> >
> > (ii) to the extent that a Statutory Decommissioning Programme would require commencement, execution and/or completion of Decommissioning in respect of any item(s) of Field Property to take place at a particular earlier time(s), it shall be assumed that such activities shall take place at such earlier time(s).
> >
> > …"

Principles Applicable to Construction Issues

17. The framework principles that apply to the construction of a contract are now well established. In summary:

    i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or reasonably available to or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see Arnold v Britton [2015] UKSC 36 [2015] AC 1619 *per* Lord Neuberger PSC at paragraph 15, the earlier cases he refers to in that paragraph and most recently, Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2; [2023] 1 WLR 575 *per* Lord Hamblen JSC at [29(1)];

    ii) In carrying out this exercise it is necessary to consider the contract as a whole since it may be apparent from such a reading that the parties intended either a narrower (or, conceivably a wider) meaning than the literal meaning of the words used might suggest when read in isolation – see Barclays Bank Plc v

UniCredit Bank AG [2014] EWCA Civ 302; [2014] 2 All ER (Comm) 115 (CA) *per* Longmore LJ at [14] and Apache North Sea Ltd v INEOS FPS Ltd [2020] EWHC 2081 (Comm) *per* Foxton J at [21];

iii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v Britton (ibid.) *per* Lord Neuberger PSC at paragraph 21;

iv) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v Britton (ibid.) *per* Lord Neuberger PSC at paragraph 17;

v) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 *per* Lord Clarke JSC at paragraph 23;

vi) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 18;

vii) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v Kookmin Bank (ibid.) *per* Lord Clarke JSC at paragraph 21 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v Britton (ibid.) *per* Lord Neuberger PSC at paragraph 19;

viii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of the drafting of the clause and the agreement in which it appears – see Wood v Capita Insurance Services Limited [2017] UKSC 24; [2017] AC 1173 *per* Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent – see Wood v Capita Insurance Services Limited (ibid.) *per* Lord Hodge JSC at paragraph 13 and National Bank of Kazakhstan v Bank of New York Mellon [2018] EWCA Civ 1390 *per* Hamblen LJ at paragraphs 39-40; and

ix) A court should not reject the natural meaning of a provision as incorrect simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v Britton (ibid.) *per* Lord Neuberger PSC at paragraph 20

and Wood v Capita Insurance Services Limited (ibid.) *per* Lord Hodge JSC at paragraph 11.

I am satisfied that the DSA is a sophisticated, complex agreement drafted by skilled professionals which should be interpreted principally by textual analysis applying the principles set out above but bearing in mind that (a) in doing so it is necessary to read each provision being construed in the light of the agreement as a whole and (b) even when construing such an agreement it is wrong in principle to ignore contextual matters and in particular commercial context entirely.

The Issues

The Life of Field Assessment - Paras 7.9, 7.10 and 7.13 of Appendix 5

18. As I have explained already, by clause 4.1 of the DSA, the claimant is required to supply a Proposed Plan for decommissioning the Field which is required to contain an estimate of Net Value of the Field and Net Cost of Decommissioning the Field, in each case taking account of the inflation of the constituent elements of each and then discounting back as necessary to come to a current value for the Relevant Year. It is these estimates that form the heart of the calculation of the Provision Amount of each Relevant Year.

19. The Proposed Plan is also required to contain a date when it is estimated Decommissioning will (a) be commenced and (b) be completed. By paragraph 7.13 of Appendix 5, it is to be assumed that the date of commencement of Decommissioning will be as soon as reasonably practical after the "*... permanent cessation of production ...*" which is a date to be determined applying the Reasonable and Prudent Operator standard - see paragraph 7.13 of Appendix 5 and clause 3.9 of the DSA. When this will be is a judgment that will be informed by the life of Field production estimates referred to in clause 4.1.1 of the DSA. That estimate is required to be "*... prepared in accordance with Paragraph 7.9 of Appendix 5...*". That requires the production estimates to be "*… based on Proved Reserves plus Probable Reserves in respect of all reservoirs within the Field as prepared by the Operator to the standard of a Reasonable and Prudent Operator …*". The phrase "*Proved Reserves*" is defined in paragraph 7.9 and I return to that in detail below.

20. As is apparent from the agreed facts, the claimant sharply accelerated the date of permanent cessation of production in the 2023 Proposed Plan from that adopted in 2022. That is a function of the claimant's approach to its assessment of "*Proved Reserves*".

21. As I have explained the Pre Tax Provision Amount specified in clause 6.1 of the DSA involves broadly deducting Net Value from Net Cost. What each is made up of is set out in the definitions of each phrase reproduced above. Each element of Net Cost and Net Value is required to be calculated applying the Appendix 5 assumptions where applicable and unless otherwise agreed by all Parties to the DSA – see paragraph (d) of the definition of Net Cost, paragraph (iv) of the definition of Net Value and the final sentence of the opening section of Appendix 5. In calculating Net Value no account is to be taken of Decommissioning costs – see paragraph (i) of the definition of Net Value.

22. Each of the key elements are calculated on a net present value basis, which means that each calculation is required to be performed by applying an assumed inflation rate

forward to the date when the cost will be incurred or the income or receivable will be received and then the resulting figure is discounted back to arrive at the net present value of Net Cost and Net Value – see respectively paragraph (c) of the definition of Net Cost and paragraph (iii) of the definition of Net Value. In carrying out these calculations, the claimant is obliged to inflate at the inflation rate set out in paragraph 3.1 of Appendix 5 (unless paragraph 3.2 applies) and discount back applying the Discount Rate as defined in clause 1.1.

23. A key issue for present purposes concerns the impact if any of Decommissioning on the formulation of the life of Field production estimates referred to in clause 4.1.1 of the DSA. The claimant's position is that in carrying out a life of Field assessment, it is required or alternatively entitled to take account of the effect of inflation upon Decommissioning costs in that assessment. The defendants deny that is so and maintain that in adopting that approach the claimant achieves precisely what is not permitted by the DSA namely taking into account Decommissioning costs in arriving at an estimate of what petroleum is "*commercially recoverable"* and, therefore, Net Value.

24. Clause 4.1.1 of the DSA requires that "*… the Operator's [ie the claimant's] life of Field production estimates …"* must be " *… prepared in accordance with Paragraph 7.9 of Appendix 5 …*". As I read that provision, what the parties intended was that the claimant's "… *life of Field production estimates …"* that form part of the geological review to be included within the Proposed Plan had to be prepared using the same methodology as paragraph 7.9 required to be used in the preparation of the life of Field production profiles referred to in paragraph 7.9 to be utilised for the calculation of Net Cost and Net Value. Such an approach ensures consistency between what is produced for the purpose of clause 4.1.1 and the estimates referred to in clauses 4.1.3 and 4.1.4. Paragraph 7.9 of Appendix 5 requires that Net Value be calculated on a life of Field production profile "*… based on Proved Reserves plus Probable Reserves … as prepared by the Operator to the standard of a Reasonable and Prudent Operator …*".

25. Each of "*Proved Reserves"* and "*Probable Reserves"* are defined within paragraph 7.9 of Appendix 5. "*Proved Reserves*" are "… *quantities of petroleum which, by analysis of geoscience and engineering data, can be estimated with reasonable certainty to be commercially recoverable, from a given date forward from known reservoirs and under defined economic conditions, operating methods and government regulations* …" [Emphasis supplied].

26. What is "*commercially recoverable"* is defined or confined by (a) the "given" date from which the forecast runs; (b) known reserves and (c) the concepts that follow including "… *defined economic conditions…*", none of which are defined terms. The claimant submits that the phrase is a reference back to the Appendix 5 Assumptions. The defendants maintain that the phrase "… *defined economic conditions…*" is a reference to the economic conditions that the Operator (the claimant) has assumed applying the Reasonable and Prudent Operator standard. In my judgment the defendants are correct for the following reasons.

27. Paragraph 7.9 of Appendix 5 requires Proved Reserves to be what is estimated to be "*commercially recoverable"* under "*… defined economic conditions, operating methods and government regulations".* None of the concepts within the definition of Proved Reserves is defined elsewhere in the DSA, probably because the definition has

been adopted from "… *section 2.2.2 of Society of Petroleum Engineers (and others) Petroleum Resources Management System document (2007)* …". That said, had the parties intended that any of the words and phrases used in the definition should have been defined, there is no doubt that they would have included what was intended to be defined either in clause 1.1 of the DSA or Appendix 5 or paragraph 7.9 of Appendix 5. The word "*defined*" applies to each of (i) economic conditions, (ii) operating methods and (iii) government regulations and in its context means identified and used by the claimant as Operator when arriving at an estimate of the quantity of petroleum that is commercially recoverable.

28. In arriving at its conclusion as to the (i) economic conditions, (ii) operating methods and (iii) government regulations that should be treated as applying to the formulation of its estimate of commercially recoverable petroleum, the claimant is required to do so applying the standard of a Reasonable and Prudent Operator (as defined in clause 1 of the DSA) by operation of clause 3.9 of the DSA, which requires that standard to be applied by the claimant (as Operator) when discharging all its obligations under the DSA, other than when this general requirement is expressly qualified or disapplied. That this is what was intended is apparent from (a) the omission of any express definition of the concepts used in the definition of Proved Reserves; (b) the requirement embedded expressly in paragraph 7.9 that the life of Field production profile is to be prepared by the claimant "*… to the standard of a Reasonable and Prudent Operator …"*; and (c) paragraph 7.9.1, which requires that:

> "in any case where a reference has been made to an Expert pursuant to Clause 4.3 or Clause 4.4, in determining whether an estimate of Net Cost or Net Value has been made in accordance with this Agreement and in determining an estimate which should have been so made, the Expert shall use such production profiles based on Proved Reserves plus Probable Reserves as he considers would have been prepared by a Reasonable and Prudent Operator …"

In relation to this last point, it would be absurd to require the Expert to approach the issue in a different way from that which the claimant was required to adopt when preparing the production profiles originally. Finally, this construction is consistent too with the requirement of paragraphs 7.10 and 7.13 of Appendix 5. The former refers to operating costs and additional expenditures to be utilised when calculating Net Cost and Net Value to include "*…additional costs and capital expenditures … prepared to the standard of a Reasonable and Prudent Operator …*" and the latter refers to the dates for commencing, executing and completing Decommissioning to be estimated "*… as would be determined by a Reasonable and Prudent Operator…*".

29. In my judgment there is no provision in the DSA in general or Appendix 5 in particular that requires the claimant to include either Decommissioning costs or inflation thereon when setting out the economic conditions that the claimant assumed when calculating Proved Reserves. Further, to the extent that life of Field production estimates referred to in clause 4.1.1 of the DSA are the same as the life of Field production profiles used for calculating Net Value, including Decommissioning costs or inflation thereon would be contrary to or would defeat the requirement embedded within the definition of Net Value that Decommissioning costs were to be excluded when calculating Net Value.

30. The claimant would be obliged to apply the assumptions applicable to inflation identified in paragraph 3.1 and 3.2 of Appendix 5 only if and to the extent that it was either (a) mandated to do so by a provision elsewhere in the DSA to take account of inflation (as is the case with paragraph (iii) of the Net Value definition and paragraph (c) of the Net Cost definition) or (b) otherwise the claimant judges it appropriate to take account of inflation in relation to an obligation which is silent on the issue but only then if that judgment has been arrived at applying the Reasonable and Prudent Operator standard. Paragraph 3.1 and 3.2 of Appendix 5 mandate the rates of inflation to apply where inflation must, or is judged necessary to be, taken into account. Neither say anything about when inflation must or should be taken into account.

31. Similar considerations apply in relation to future market prices. It is a matter of judgment, applying the Reasonable and Prudent Operator standard whether it is appropriate to take account of future market prices of oil and gas products as part of the defined economic conditions controlling what is commercially recoverable but once it has been decided to take account of the future market price of the oil, condensate or gas then the claimant is obliged to apply the (but only the) assumptions relating to future market price specified in paragraphs 7.4-7.6. Neither they, or paragraph 3.2 impose any obligation to take account of Decommissioning costs or inflation. That again is a matter of judgment applying the Reasonable and Prudent Operator standard.

32. I do not accept Mr Allen's submission that adopting the construction set out above defeats Appendix 5 in the sense that if right it would mean that the claimant would never be required to apply Appendix 5 at any stage. That is not the effect of the construction set out above, which gives effect to all the language used by the parties and preserves Appendix 5 in the role that the parties intended it should play. It recognises too that not all the Appendix 5 assumptions may be applicable and whether a particular assumption is applicable may vary from year to year – something that the parties have expressly recognised by including within the final sentence of the opening part of Appendix 5 the words "*where applicable"* and which is to be determined applying the Reasonable and Prudent Operator standard.

33. It is the claimant's case that in arriving at an estimate of what is commercially recoverable from the Field "… *under defined economic conditions* …", it is necessary to take account of the effect of inflation on Decommissioning costs because it is " … *self-evident that to be within this definition the value of the petroleum extracted must outweigh all the elements associated with its production, otherwise the assessment is not a true reflection of whether the petroleum is "commercially recoverable*". In my judgment there are real difficulties with this submission but in any event on proper analysis this is not a construction issue. My reasons for reaching that conclusion are as follows.

34. Firstly, there is as I have said already nothing within Appendix 5 that requires Decommissioning costs or the inflation of such costs to be taken into account. Paragraph 3.1 of Appendix 5 imposes a requirement only that if inflation is to be taken into account the rate that must be applied is that set out in paragraph 3.1. Whether Decommissioning costs or the inflation of such costs should be taken into account is a matter for judgment to be arrived at applying the Reasonable and Prudent Operator standard. That is why commercial recoverability is not further defined than it is and reflects the different economic conditions (and for that matter operating methods or

applicable regulations) that might reasonably and prudently be assumed to apply at any particular time. Mr Allen may be correct in the points he deploys as to why it is appropriate to take account of Decommissioning costs and the inflation of such costs as part of the defined economic conditions relevant for ascertaining Proved Reserves, but that depends not on the construction of the DSA but on the application of a judgment applying the Reasonable and Prudent Operator standard.

35. Secondly, a relevant consideration in arriving at a conclusion as to whether Decommissioning costs or the inflation of such costs should be included as part of the defined economic conditions relevant for ascertaining Proved Reserves, is that the claimant's approach contradicts the requirement discussed earlier that the life of Field assessment for use when arriving at an estimate of Net Value is required to exclude Decommissioning costs. The same logic behind this exclusion (namely that it is wrong to take account of the cost of Decommissioning in determining the commercial life of the Field because such costs will be incurred in any event and are not relevant to ascertaining the value of petroleum forecast to be produced and delivered from the Field, which is concerned with the costs of extraction and/or production of the petroleum concerned) may lead to a similar approach (applying the Reasonable and Prudent Operator standard) when defining the economic conditions for estimating what quantities of petroleum are commercially recoverable for the purpose of ascertaining Proved Reserves.

36. Mr Fealy submits that the inclusion within paragraph 7.9 of an express reference to "… *section 2.2.2 of Society of Petroleum Engineers (and others) Petroleum Resources Management System document (2007)* …" ("PRMS") incorporates by reference the reasoning on that document as to what is to be included and what is not. I do not accept that is the effect of the inclusion of those words. They refer only to the source of the definition that has been adopted. All that has been included from that document is the definitions of Proved and Probable Reserves. In giving effect to those definitions, as I have explained, the claimant is required to make judgments applying the Reasonable and Prudent Operator standard. If a Reasonable and Prudent Operator would have regard to what is set out in PRMS then obviously what is set out in the document becomes material but only on that basis.

37. Ultimately, therefore, whether the claimant is correct in its submission on this issue or not is a question of judgment for the Operator or, if there is a disagreement, for the Expert, applying the Reasonable and Prudent Operator standard. If Mr Allen is correct in his submission that not to adopt the approach he contends for would result in a "*commercially insensible"* approach then by definition it is not one that could be arrived at applying the Reasonable and Prudent Operator standard.

Capital Costs

38. In calculating Net Value, the parties have agreed that "… *allowance shall be made for the costs attributable to such aforementioned items, including operating and capital costs (other than of Decommissioning) and sales costs* …". The "… *aforementioned items …"* are each of the receipt streams identified in paragraphs (a) to (c) of the definition of Net Value. It is common ground that the Appendix 5 Assumption that applies is that set out in paragraph 7.10, which in so far as is material provides that the " … *capital expenditures utilised for calculations of Net Cost and Net Value under this*

Agreement shall be (i) those approved at the time of such calculation by the Operating Committee under the UOA; and (ii) any additional operating costs and capital expenditures set out in the life of Field production estimates referred to in Paragraph 7.9 above …". The issue between the parties in relation to paragraph 7.10 of Appendix 5 concerns whether the claimant was required to assume minimal capital expenditure (as it has for 2023 when compared with what was assumed for 2022, as to which see the statement of agreed facts set out earlier) against a background of rising oil and gas prices.

39. Although Mr Allen accepted that only those capital expenditures as are consistent with the life of Field production profiles used for the purpose of calculating Net Cost and Net Value should be included, in my judgment that submission misses the point being made by the defendants. Their point is that an Operator in the position of the claimant and applying the Reasonable and Prudent Operator standard would not assume minimal capital expenditure against a background of rising oil and gas prices. They accept at least implicitly they might be right or they might be wrong about this point but they submit that the dispute having arisen it should be resolved by the Expert applying the Reasonable and Prudent Operator standard.

40. In my judgment in principle the defendants are correct in their submission, subject to what I say below concerning the questions that have to be resolved by the Expert. All that paragraph 7.10 requires is that the capital expenditures used for calculating Net Cost and Net Value will be those approved by the Operating Committee (and as far as I am aware that is not relied on in this case) and any additional operating costs and capital expenditures set out in the life of Field production estimates. It is entirely silent as to what additional capital expenditures should be included in the life of Field production estimates for the obvious reason that what expenditures it will be appropriate to include is a matter for judgment (applying the Reasonable and Prudent Operator standard) and may well alter from year to year in the light of changing circumstances or the defined economic circumstances relied on for the purpose of estimating Proved Reserves.

41. What capital expenditures are included in the life of Field production estimates and in what amount is a matter for the judgment of the Operator applying the Reasonable and Prudent Operator standard. In my judgment that construction is put beyond doubt by the express requirement that the *"… additional operating costs and capital expenditures set out in the life of Field production estimates …*" are required to be prepared (by the claimant as Operator) "*… to the standard of a Reasonable and Prudent Operator* …" and furthermore that on any reference to an Expert under the dispute resolution provisions within the DSA, "*… in determining whether an estimate of Net Cost or Net Value has been made in accordance with this Agreement and in determining an estimate which should have been so made, the Expert shall use such estimates of costs and expenditures as he considers would have been prepared by a Reasonable and Prudent Operator*." This formulation is consistent only with a judgment by the Operator applying the contractual Reasonable and Prudent Operator standard.

42. This approach is also supported by the terms of paragraph 7.9.2 of Appendix 5 because it anticipates that Proved Reserves may increase as a result of capital expenditure and the estimate of Net Cost and Net Value must include production arising as a result of capital expenditure. Whilst I agree with Mr Allen that there is no assumption in the

DSA that commercial recoverability will involve any or any specific amount of capital expenditure, a judgment has to be made as to what additional Proved Reserves will result from what additional capital expenditure in deciding whether to include within Proved Reserves the production that will arise from any increased expenditure.

The Effect of Clause 6.6 of the DSA

43. The issues appear to be academic in the sense they may never arise. However neither party has submitted that I ought not to determine the issue between them on this basis and given the commercial urgency that there is in resolving the outstanding issues that arise for the Relevant Year 2023, there is good reason why the issue should be determined now rather than leaving it to a future hearing once the expert has reached his conclusions. This is all the more the case because the issue may arise in the future and it is in all parties' interests to avoid the need for further litigation if possible. In reaching these conclusions I have applied the principles identified by Aikens LJ in Rolls-Royce plc v Unite the Union [2009] EWCA Civ 387; [2010] 1 WLR 318 at [120], sub-paragraphs (1), (3), (5), (6) and (7).

44. Clause 6.6 requires the Operator to calculate the effect of a change to which the clause applies and then to take the steps required by clause 6.6.1 or as the case may be 6.6.2. The clause applies whenever "… *any assumption used to calculate the Provision Amounts in accordance with Appendix 5 (for example, oil prices, rig rates, etc.) changes since the last calculation* …". The Provision Amount is the share of the cost of Decommissioning calculated as set out in clause 6.1, which as I have said focuses primarily on Net Cost on one side of the equation and Net Value on the other. Clause 6.2 requires the Operator to advise all parties of the results of the clause 6.1 calculation by 1 October in the year prior to the Relevant Year. Inevitably therefore to the extent that future oil prices form part of the calculation, it will be necessary to apply the assumptions concerning future prices set out in Appendix 5. It is for that reason for example that the assumptions to be used for future market prices of crude oil are to be those published by Wood Mackenzie "… *for the period of January to March inclusive last falling prior to the time of calculation of the Net Value hereunder.*"

45. There was a difference between the parties as to the significance of the phrase "*… in accordance with Appendix 5 …".* Although the defendants submitted this had the effect of limiting the effect of clause 6.6 to the assumptions specified in Appendix 5, in my judgment that is wrong. That phrase applies to the calculation of the Provision Amounts and so includes but is not limited to the assumptions specified in Appendix 5. This is so for two reasons. First, as I have explained a number of times, the Provision Amounts are a function of Net Value and Net Cost and Appendix 5 expressly requires that (absent agreement by all Parties) the claimant will "… *apply the following assumptions, where applicable, in any calculation of Net Cost or Net Value and TR*". That language does not confine the assumptions to be made only to those set out in Appendix 5. Secondly, the words in parenthesis includes *"rig prices"* but there is nothing in Appendix 5 that specifies any assumption to be made concerning rig prices other than that relating to inflation, which as I have said requires the rate specified to be applied wherever inflation is taken into account. As I have explained already, calculating Net Value and Net Cost depends on a life of Field production profile based on Proved Reserves and that requires the claimant to identify both the economic conditions and operating methods that have been assumed in arriving at a judgment as to what is commercially recoverable. It is for that reason that clause 6.6 expressly applies to "…*any assumption used to calculate the Provision*

Amounts …"[emphasis supplied]. Plainly that may include assumptions other than those identified in Appendix 5, which is why rig prices were included as an example of what clause 6.6 applies to. It is for these reasons that on proper construction the phrase "*… in accordance with Appendix 5 …*" is not a phrase that limits the application of clause 6.6 to any assumption set out in Appendix 5 (for example that relating to future crude prices) but refers back to the calculation of the Provision Amounts.

46. The difference between the parties is this: the claimant submits that any change of any of the applicable Appendix 5 assumptions must be taken into account applying clause 6.6. The defendants submit that this is too wide and what is required is a change to the assumption that the parties are required to apply and so for example would apply if Wood Mackenzie corrected the defined Q1 price that the claimant is required to apply when making assumptions about future oil prices. In other words, as Mr Fealy put in his oral submissions, "*… the mere publication by a reporting agency such as Wood Mackenzie of a subsequent price or figure for a later quarter does not amount to a change of assumption.*"

47. As I have explained already, the effect of clause 6.6 is not confined only to the assumptions set out in Appendix 5 (though of course it will apply to those assumptions) but to any assumption used to calculate Provision Amounts. How clause 6.6 might apply to assumptions other than those specified in Appendix 5 as the basis for making calculations and estimates depends critically on the nature of the assumption made. None have been identified and the argument has focussed exclusively on the assumptions required to be made by Appendix 5. What I say hereafter is confined to the application of clause 6.6 to those assumptions. How that clause applies to non-Appendix 5 assumptions cannot safely be determined as a matter of generality and therefore must await an occasion when the point arises. In reaching that conclusion I bear in mind the construction principles summarised earlier that require widely expressed provisions to be construed in a way that does not undermine either the agreement as a whole or other specific parts of the agreement under construction.

48. Using the assumptions set out in Appendix 5 is mandatory where applicable as I have explained and indeed as is the claimant's case. The parties have chosen to adopt assumptions set out in Appendix 5 that define the rate of inflation or the future prices of oil, gas and condensate by reference to a particular figure published for a particular period ending on a specified date. In relation to those assumptions, Clause 6.6 applies to a change in the rate published for the particular period ending on the specified date in the relevant assumption but not otherwise. To do otherwise would permit a departure from the assumptions that the parties had agreed were to be made and there is nothing in the wording of the DSA as a whole or clause 6.6 or Appendix 5 in particular that suggests this was the intention of the parties. The parties chose to require highly prescriptive assumptions to be made concerning futures pricing and inflation and clause 6.6 does not suggest an intention to depart from those highly prescriptive formulations.

49. The inflation assumption for example that is required to be used when inflation is an issue is the " … *annual rate of inflation shall be equal to one third of the sum of the annual percentage changes in the Producer Price Index over the three (3) Year period ending on 31 March in the Year of calculation* …". For there to be a clause 6.6 change what is required is a change to " … *the sum of the annual percentage changes in the Producer Price Index over the three (3) Year period ending on 31 March in the Year of*

calculation …". Similar considerations apply to the assumption concerning the future price of crude oil. What is required is a change by Wood Mackenzie of its previously published Q1 price. Giving effect to a published change to a rate that the parties had agreed should be the basis for an assumption, gives effect to both clause 6.6 and Appendix 5 in relation to the Appendix 5 assumptions.

50. Although Mr Allen submitted that the effect of the provision was to permit a rolling adjustment to be made to the Provision Amount throughout the year, in my judgment, for the reasons I have given above, that was not its intended effect at any rate in relation to the Appendix 5 assumptions. Such a provision could have been included in the DSA but was not. The need for it is largely eliminated by the requirement to take account in arriving at the Provision Amount for the current year the security already provided in previous years. Thus if there is a change of the sort I have concluded cannot be taken account of in relation to an Appendix 5 assumption, that is taken account of in the calculation for the following year. Whilst I can see that may have an effect on cash flow issues between each calculation that is nothing to the point because the parties have chosen who is to bear the risk of such changes in the way I have described.

The Role of the Expert

51. It is common ground that clause 4.3 of the DSA requires the Expert first to determine whether " … *those elements of the estimates of Net Cost or Net Value … which have been the subject of objections or written recommendations … have been calculated in accordance with this Agreement…*". Only if the Expert has so determined is the Expert then permitted and required to go on and " …*determine the estimates which should have been so made …"* and the claimant thereafter required to " … *incorporate the Expert's determinations into the Proposed Plan …*". Approached in this way, if Mr Allen is correct in his submission concerning the need to take account of inflation on Decommissioning costs referred to earlier, the challenge by the defendants on this point will fail at the first hurdle.

52. The claimant's submission, however, that the first of these questions requires the Expert to proceed to the second issue only if he concludes that no reasonable Operator could have reached the conclusions under challenge, is mistaken. My reasons for reaching that conclusion are as follows.

53. That is not the effect of what has been agreed. What has been agreed in relation to references to an Expert under clause 4.3 or 4.4 is set out in paragraph 7.9.1 of Appendix 5 and is that " … *in determining whether an estimate of Net Cost or Net Value has been made in accordance with this Agreement* <u>*and*</u> *in determining an estimate which should have been so made, the* <u>*Expert shall use such production profiles based on Proved Reserves plus Probable Reserves as he considers would have been prepared by a Reasonable and Prudent Operator*</u> …" [Emphasis supplied].

54. In my judgment this makes it clear that in deciding whether an estimate of Net Cost or Net Value has been made in accordance with this Agreement, the Expert is required to use (and if necessary himself determine) the production profiles based on Proved (and Probable) Reserves which in his judgment would have been prepared by a Reasonable and Prudent Operator - that is (as the parties have agreed) " … *a Person seeking in good faith to perform its contractual obligations and, in so doing and in the general conduct*

of its undertaking, exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking in the UK Continental Shelf under the same or similar circumstances or conditions …". If the Expert concludes in his judgment applying that test, that the estimate under challenge has not been arrived at in accordance with the agreement, then and in that event he is required to go on and determine the estimate that should have been made, applying the same test. Whilst the two exercises are likely to be very similar they are as I have said distinct.

55. The claimant maintains that this approach is contrary to the decision of Popplewell J (as he then was) and the Court of Appeal in Barclays Bank plc v UniCredit Bank AG and another [2012] EWHC 3655 (Comm); [2013] 2 Lloyds Rep 1 and [2014] EWCA Civ 302; [2014] 2 All ER (Comm) 115. In my judgment these authorities do not assist on the issue that arises in this claim. In that case there was a debate as to the test to be applied where a bank was required to act in a commercially reasonable manner in determining whether a contractual consent was to be given – see Longmore LJ's summary at [14]. However he concluded that although " … *interesting this debate was not, in my view, ultimately helpful since the meaning of the clause has to be determined as a matter of construction of this particular contract in its particular context*." As Longmore LJ added at [15]:

> "… it is Barclays who has to determine whether that consent is to be given, albeit in a commercially reasonable manner. It is the manner of the determination which must be commercially reasonable; it does not follow that the outcome has to be commercially reasonable although, if it is not, that would no doubt cause one to look critically at the manner of the determination."

56. This case is different. It is concerned with a complex commercial evaluation that the claimant as Operator has to carry out in part applying agreed assumptions where they apply and in part by applying other assumptions and judgments applying the contractually agreed Reasonable and Prudent Operator standard. In recognition of the complexity and specialist nature of the issues involved, the parties understandably adopted an agreed dispute resolution mechanism involving expert determination applying the approach referred to above.

57. That test requires the Expert to answer the two questions that he is required to resolve applying the Reasonable and Prudent Operator standard. There is nothing in the language used by the parties that suggests the parties intended the Expert to ask himself in relation to the first question whether the conclusions reached by the claimant were ones that no reasonable Operator applying the relevant standard could have arrived at. Had that been what was intended the parties could and would have used language that made it clear that was the threshold requirement.

58. The parties' intention is to be discerned from the language they have used in clause 7.9.1 – it is that in answering each of the two questions, the Expert shall use such production profiles based on Proved Reserves plus Probable Reserves as he (the expert) considers would have been prepared by a Reasonable and Prudent Operator. This is not the language of a quasi public law review but a requirement that the Expert resolve the

dispute between the parties by answering the two questions it has been agreed he or she should answer applying the relevant test using his or her own skill judgment and experience.

59. This contract is entirely different from those that engage the principles set out in Braganza v. BP Shipping Limited [2015] UKSC 17; [2015] 1 WLR 1661, which is concerned with the control that a court will exercise over a contractual party on whom the parties to a contract have conferred an apparently unqualified decision-making power which involves making an assessment, or choosing from a range of options, where the interests of both parties may be affected by the decision taken and where no dispute resolution mechanism has been agreed between the parties. Where the parties have agreed their own dispute resolution mechanism the Braganza doctrine is not engaged and the dispute resolution mechanism agreed by the parties takes effect is accordance with its terms, as it is to be construed applying the principles summarised earlier.

60. Although Mr Allen submitted that the effect of this approach was to construe the contract as meaning it was the expert that would in all cases take the relevant decisions or make the relevant judgments, I disagree, if by that he meant that it would be open to the parties in the position of the defendants simply to invoke the expert determination mechanism at every stage and in relation to each clause 4.1 proposal irrespective of the merits of the disagreement simply to ensure that the parties proceeded on the basis of what the Expert concluded rather than what the claimant had concluded. The purpose of the parties creating the two question approach was to prevent such abuse by requiring the Expert first to be satisfied that the estimate of Net Cost or Net Value has not been made in accordance with this Agreement applying the Reasonable and Prudent Operator test and only answering the second question (the estimate which should have been so made) if so satisfied.

61. In other words the control mechanism agreed by the parties to prevent abuse of the sort Mr Allen was concerned about is the requirement that the Expert should answer the first question affirmatively before proceeding to the second. It is wrong in principle for the court to attempt to circumvent that agreement by adopting the reductive construction for which the claimant contends. That may not any longer be perceived as satisfactory by the claimant but that is not to the point. Construction is not about re-writing the contract after the event in the apparent interests of one party over another. There is nothing within the DSA or its wider relevant contractual or commercial matrix which justifies confining the Expert's decision-making in the way for which the claimant contends.

The Timing Issue and the Impact of the Levy

62. It is common ground but in any event I find that as a matter of construction the Expert is required to reach a conclusion by reference to what the Operator did and what he should have done as at 30 June 2022 in relation to the Relevant Year 2023. That this is so follows from (a) the Proposed Plan having to be submitted by 30 June in the year prior to the Relevant Year; (b) the Expert being required to determine whether the estimates or part of estimates under challenge "*have been calculated in accordance with this Agreement*", which required estimates to be submitted by 30 June and (c) the Expert, if satisfied that the estimates or parts under challenge have not been calculated

in accordance with the Agreement, being required "*... to determine the estimates which should have been so made ...*" being those that should have been arrived at by 30 June.

63. This approach is consistent with my construction of clause 6.6 referred to above as it applies to the assumption in Appendix 5 that the claimant (and Expert) is obliged to apply when making the relevant calculations in respect of inflation, which requires inflation to be calculated (if applicable) at "*... one third of the sum of the annual percentage changes in the Producer Price Index over the three (3) Year period ending on 31 March in the Year of calculation* …" and for any assumption concerning future prices of oil distillate or gas to be those published by Wood Mackenzie " … *for the period of January to March inclusive last falling prior to the time of calculation of the Net Value hereunder (the "Q1 Price")* …".

64. The question to which this issue goes concerns whether or not the claimant or Expert ought to have taken account of the Energy (Oil and Gas) Profits Levy Act 2022 (the "2022 Act") in formulating its Proposed Plan for the Relevant Year 2023.

65. It is common ground that the Levy came into force after 30 June 2022 (albeit with retrospective effect). The assumption that the parties have agreed should be applied to "*Legislation*" is that set out in paragraph 5.3 of Appendix 5 – that is that the " *... applicable law shall be the Legislation in existence at the time of the completion of the assumption statement under this Appendix 5 or (in the event of a major change of tax legislation brought into force after the completion of each assumption statement) the Legislation in existence as at the end of the Year*." The date the "*assumption statement*" is required to be completed is 30 June – see the opening words of Appendix 5. "*Legislation*" is defined as including any " … *national and local laws, by-laws, regulations, decisions and judgments of any competent authority* …". Although the phrase "*tax legislation"* is not defined, the word "*Tax*" is defined as meaning " … *any tax, levy, impost, duty, charge, assessment or fee of any nature that is imposed by any taxing authority in England, Wales, Scotland, or Northern Ireland (including royalty, Corporation Tax, Petroleum Revenue Tax and other profit or petroleum-based taxes, to the extent applicable) ...*". In my judgment in the context in which the phrase "*tax legislation*" has been used, it is to be construed consistently with the agreed definitions of "*Tax*" and "*Legislation*". Construed in this way it includes any national law imposing any tax, levy, or duty collectable by any taxing authority in England, Wales, Scotland, or Northern Ireland and as such includes the 2022 Act.

66. It is common ground (see paragraph 14 of the Agreed Facts set out earlier) that the 2022 Act received Royal Assent on 14 July 2022 and took effect retrospectively from 26 May 2022. In my judgment it is common ground and in any event obvious that the 2022 Act was "… *a major change of tax legislation brought into force after the completion of each assumption statement) the Legislation in existence as at the end of the Year*."

67. The claimant submits that the impact of the 2022 Act is a matter for the claimant as Operator not a matter for the Expert applying the reasoning set out above concerning the date by reference to which the Expert is required to reach his or her conclusions. In my judgment this construction is wrong.

68. Clause 11.9 of the DSA requires the Expert to reach his or her conclusions "… *on such basis as is fair and reasonable, taking into account the terms of this Agreement (in*

particular the assumptions in Appendix 5 as may have been varied by agreement of the Parties) and the objectives of the Parties in entering into this Agreement, compliance with Legislation, good oil and gas industry practice and its duty of care to all Parties and Third Tier Participants." [Emphasis supplied]. This language makes clear that the Expert must have regard to the whole of the assumptions set out in Appendix 5 and in addition compliance with Legislation.

69. To require the Expert to proceed on the basis that the " … *applicable law shall be the Legislation in existence at the time of the completion of the assumption statement under this Appendix 5*…" whilst at the same time ignoring the words which it is common ground apply to the 2022 Act – that is "... ***or*** *(in the event of a major change of tax legislation brought into force after the completion of each assumption statement) the Legislation in existence as at the end of the Year*" [emphasis supplied] would be contrary to clause 11.9 of the DSA. It would also be contrary to clause 11.9 because it would compel the Expert to ignore the impact of Legislation being the 2022 Act which applied retrospectively back to a date before 30 June. If correct the claimant's construction would risk multiple references entirely unnecessarily. That being so, the claimant's submission that the Expert must reach his determination without regard to the impact of the 2022 Act is entirely mistaken.

The Expert Appointment

70. Clause 11.1 of the DSA provides that:

> "If any dispute, difference or matter of any kind arises which, under this Agreement, is required or permitted to be referred to an Expert for determination, then the relevant Party … who, being so entitled, wishes to refer the matter may serve notice on the other Parties … entitled to be involved in such referral (each, together with the referring Party … a "Relevant Party") requiring the matter to be so determined in accordance with this Clause 11."

It was suggested on behalf of the claimant that the defendants contended that it (the claimant) was not a "*Relevant Party*" for the purposes of clause 11.1. That is not the defendants' case – see paragraph 98 of the defendants' skeleton argument for this hearing. I will hear the parties following hand down as to whether a declaration to this effect is required given that the position is an agreed one.

71. The defendants maintain that the claimant should enter into the Expert Agreement and Terms of Reference that have been prepared by or on behalf of the defendants. The claimant appears to be suggesting that it cannot be required to concur with the appointment of an Expert other than on terms that it is willing to agree to and the defendants cannot unilaterally appoint an Expert. If that was literally correct, then it would enable the claimant to prevent a dispute being resolved by expert determination as had been agreed between the parties. It would of course be wrong in principle, as Mr Allen accepted[1], for any party to the DSA to seek to defeat the Expert determination process agreed between the parties by wrongly refusing to cooperate in the appointment process. It is likely that any such attempt would be met with applications to the court

[1] Transcript, Day 1, page 62, line 23-page 64, line 3

for mandatory orders requiring the parties to give effect to what has been agreed. In reality this question depends upon whether the claimant is wrongfully refusing to agree what the defendants have proposed.

72. The claimant maintains that it is not acting wrongfully by refusing to agree the Expert Agreement and Terms of Reference proposed by the defendants because the defendants propose that disputed issues of law be resolved by the expert and that is contrary to the agreement of the parties. The claimant maintains that all issues of construction are questions of law and that on a true construction of the DSA, it has been agreed that all such questions will be resolved exclusively by the court. In support of its submission that the Expert is precluded from deciding any issues of construction that might arise in the course of his determination, the claimant relies on clauses 11.10 and 15.9 of the DSA.

73. It was this argument that has led to the commencement of these proceedings and to the identification by the parties of the issues of construction between them for resolution in these proceedings. It is unclear to me to what extent the issues between the parties in relation to the appointment of the expert survive the determination of those issues. However, since the question is one that might arise in the future, is in genuine dispute between the parties and is a controversy the parties have asked me to resolve, I do so below.

74. In my judgment clauses 11.9 and 11.10 must be read together with clause 15.9 of the DSA. For convenience they respectively provide:

> "11.9 The Expert shall reach its decision on such basis as is fair and reasonable, taking into account the terms of this Agreement (in particular the assumptions in Appendix 5 as may have been varied by agreement of the Parties) and the objectives of the Parties in entering into this Agreement, compliance with Legislation, good oil and gas industry practice and its duty of care to all Parties and Third Tier Participants.
>
> …
>
> 11.10 The final decision of the Expert shall be binding on all the Parties to this Agreement … except in the case of fraud, mistake of law, or manifest error. The Expert shall act as expert and not as arbitrator. The Expert shall apply, and adhere to, the law, provided that the Expert shall not interpret or construe the law, such interpretations and construction being reserved for decisions in accordance with Clause 15.9
>
> …
>
> 15.9 Law and Jurisdiction
>
> This Agreement and any disputes or claims arising out of or in connection with its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the laws of England. Each Party

> irrevocably agrees to submit to the exclusive jurisdiction of the courts of England over any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes and claims).."

The claimant submits that the requirement in clause 11.10 " … *that the Expert shall not interpret or construe the law*…" precludes the Expert from resolving any issue of construction that might arise in the course of the reference because " … *in English jurisprudence, as a legacy of the system of trial by juries who might not all be literate, the construction of a written agreement, even between private parties, became classified as a question of law*." – see Pioneer Shipping v B.T.P Tioxide Limited [1982] AC 724 *per* Lord Diplock at 736A-C and where " … *the parties have expressly agreed that certain matters should not be referred to the Expert, … it would be surprising for it to be a proper exercise of the court's discretion to make a mandatory order at the behest of one party which requires the other party to instruct the Expert to determine those very matters.*" – see Chelsfield Advisers LLP v. Qatari Diar Real Estate Investment Company and another [2015] EWHC 1322 (Ch) *per* Richard Spearman QC sitting as a Deputy judge of the Chancery Division at [103].

75. Whilst Mr Spearman did make the point relied on by the claimant in the extract quoted above, it is worthwhile noting what Mr Spearman added in paragraph 104:

> "Conversely, if there is a genuine dispute about the limits of the remit of an expert, and he is in a position to proceed and wants to proceed with his determination, it may be that the court would, or should, be slow to restrain him from continuing with his determination, for the reasons given by Lightman J in his fifth principle discussed above. However, that is not the present case. To my mind, it is very different from this case."

Lightman J's "*fifth principle*" had been stated by him in British Shipbuilders v VSEL Consortium Plc [1997] 1 Lloyd's Rep. 106, at 109 in these terms (as quoted by Mr Spearman in paragraph 98 of his judgment):

> "[the] Court has jurisdiction ahead of a determination by the expert to determine a question as to the limits of his remit or the condition which the expert must comply with in making his determination, but (as a rule of procedural convenience) will (save in exceptional circumstances) decline to do so. This is because the question is ordinarily merely hypothetical, only proving live if, after seeing the decision of the expert, one party considers that the expert got it wrong. To apply to the Court in anticipation of his decision (and before it is clear that he has got it wrong) is likely to prove wasteful of time and costs – the saving of which may be presumed to have been the, or at least one of the, objectives of the parties in agreeing to the determination by the expert."

76. Mr Fealy submitted that it was common ground that an expert determination is liable to be set aside if the Expert were to render his decision on the basis of an incorrect

interpretation of the DSA, as this would be a mistake of law. That necessarily follows from the express terms of clause 11.10 quoted above. He maintains however, that on its true construction the DSA does not require the Expert to ignore such issues or refer them to the court before reaching a final determination.

77. I do not accept the claimant's submission that the effect of the words within clause 11.10 that it relies on for present purposes - that the " … *Expert shall apply, and adhere to, the law, provided that the Expert shall not interpret or construe the law* …" - preclude the Expert from resolving issues of construction of the DSA that arise in the course of the expert determination. Whilst of course I accept as correct what Lord Diplock said in Pioneer Shipping v B.T.P Tioxide Limited (ibid.), the meaning of the phrase "*… the law…"* is a question of construction of the DSA, to be resolved applying the principles set out earlier in this judgment. Given the need to consider the agreement as a whole when construing particular provisions within it, I consider that the phrase "*… the law …"* in clause 11.10 has the meaning referred to in Paragraph 5.3 of Appendix 5– that is:

> "The applicable law shall be the Legislation in existence at the time of the completion of the assumption statement under this Appendix 5 or (in the event of a major change of tax legislation brought into force after the completion of each assumption statement) the Legislation in existence as at the end of the Year."

or that phrase should be construed consistently with it. So construed, the phrase on which the claimant relies is confined to the general law.

78. Even if this is wrong, in my judgment the provision on which the claimant relies does not have the effect of precluding an Expert from proceeding with his mandate on the basis of his understanding of the DSA to the extent that it is relevant to the two ultimate questions he has to decide being whether " … *those elements of the estimates of Net Cost or Net Value … which have been the subject of objections or written recommendations … have been calculated in accordance with this Agreement…*", and if they have not " …*the estimates which should have been so made …"*. The effect of clause 11.10 is simply to make clear that the Expert's determination of the issues referred to in the third sentence of clause 11.10 are not binding but are ones that it has been agreed will ultimately be determined by the court, if and to the extent there is a disagreement. This is an entirely proportionate and commercial approach because the issue may not in the event have a material impact on the ultimate outcome. It eliminates the risk that a court will be required to determine academic points or points other than in relation to material facts and enables disputes to be resolved in a manner that is relatively inexpensive and speedy.

79. In my view this approach gains some implicit support from clause 11.9A of the Agreement, which requires the Expert to arrive at a preliminary decision within 30 days of the Appointment Date, to give the parties 10 days thereafter to make representations on the preliminary decision with a final decision to be reached within 30 days after notification of the preliminary decision. The parties have not made any provision that enables these timings to be extended or paused (other than if agreed between them) either generally or for the purpose of enabling a court to arrive at a conclusion on any points of law or construction that may arise. The agreement of the parties that the final

decision of the Expert shall be binding on all the Parties to this Agreement " … *except in the case of ... mistake of law ...*" makes clear the intention of the parties that the primary dispute resolution mechanism is to be expert determination with resort to the court only in limited and defined circumstances including a mistake of law – which implies that court proceedings will come (or is consistent with court proceedings coming) after, not before or during the expert determination process. This approach is entirely conventional – see Mercury Communications v Director General of Telecommunications [1994] CLC 1125; British Shipbuilders v VSEL Consortium Plc (ibid.) *per* Lightman J at 109; Chelsfield Advisers LLP v. Qatari Diar Real Estate Investment Company and another (ibid.) *per* Richard Spearman QC at [104] and most recently General Electric Company v. AI Alpine US Bidco Inc [2021] EWHC 45 (Ch) *per* Miles J at [31].

80. In summary therefore I conclude as is common ground that any error of construction or any failure of the Expert to adhere to the law including any impermissible interpretations or constructions of the law will entitle a party dissatisfied with the outcome to challenge it by proceedings brought before the Courts of England and Wales to be resolved applying English law – see clause 15.9 of the DSA. Any additional issues beyond those addressed earlier in this judgment that arise should be resolved in the conventional manner anticipated by the parties – that is by allowing the expert to resolve the issues that arise with any mistakes of law including any errors of construction of the DSA or general law being left to be resolved by a court after the event.

81. I do not accept that the language used by the parties in clause 11.10 entitles the claimant to insist that all issues of construction be excluded from consideration by the Expert either because the reference to "…*the law …"* is not on proper construction a reference to issues of construction of the DSA but to the general law but in any event does not oblige the parties or entitle any party to insist on the resolution of such issues before the event but only as the correction of an error of law as has been expressly agreed by clause 11.10.

82. Obviously I have asked myself in the course of preparing this judgment whether I should have adopted this approach to the issues of construction the parties have identified in their pleadings in these proceedings. However, neither party has asked me not to determine the issues that arise on this basis and there is no doubt that in relation to most if not all of these issues, there is a dispute that is real rather than hypothetical, or there was when the proceedings were commenced and it is in everyone's interests that these issues be resolved so as to enable the parties to know where they stand in relation to future years as well as 2023.

Conclusion

83. I direct that the parties should now use best endeavours to agree the terms of the declarations necessary to give effect to these conclusions. Since these declarations are primarily for the guidance of the parties, the Expert the parties have agreed should be appointed to resolve the current dispute and any Experts appointed in the future to resolve similar such disputes, I consider it would benefit all if the number of declarations were limited and expressed in the language that a non-legally qualified expert can reasonably be expected to understand and apply. In default of agreement

being reached, the declaration will be settled at the hearing at which this judgment is handed down.