Neutral Citation Number: [2019] EWHC 3241 (Comm)

Case No: CL-2019-000014

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

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

Date: 06/12/2019

Before :

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

- -

Between :

APACHE NORTH SEA LIMITED	**Claimant**
- and -	
(1) EUROIL EXPLORATION LIMITED	
(2) EDISON S.P.A	**Defendants**

- -
- -

Mr David Allen QC and Mr Henry Moore (instructed by **Clyde & Co LLP**) for the **Claimant**
Mr Alec Haydon QC (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing dates: 28 October 2019

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Approved Judgment

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

.....

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

HH Judge Pelling QC:

Introduction

1. This is a trial of a claim concerning the sums payable by the first defendant ("EEL") to the claimant ("ANSL") under a farm out agreement made on 19 February 2015 by which ANSL sold to EEL a minority interest in respect of two UK Continental Shelf Licences ("FOA"). What was sold is defined within the FOA and is described in more detail later. The second defendant is a parent company of EEL and is its guarantor under a Deed of Guarantee and Indemnity with ANSL dated 19 February 2015. The Licence relevant to this dispute is Licence P.1998 for two licence blocks constituting an area called "Val D'Isere". It is referred to hereafter as "the Licence". The other – and irrelevant – area is called "Les Arcs" and it is necessary to mention it only to understand references to it in the FOA and other agreements to which it will be necessary to refer in this judgment.

2. The issue between the parties is whether (as ANSL claims) it is entitled on a true construction of the FOA to a payment from EEL of £3,280,482.46 being a 26.25% share of the full costs incurred by ANSL in drilling the Val D'Isere well ("Earn-In Well") or whether (as EEL contends) ANSL is entitled to no more than £1,114,480.68.

The Facts

3. The FOA having been entered into on 19 February 2015, on 22 July 2015, the parties entered into an associated Joint Operating Agreement ("VJOA") that was substantially in the form annexed to the FOA. Following execution of the VJOA, on 4 November 2016, ANSL concluded a "Farm In Agreement" in relation to the licence with a company that thereafter changed its name to DNO Exploration UK Limited ("DNO"). A Deed of Novation by which DNO became a party to the VJOA followed on 13 July 2017. Nothing relevant to this dispute turns on the detail of these agreements and I need say no more about them or their contents.

4. ANSL used a drilling rig ("Rig") to drill the Earn-In Well that it had leased from 12 August 2013 at a rate that at the date of drilling the Earn-In Well exceeded the market rate for an equivalent rig. The Rig was deployed in drilling the Earn-In Well between 19 December 2017 and 3 February 2018. The Earn-In Well proved to be dry and in consequence EEL did not exercise the option referred to in clause 3.1.8 of the FOA (the terms of which are set out below) and operations in connection with it were wound up. ANSL claimed the rate it was paying to lease the rig for the period it was deployed in drilling the Earn-In Well, maintaining that it was entitled to reclaim the whole of that sum by operation of the FOA. EEL maintains that ANSL was entitled only to the rate prevailing for similar equipment at the date when the Earn-In Well was drilled by operation of the VJOA. This issue explains in effect the whole of the difference between what ANSL claims to be due and what EEL admits is due.

5. These proceedings were started in January 2019 and on 13 May 2019, EEL paid the sum it admits is due in respect of the Rig charges. It refused to pay the balance, maintaining that no sum other than what is admitted to be due was properly due to ANSL.

6. The trial took place on 28 October 2019. No evidence was called. The trial took place on the basis of a list of common ground and legal submissions.

The FOA, VJOA and their Relevant Terms

The FOA

7. By the FOA, ANSL agreed to transfer an undivided legal interest in the Licence and a 17.5% interest under the VJOA in return for a promise by EEL to pay 26.25% of the total costs in relation to the Earn-In Well and a proportion of some historic costs. This is the effect of clause 2 of the FOA when read with the definition within the FOA of the phrase **"***Val D'Isere Earn-In Costs*" set out in clause 1 of the FOA and is the basis on which ANSL claims to be entitled to the whole of the hire costs for the Rig during the drilling period.

8. In so far as is material, the FOA provided:

> "WHEREAS:
>
> …
>
> B. On and subject to the terms and conditions of this Agreement, [ANSL] is willing to transfer the Earned Interests to [EEL] in consideration of the payment by [EEL] of certain costs that would otherwise be borne by Apache.
>
> C. The costs to be borne by [EEL] described in Recital B are in respect of the drilling of up to two (2) separate wells at different times under the Licences
>
> **NOW THEREFORE IT IS HEREBY AGREED as follows:**
>
> **1. Definitions and interpretation**
>
> ***Definitions***
>
> 1.1 In this Agreement the following expressions shall, except where the context otherwise requires, have the following respective meanings:
>
> …
>
> "**AFE**" means an authorisation for expenditure pursuant to the relevant JOA relating to an Earned Interest (including those set out in Schedule 6);
>
> …
>
> "**Agreement**" means this deed including the recitals and the Schedules attached hereto;
>
> …

"**Earned Interests**" means the Les Arcs Interest and the Val D'Isere Interest, and "Earned Interest" means either of them;

…

"**Earn-In Costs**" means the Les Arcs Earn-In Costs and the Val D'Isere Earn-In Costs;

…

"**JOA**" means the Les Arcs JOA or the Val D'Isere JOA to be entered into at Completion (substantially in the form set out in Schedule 7) (or either of them as the case may be);

…

"**Les Arcs Earn-In Costs**" means (i) twenty-five percent (25%) of the total costs (other than the Back Costs) in relation to the Les Arcs Earn-In Well, whensoever incurred in respect of all works undertaken pursuant to the Well Programme for the purpose of the Les Arcs Earn-In Well, including the planning, surveying, drilling (including side-tracking for mechanical reasons), coring, testing, logging, suspending and abandoning of the Les Arcs Earn-In Well and the mobilisation and demobilisation of the rig (if relevant) provided that in the event that the costs in respect of Les Arcs Earn-In Well net to [EEL] exceed seven million seven hundred thousand Pounds Sterling (£7,700,000), then with respect to any such costs in excess of such amount such percentage shall be reduced to ten percent (10%) of such costs, plus (ii) the Back Costs set out in Schedule 4 Part 1);

…

"**Val D'Isere Earn-In Costs**" means (I) (a) in the event that the Val D'Isere Option is not exercised twenty six point twenty five percent (26.25%) of the total costs (other than the Back Costs) in relation to the Val D'Isere Earn-In Well, whensoever incurred, and in respect of all works undertaken pursuant to the Well Programme in connection with the Val D'Isere Earn-In Well, including: the planning, surveying, drilling (including side-tracking for mechanical reasons), coring, testing, logging, suspending and abandoning of the Val D'Isere Earn-In Well and the mobilisation and demobilisation of the rig (if relevant), provided that in the event that the costs in respect of Val D'Isere Earn-In Well (net to [EEL]) exceed ten million five hundred thousand pounds (£10,500,000), then with respect to any such costs in excess of such amount such percentage shall be reduced to seventeen point five percent (17.5%) of such costs; or (b) in the event that the Val D'Isere Option is exercised, thirty-seven point five percent (37.5%) of the total costs (other than the Back

Costs) in relation to the Val D'Isere Earn-In Well, whensoever incurred, and in respect of all works undertaken pursuant to the Well Programme in connection with the Val D'Isere Earn-In Well, including: the planning, surveying, drilling (including sidetracking for mechanical reasons), coring, testing, logging, suspending and abandoning of the Val D'Isere Earn-In Well and the mobilisation and demobilisation of the rig (if relevant), provided that in the event that the costs in respect of Val D'Isere Earn-In Well (net to [EEL]) exceed eighteen million Pounds Sterling (£18,000,000), then with respect to any such costs in excess of such amount such percentage shall be reduced to twenty-five percent (25%) of such costs; plus (II) the Back Costs as further set out in Schedule 4 Part 2;

"**Val D'Isere Earn-In Well**" means the well to be drilled in accordance with the Well Programme pursuant to the Val D'Isere JOA by the Operator;

"**Val D'Isere Earned Interest**" means an undivided legal interest in the Licence P.1998 and a seventeen point five percent (17.5%) Percentage Interest under the Val D'Isere JOA in the event that the Val D'Isere Option is not exercised, or twenty five percent (25%) Percentage Interest under the Val D'Isere JOA in the event that the Val D'Isere Option is exercised, together with all rights and obligations attaching thereto and including but not limited to: (1) the right to take and receive a consequent share of all Petroleum produced under Licence P.1998 on or after the Completion Date and to receive the gross proceeds from the sale or other disposition thereof; and (ii) all rights, liabilities and obligations associated with such an interest under the Earned Interest Documents and Earned Interest Data;

"**Val D'Isere JOA**" means the joint operating agreement for UKCS Licence No P.1998, Blocks 21/10b and 21/9b to be entered into at or prior to Completion substantially in the form set out at Schedule 7;

"**Val D'Isere Option**" means the option as set out in Clause 3.1.8;

…

"**Well Programme**" means the well programme and map of the well location and associated budget in respect of each Earn-In Well (as the context requires) approved by [ANSL] and any Relevant Third Parties pursuant to the relevant JOA, as may be amended or re-issued from time to time pursuant to the relevant JOA and as are each set out in Schedule 6 and dated the date of this Agreement;

Interpretation

…

1.3 The headings in this Agreement are inserted for convenience only and shall be ignored in construing this Agreement.

…

2. Agreement to Transfer the Earned Interests

2.1 Subject to the terms of this Agreement, in consideration of [EEL] paying the Earn-In Costs in accordance with the provisions of clause 3.1 below, [ANSL] hereby agrees to transfer the Earned Interests to [EEL] free from all Encumbrances (other than any Encumbrances set out in the Earned Interest Documents) and [EEL] hereby agrees to acquire from Apache, the Earned Interests and to pay the Earn-In Costs.

…

3. Well Programme and Earn-In Costs

3.1 ***Determination and Payment of Earn-in Costs***

3.1.1 Subject to the terms of this Agreement, [EEL] shall pay the Earn-In Costs, in accordance with the provisions of this Clause 3.1. On and from Completion [EEL] shall, for the avoidance of doubt, also pay its Percentage Interest share of any other costs pursuant to or in connection with the relevant JOA and/or the Earned Interests.

3.1.2 [EEL] agrees to pay [ANSL] within three (3) Business Days of execution of this Agreement the sum of five million Pounds Sterling (£5,000,000) in respect of the anticipated Earn-In Costs (the "Upfront Payment"). The Upfront Payment shall be applied by [ANSL] towards payment of the Earn-In Costs following receipt of a corresponding AFE, cash call or invoice issued by [ANSL] in accordance with the relevant JOAs within the applicable time periods as set out in the relevant JOAs.

3.1.3 Upon Earn-In Well Completion, [ANSL] shall calculate the total amount remaining due pursuant to Clause 3.1.1, taking into account the Upfront Payment and payments made pursuant to Clause 3.1.4. [ANSL] shall issue a statement within ten (10) days of the Earn-In Well Completion having occurred, which shall confirm whether or not any payment is due under this Clause 3.1.3 by [EEL] to [ANSL], or by [ANSL] to [EEL] (as applicable) and the amount of such payment (the "Reconciliation Statement"). The Parties shall then discuss and agree the same (taking into account any items which may be the subject of

dispute with the Operator under the JOA). If a payment is due under the Reconciliation Statement, such payment shall be made within thirty (30) days of the date of issue of the Reconciliation Statement and any dispute regarding the amounts set forth in the Reconciliation Statement shall be resolved between the Parties in accordance with the JOA.

3.1.4 [EEL] shall pay all sums payable by it with respect to the Earn-In Costs upon receipt of an invoice from [ANSL] (taking into account the Upfront Payment) in accordance with the relevant JOA within the applicable time periods as set out in the relevant JOA, provided that the payment of the Back Costs agreed with respect to Val D'Isere Earn-In Well shall be made within seven (7) Business Days of a demand being made for such payment, such demand to be made no earlier than 1 January 2016.

…

3.1.8 [EEL] may, by giving notice in writing to [ANSL] at any time prior to the date falling ninety (90) days after Earn-In Well Completion in respect of Earn-In Well Completion of the Les Arcs Earn-In Well (the "Option Expiry Date"), exercise the option to acquire a further 7.5% Percentage Interest under the Val D'Isere JOA. At such time, [EEL] shall pay the amount of any further Val D'Isere Earn-In Costs then due and not yet paid as a result of exercising such Val D'Isere Option..

…

3.3 **JOAs**

3.3.1 For the purpose of this Agreement, the parties agree that the Les Arc JOA and Val D'Isere JOA shall, to the extent not otherwise in force and effect, be deemed to be in full force and effect both prior to and after Completion and [ANSL] shall, with respect to the Earn-in Costs, issue AFEs pursuant to and in accordance with the relevant JOAs from the date hereof.

3.3.2 Notwithstanding the provisions of Clause 3.3.1, ANSL may amend the Well Programme, approve or amend any AFEs and make contract awards in respect of the Earn-In Wells without the consent of [EEL] and otherwise in accordance with the JOAs.

…

4. **Interim Period**

4.1 In respect of each Earned Interest, from the date of this Agreement until Completion, [ANSL] shall (to the extent it is

> permitted to do so under the Licences and by the JOAs and subject to any confidentiality obligations by which it is bound):
>
> …
>
> 4.1.6 maintain insurance in relation to the Earned Interests in accordance with the JOA;
>
> …
>
> 11. **Costs and Expenses**
>
> …
>
> 11.2 Without prejudice to any other rights hereunder, if any amount payable pursuant to this Agreement is not paid when due, the defaulting Party shall pay interest on such amount from the due date of payment (after as well as before judgment) at the Default Rate (on a compounded basis).
>
> …
>
> 19. **General**
>
> 19.1 If there is any conflict between the provisions of this Agreement and the provisions of the Assignment Documents, the Reassignment Documents and/or the JOAs, the provisions of this Agreement shall prevail."

9. On 16 July 2015, the parties entered into a restated and amended FOA. Neither party contends that the variations contained in this document have any impact on the issues that I have to decide.

10. The VJOA concluded between the parties on 22 July 2015 was substantially in the form set out in Appendix 6 to the FOA. It is not suggested by either party that there are any material differences between the draft appended to the FOA and the VJOA the parties executed on 22 July. In so far as is material the VJOA provided:

> "**Definitions and Interpretation**
>
> 1.1 In this Agreement the words below have the meaning next to them unless the context requires otherwise:
>
> **Accounting Procedure** the procedure set out in Schedule 1.
>
> …
>
> **AFE** authority for expenditure.
>
> …

Invoice	any invoice presented for payment by the Operator to a Participant in accordance with the provisions of the Accounting Procedure in connection with Joint Operations.

…

3 **Scope and Understanding**

3.1 Scope

3.1.1 The scope of this Agreement shall extend to:

(a) the exploration for, and the appraisal, development and production of, Petroleum under the Licence;

(b) without prejudice to clause 18, the treatment, storage and transportation of Petroleum using Joint Property;

(c) the decommissioning or other disposal of Joint Property; and

(d) the conditions for the carrying out of Sole Risk Projects in the Licence Area,

3.1.2 This Agreement shall not extend to:

(a) any joint financing arrangements or any joint marketing or joint sales of Petroleum;

(b) the consideration of any commercial terms in connection with the treatment, storage and transportation of Petroleum under the Licence using third party infrastructure;

(c) the consideration of any commercial terms in connection with the use of Joint Property by third parties.

3.1.3 The Operator shall prepare and issue a revised Schedule 5 to the Participants promptly following the execution of any agreement which the Participants have agreed shall be incorporated as an Associated Agreement under this Agreement.

3.1.4 Where the Operator represents the Participants in relation to any Associated Agreement, unless otherwise agreed in such Associated Agreement;

(a) the responsibility and liability of the Operator in relation to such Associated Agreement shall be in accordance with this Agreement; and

(b) the liability of the Participants under any Associated Agreement shall be apportioned in accordance with their Percentage Interests.

3.2 Understanding

This Agreement represents the entire understanding of and agreement between the Participants in relation to the matters dealt with in this Agreement, and supersedes all previous understandings and agreements, whether oral or written, relating to such matters. Each Participant agrees that it has not been induced to enter into this Agreement in reliance upon any statement, representation, warranty or undertaking other than as expressly set out in this Agreement, and to the extent that any such representation, warranty or undertaking has been given, the relevant Participant unconditionally and irrevocably waives all rights and remedies which it might otherwise have had in relation to it. Nothing in this clause shall however operate so as to exclude any right any Participant may have in respect of statements fraudulently made or fraudulent concealment.

4 Interests of the Participants

Subject to the provisions of this Agreement, the licence, all Joint Property, all Joint Petroleum and all costs and obligations incurred in, and all rights and benefits arising out of, the conduct of the Joint Operations shall be owned and borne by the Participants in proportion to their respective Percentage Interests which at the date of this Agreement are as follows:-

[ANSL] 82.5%

[EEL] 17.5%

TOTAL 100.0%

5 The Operator

5.1 Designation

[ANSL] is hereby designated and agrees to act as the Operator under this Agreement for the purposes of the exploration for and the production of Petroleum within the Licence Area.

…

6 **Authorities and Duties of the Operator**

…

6.1 Rights

6.1.1 Subject to all the provisions of this Agreement, the Operator has the right and is obliged to conduct the Joint Operations by itself, its agents or its contractors under the overall supervision and control of the Joint Operating Committee.

…

6.2 Responsibilities

…

6.2.2 The Operator shall:

(a) conduct the Joint Operations in a proper and workmanlike manner in accordance with Good Oilfield Practice;

(b) conduct the Joint Operations in compliance with the requirements of the Acts, the Licence and any other applicable Legislation;

(c) do or cause to be done, with due diligence, all such acts and things within its control as may be necessary to keep and maintain the Licence in force and effect; and

(d) save as may otherwise be expressly provided under this Agreement (including the Accounting Procedure), neither gain nor suffer a loss in such capacity as a result of acting as Operator in the conduct of Joint Operations.…

…

6.5 Commitments for Material and Services

…

6.5.2 In connection with work to be carried out pursuant to an approved Programme and Budget or AFE:

(a) subject to clause 6.5.2(b) the Operator, or any Affiliate of the Operator, may supply necessary Material and services whether owned, leased or otherwise, from its own resources and shall charge the costs to the Joint Account in accordance with the Accounting Procedure;

(b) in the event that the Operator, or any Affiliate of the Operator, proposes to supply Material and/or services from its own resources which it estimates will cost more than £500,000 (five hundred thousand Pounds) the Operator shall obtain the approval of the Joint Operating Committee prior to supplying such Material and/or services;

…

6.10 Expenditures and Actions

6.10.1 The Operator is authorised to make such expenditures, incur such commitments for expenditures and take such actions as may be authorised by the Joint Operating Committee in accordance with clauses 10 to 14 provided that nothing contained in this clause 6.10.1 shall derogate from the Operator's duties under clause 6.5.

6.10.2 The Operator is also authorised to make any expenditures or incur commitments for expenditures or take actions it deems necessary in the case of emergency for the safeguarding of lives or property or the prevention of pollution. The Operator shall promptly notify all the Participants of any such circumstances and the amount of expenditures and commitments for expenditure so made and incurred and actions so taken.

…

10 Exploration and Appraisal Programmes and Budgets

…

10.2 Authorisation for Expenditure

Except as provided in clause 6.10.2, the Operator shall, before entering into any commitment or incurring any capital expenditure or seismic expenditure in excess of £500,000 (five hundred thousand Pounds) under an approved exploration and/or appraisal Programme and Budget submit to the Participants an AFE for it in accordance with the Accounting Procedure. To the extent that the Joint Operating Committee approves an AFE, the Operator shall be authorised and obliged, subject to clauses 6.5 and 10.3, to proceed with such commitment or expenditure. The Operator shall prepare and submit to the Participants a separate APE for each exploration or appraisal well, on a dry-hole basis, Drill stem testing shall be a contingent item.

11 Development Programmes and Budget

…

11.2 Authorisation for Expenditure.

Except as provided in clause 6.10.2, the Operator shall, before entering into any commitment or incurring any capital expenditure in excess of £1,000,000 (one million Pounds) with respect to the preparation of a development Programme and Budget or under an approved development Programme and

Budget submit to the Participants an AFE for it in accordance with the Accounting Procedure. To the extent that the Joint Operating Committee approves an AFE, the Operator shall be authorised and obliged, subject to clauses 6.5 and 11.3, to proceed with such commitment or expenditure. The Operator shall prepare and submit to the Participants a separate AFE for each development well.

…

13 Decommissioning Programme and Budget

…

13.2 Authorisation for Expenditure

Except as provided in clause 6.10.2, the Operator shall, before entering into any commitment or incurring any capital expenditure in excess of £1,000,000 (one million Pounds under an approved Decommissioning Programme and Decommissioning Budget, submit to the Participants an AFE for it in accordance with the Accounting Procedure. To the extent that the Joint Operating Committee approves an AFE, such approval not to be unreasonably withheld or delayed where the AFE is consistent with the approved Decommissioning Programme and Budget, the Operator shall be authorised and obliged, subject to clauses 6.5 and 13.3, to proceed with such commitment or expenditure.

…

16 Costs and Accounting

16.1 The Accounting Procedure

The Accounting Procedure is hereby made part of this Agreement. In the event of any conflict between any provision in the main body of this Agreement and any provision in the Accounting Procedure, the provision in the main body shall prevail.

…

SCHEDULE 1

Accounting Procedure

Joint Operating Agreement

UKCS Licence No. P.1998

Blocks 21/10b and 21/9b

1 Purpose and Intent

1.1 The purpose of this Accounting Procedure is to define the responsibilities and procedure for accounting for the financial transactions relating to this Agreement.

1.2 It is intended that the Accounting Procedure is fair and equitable as regards the charges, income, losses and gains attributed to the Joint Account, and to their apportionment amongst the Participants, and as regards the rights of the Participants on the disposal of assets and surplus materials. It is further intended that the Operator shall neither gain nor suffer any loss as a result of acting as Operator. The Participants agree that if any Participant considers that the methods described herein are materially inequitable, the Participants shall meet and in good faith endeavour to agree on changes in methods deemed appropriate to correct any inequity. For the avoidance of doubt, any changes made to the Accounting Procedure shall be subject to unanimous approval of the Participants or, where expressly so provided, by decision of the Joint Operating Committee.

1.3 The Operator shall charge and credit the Joint Account for all costs and receipts properly and necessarily incurred to conduct Joint Operations in accordance with the principles set out in this Accounting Procedure and, if the Joint Operating Committee so determines, with the Standard Oil Accounting Procedures issued by Oil and Gas UK from time to time ("SOAPs") in effect on the date on which the transaction is charged or credited to the Joint Account provided that in the event of any conflict between the SOAPs and this Accounting Procedure, this Accounting Procedure shall prevail and in the event of a conflict between the provisions of the Accounting Procedure and the provisions of the Agreement, the Agreement shall prevail.

1.4 Subject to the necessary Budget and AFE being approved in accordance with clauses 10 to 14 (as applicable), expenditures properly and necessarily incurred to conduct Joint Operations from and after the effective date of this Agreement as set out in clause 2.1 shall be charged to and paid by the Participants in proportion to their respective Percentage Interests. The Operator may, in accordance with the Accounting Procedure, Invoice the Participants Monthly in respect of all expenditures to be borne by the Participants incurred pursuant to this Agreement provided, however, that other frequencies and procedures for invoicing may be approved by unanimous decision of the Participants from time to time.

…

> **3 Accounting Basis**
>
> …
>
> 3.2 Subject to the necessary Budget and AFE being approved in accordance with clauses 10 to 14 (as applicable), the Operator shall charge and credit the Joint Account on the basis of its accounting policies in effect on the date on which the transaction is charged or credited to the account for all the costs and income properly and necessarily incurred and received in accordance with this Agreement, including:
>
> …
>
> 3.2.4 the cost of services, equipment, and/or facilities owned, partly owned, leased or hired by the Operator or its Affiliates and used on behalf of the Joint Account, which shall be charged at rates commensurate with the cost of ownership. The rates shall not exceed rates currently prevailing for like services, equipment and/or facilities if provided by non-affiliated third parties;
>
> ..."

Parties Cases in Summary

11. ANSL's case is that the FOA was a contract by which it sold the rights defined in the FOA as the "*Earned Interests*" for the price fixed by clause 2.1 – that is by payment of the "*Earn-In Costs*". The "*Val D'Isere Earn-In Costs*" are those that are relevant and were defined to mean *"(I) (a) … (26.25%) of the total costs (other than the Back Costs) in relation to the Val D'Isere Earn-In Well … plus (II) the Back Costs …*". Alternative (b) within the definition is not relevant because the option set out in clause 3.1.8 of the FOA was not exercised. The Rig was deployed to drill the Earn-In Well, the costs of deploying it for that purpose were costs "*… in relation to …*" the Earn-In Well and thus were part of the "*…total costs …*" that EEL were required to pay by operation of clause 2.1 of the FOA. ANSL submits that phrase is to be construed as meaning all costs in fact incurred without qualification. Any provision contained in the VJOA is immaterial even though that agreement contains a detailed mechanism for assessing cost and billing for it and even though the FOA is replete with references to the VJOA and the Accounting Procedure contained in Schedule 1 to that agreement. ANSL further submits that in any event any provision within that agreement that qualifies what is set out in the FOA is negatived by operation of clause 19.1 of the FOA.

12. EEL submits that the FOA provides that the parties were bound by the terms of the VJOA even before it was formally executed by operation of clause 3.3.1 of the FOA. EEL submits that since the phrase "*total costs"* is not defined by the FOA and there is no mechanism for identifying what costs come within that phrase or how such costs are to be calculated but there is a comprehensive mechanism for dealing with such issues within the VJOA, which is referred to throughout the FOA in connection with payments to be made by EEL to ANSL, it follows that ANSL was bound to charge for all costs in relation to the Earn-In Well only in accordance with the Accounting Procedure forming part of the VJOA. It follows, so it is submitted, that ANSL was limited by operation of

clause 3.2.4 of Schedule 1 to the VJOA to charging for use of the Rig a sum that did not exceed the rate for a similar rig " *... currently prevailing ... if provided by non-affiliated third parties*". It is common ground that the difference between the sum claimed and the sum that EEL maintains is due is the difference between the actual cost of the Rig and the rate for a similar rig prevailing during the period the Earn-In Well was being drilled.

Applicable Principles

13. It is common ground that the general principles applicable to the construction of contracts governed by English law apply to the construction of the FOA. 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 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 and the earlier cases he refers to in that paragraph;

ii) 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;

iii) 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;

iv) 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;

v) 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;

vi) 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;

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v. Capita Insurance Services Limited [2017] UKSC 24 *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

viii) A court should not reject the natural meaning of a provision as correct 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.

14. Before giving effect to an inconsistency clause such as clause 19.1 of the FOA, the court must decide whether, objectively, there is a conflict between (in this case) the FOA and the VJOA – see Pagnan SpA v. Tradax Ocean Transportation SA [1987] 3 All E.R. 565 *per* Bingham LJ (as he then was) at 574. As to what constitutes a conflict for these purposes, "*... it is not enough that one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses ...*" - Pagnan SpA v. Tradax Ocean Transportation SA (ibid.) *per* Bingham LJ at 575 – or "*... cannot sensibly be read together ...*" – see Pagnan SpA v. Tradex Ocean Transportation SA (ibid.) *per* Dillon LJ at 575. This latter formulation means that consideration needs to be given not merely to whether there is a literal contradiction but whether there is such a contradiction having regard to issues of reasonableness and business common sense – see Alexander v. West Bromwich Mortgage Company Limited [2016] EWCA Civ 496; [2017] 1 All E.R. 942 *per* Hamblen LJ at paragraph 41. Thus there will be inconsistency where one clause in one document emasculates another clause in another document.

Discussion

15. Neither party maintains that there is any relevant factual or commercial context that is relevant to the construction of the FOA other than is to be found in the FOA and VJOA – see paragraph 47 of EEL's written opening submissions and paragraph 71 of ANSL's opening submissions. This is unsurprising. The FOA is a complex agreement drafted by skilled and specialist solicitors acting for sophisticated and experienced parties. In those circumstances and applying the principles referred to above it is an agreement that is bound to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent.

16. In interpreting the FOA, it is not appropriate to ignore the VJOA even though it was not entered into until well after the FOA had come into effect. By clause 3.3.1 of the FOA, ANSL and EEL had agreed that the VJOA was deemed to be in full force and

effect both prior to and after Completion of the transfer of the Earned Interests in accordance with the provisions of the FOA – see the definition of Completion in clause 1.1 of the FOA. It was because that was so that the draft VJOA was annexed to the FOA and clause 19.1 was included within the FOA. Thus the FOA has to be construed on that deemed factual basis. By clause 19.1 any conflict between the provisions of the FOA and the VJOA has to be resolved on the basis that the provisions of the FOA prevail. As I have said above however, clause 19.1 only becomes relevant if it is concluded that a provision within the VJOA relied on by EEL contradicts a term of the FOA or cannot sensibly be read with any provision of the FOA either literally or by reasonably applying business common sense. If there is no such conflict then clause 19.1 is not engaged.

17. Turning to the FOA, while a large number of words and phrases used in the FOA are defined with great precision, the phrase " … *the total costs … in relation to the Val D'Isere Earn-In Well* …" is not a defined phrase other than that it applies to " … *all works undertaken pursuant to the Well Programme in connection with the Val D'Isere Earn-In Well* …" Thus although clause 3.1.1 requires EEL to pay the Val D'Isere Earn-In Costs, how that sum is to be ascertained is not defined anywhere in the FOA. Although ANSL relies on the reference to "… *certain costs…*" in Recital B of the FOA, in my judgment that does not assist since all that does is draw attention to the definition of the costs payable by operation of the terms of the agreement that follow, which begs the question what constitutes "… *total costs …"* within the definition of the Val D'Isere Earn-In Costs. ANSL maintain that the reason why this phrase is not defined is straight forward – it was intended by both parties that EEL would pay its proportion of the costs whatever they were and however they were incurred as long they were in respect of any part of the works undertaken by it " … *pursuant to the Well Programme in connection with the Val D'Isere Earn-In Well …".* I am unable to agree. I am also unable to agree that the proper application of clause 19.1 results in such an outcome. My reasons for these conclusions are as follows.

18. Clause 2.1 of the FOA makes clear that the Val D'Isere Earn-In Costs must be paid in accordance with the provisions of clause 3.1 of the FOA.

19. Clause 3.1.2 provides for the payment by EEL of an "*Upfront Payment*" on account of the anticipated Earn-In Costs. The Upfront Payment is not a payment that simply accrues to the benefit of ANSL upon payment. As clause 3.1.2 makes clear, ANSL must apply it " … *towards payment of the Earn-In Costs following receipt of a corresponding AFE, cash call or invoice issued by [ANSL] in accordance with the relevant JOAs*…" In my judgment this provision provides an important indication of the answer to the question I have to determine. The FOA does not define what comes within the scope of the phrase "*…total costs …*" nor does it provide any machinery by which what comes within that phrase can be determined because the parties' intention was that this would be determined using the machinery provided by the VJOA to determine that issue. This is apparent when clauses 3.1.2, 3.1.3 and 3.1.4 of the FOA are read together and those provisions are read together with clause 3.3.1 of the FOA. My reasons for reaching that conclusion are set out in the paragraphs that follow.

20. Clause 3.1.2 makes clear that the AFE, cash call or invoice by reference to which ANSL becomes entitled to apply the Upfront Payment towards payment of the Earn-In Costs must be one "*… issued by [ANSL] in accordance with the relevant JOAs within the*

applicable time periods as set out in the relevant JOAs …". This is consistent with clause 3.3.1 of the FOA, which provides that, with respect to the Earn-In Costs, ANSL would issue " *… AFEs pursuant to and in accordance with the relevant JOAs …*" from the date of the FOA. None of this makes any sense if the intention of the parties had been as is alleged by ANSL.

21. The balance of the Earn-In Costs is provided for by clauses 3.1.3 and 3.1.4 of the FOA. Clause 3.1.3 required ANSL to provide a Reconciliation Statement to EEL after which the parties were required "… *to discuss and agree the same (taking into account any items which may be the subject of dispute with the Operator under the JOA)* …". Clause 3.1.4 required that EEL pay all sums payable in respect of the Earn-In Costs "… *upon receipt of an invoice from [ANSL] (taking into account the Upfront Payment) in accordance with the relevant JOA within the applicable time periods as set out in the relevant JOA* …" These provisions are inconsistent with the intention of the parties being as alleged by ANSL, as is Clause 3.1.2.

22. In both clauses 3.1.2 and 3.1.4 there is a reference to invoices "…*in accordance with the relevant JOAs …* ". Clause 1.1 of the VJOA defines "*Invoice*" as being "… *any invoice presented for payment by [ANSL] to a Participant in accordance with the provisions of the Accounting Procedure in connection with Joint Operations*". This can only mean that the sums invoiced must have been ascertained applying the Accounting Procedure and must be in respect of sums due in respect of activity in connection with "*Joint Operations"*.

23. The phrase "*Joint Operations*" is widely defined as meaning all operations carried out by ANSL on behalf of all the participants in accordance with the VJOA after the date of its commencement. The drilling of the Earn-In Well commenced well after this date. Given the definition in clause 3.1.1 of the VJOA of the scope of the VJOA as including "… *the exploration for Petroleum under the Licence*" this necessarily includes the work referred to in the definition within the FOA of the Val D'Isere Earn-In Costs since that applies to " … *all works undertaken pursuant to the Well Programme in connection with the Val D'Isere Earn-In Well* …" and the phrase "*Well Programme*" is defined by the FOA to mean the Well Programme "… *approved by [ANSL]… pursuant to the relevant JOA* …". It follows that any invoice that is the trigger for payment of some or all of the Earn-In Costs has to be presented in accordance with the Accounting Procedure being the procedure set out in Schedule 1 to the VJOA.

24. In my judgment, had the parties aided by their skilled and specialist advisors intended the position to be as ANSL maintains it to be, that it would have been entirely unnecessary to have approached payment in the way that it is approached in the FOA. The FOA would have provided for a simple billing mechanism that provided for payment against invoices whenever raised without any reference to the need for such invoices to be issued in accordance with the JOA, which on ANSL's submission would have had no relevance.

25. It is difficult to see how the work identified within the definition of the Val D'Isere Earn-In Costs within the FOA – that is " … *all works undertaken pursuant to the Well Programme in connection with the Val D'Isere Earn-In Well* …" could not be work to which the VJOA applied given the definitions referred to above.

26. Even if there was a distinction that could be drawn between the work falling within the scope of the VJOA and a sub-category of that work that came within the definition of the Val D'Isere Earn-In Costs, there is no business sense in providing for the costs of the types of work coming within the Val D'Isere Earn-In Costs to be treated differently from all other work coming within the scope of "*Joint Operations"*. To adopt such a course would be contrary to commercial common sense when viewed at the date when the FOA was entered into because there is no machinery within the FOA for identifying what precisely what work comes within the definition of the Val D'Isere Earn-In Costs that does not come within the scope of the VJOA, or how sums attributable to such work are to be assessed but there is a carefully formulated and comprehensive method for arriving at the costs recoverable by ANSL contained in the VJOA, which is referred to by the FOA where payment of the Earn-In Costs is mentioned. No basis (other than that I refer to in paragraph 26 below) has been identified as to why the parties could have intended that the VJOA machinery would apply to the costs of the work within the scope of the VJOA but not to the costs of the work that supposedly came within the definition of the Val D'Isere Earn-In Costs. Not merely does all the textual material suggest that there is one set of costs and that those costs should be arrived at and charged in accordance with the procedure contained in the VJOA but there is nothing either textual or contextual that justifies treating the costs of the work said to be within the definition of the Val D'Isere Earn-In Costs differently from all the other work coming within the scope of the VJOA.

27. In my judgment, paragraph 3.1 of the FOA, when read as a whole, and sub-paragraphs 3.1.1 – 3.1.4 in particular are all consistent with the parties having intended that the amount of the sale consideration set out in clause 2.1 was to be calculated, claimed for and paid in accordance with the terms of the VJOA. There is no definition of the "…*total costs …*" in the definition of the Val D'Isere Earn-In Costs because one was not required since the intention of the parties was to leave the amount to be worked out under the VJOA.

28. A central submission made by ANSL was that it was wrong in principle to adopt the construction referred to above since it was an unwarranted interference with the price that ANSL was entitled to receive for what it had sold to EEL. I reject that submission. The sum payable under the FOA was either 26.25% of the "*... total costs ...*" for an undivided legal interest in the Licence and a 17.5% interest under the Val D'Isere JOA in the event that the Val D'Isere Option was not exercised (as in fact was the case) or 37.5% of the "*... total costs ...*" for a 25% interest under the Val D'Isere JOA in the event that the Val D'Isere Option was exercised. The profit from entering into the FOA so far as ANSL was concerned lay in the amount of the total costs being paid by EEL being in excess of what would be referable to the share it was purchasing. It did not lie in recovering by way of total costs a sum in excess of what was provided for under the Accounting Procedure. EEL was purchasing either a 17.5% interest under the VJOA for a price of 26.25% of the total costs if the option was not exercised or a 25% interest for a price of 37.5% of those costs if it was. On the assumption that the option was exercised, that arrangement left ANSL with a 75% interest under the VJOA (subject to any further disposals by ANSL) but a costs exposure of only 62.5% of the relevant costs. This equates to a 12.5% cost benefit to ANSL. Assuming the option was not exercised, then the cost benefit to ANSL was 8.75%. Importing a requirement that limited what ANSL could recover for equipment it leased or hired and provided to "… *rates currently prevailing for like services, equipment and/or facilities if provided by*

non-affiliated third parties …" had no impact on the profit made by ANSL under the FOA. It meant merely that the costs recoverable by reference to the JOA were limited by a contractual provision that parties had agreed to from the outset.

29. I turn now to the VJOA. It defines the "*Accounting Procedure*" as being the procedure set out in Schedule 1 and reflects the intention of the parties that ANSL would neither gain nor suffer a loss as a result of acting as Operator – see clause 6.2.2. This approach provides further support of my conclusions set out in the previous paragraph. The only gain that ANSL was to obtain as between it and EEL was the gain referred to in the previous paragraph of this judgment.

30. As Operator under the VJOA, ANSL was permitted to supply material "*… from its own resources and … charge the costs to the Joint Account in accordance with the Accounting Procedure …*". The Accounting Procedure entitled ANSL to charge for "*… all costs … properly and necessarily incurred …*" - see paragraph 1.3 of Schedule 1. Costs properly and necessarily incurred include those categories of charges identified in paragraph 3.2 of Schedule 1 which in turn includes " … *the cost of … equipment … leased or hired by [ANSL] … which shall be charged at rates commensurate with the cost of ownership. The rates shall not exceed rates currently prevailing for like services, equipment and/or facilities if provided by non-affiliated third parties*" – see paragraph 3.2.4. In my judgment the phrase "*… total costs …*" used in but which is undefined by the FOA refers to what is described in the VJOA as costs properly and necessarily incurred. It follows therefore that if the cost of equipment hired by ANSL and used in drilling the Earn-In Well is to be recovered as part of the "*… total costs …*" referred to in the FOA, it must be a cost properly and necessarily incurred as defined by the JOA and for that reason what is recoverable is limited to the rate " … *currently prevailing for like … equipment … if provided by non-affiliated third parties* …"

31. There is no relevant conflict between the VJOA and the FOA because the former does not contradict or conflict with any term in the latter as is required by the caselaw referred to earlier. The FOA does not define the "… *total costs* …" referred to in the definition of Val D'Isere Earn-In Costs. The only provision within the FOA that governs the payment of Earn-In Costs is Section 3. Paragraph 3.1.2 provides that the Upfront Payment can be drawn down against only following the issue of an Invoice issued by ANSL "*… in accordance with the relevant JOAs …*" and all other payments in respect of the Earn-In Costs were required to be paid by EEL only upon receipt of an invoice issued by ANSL "*… in accordance with the relevant JOA …*". It was for that reason amongst others that the VJOA was deemed by clause 3.3.1 of the FOA to be in full force and effect.

32. Back Costs are not relevant for present purposes. They were an ascertained sum that it was agreed that EEL would pay to ANSL as part of the consideration for its participation. It has no impact on the calculation of future total costs, which is what this dispute is concerned with and does not impact either on the point made above concerning the commercial benefit to ANSL of the FOA or at least there is no evidence that it does.

33. The reality is that if both agreements are read together as was plainly intended by the inclusion of the VJOA as an appendix to the FOA and by the deeming provision within clause 3.3.1 of the FOA then together they work as a cohesive whole. Treating the FOA

as an independent agreement in the way contended for by ANSL would create anomalies including at least those identified by EEL in paragraph 94 of its written submissions. None of those arise if the approach set out above is adopted. In particular if EEL is correct then there is a comprehensive machinery for ascertaining what has to be paid and when, whereas, if ANSL is correct there is no such machinery and disputes were likely to be the result. In my judgment it is inconceivable that either party's expert and specialist lawyers would have wished to expose the parties to such an outcome.

34. There are two final points that I need to address. The first is a submission that ANSL had freedom to drill as it saw fit. That is so but is irrelevant. How the work is done does not impact on how the costs of doing that work is to be assessed. There is nothing within either clause 3.3.2 of the FOA or the definitions of Well Programme and Relevant Third Party that lead to the conclusion that ANSL was free to charge otherwise than as provided by the VJOA. Secondly, ANSL characterises EEL as submitting that it was required to lease a new rig rather than use the Rig. EEL submits no such thing. What was required was an adjustment exactly as in the end the parties have undertaken and which leads to the financial difference between them. Finally, although ANSL sought to place some reliance on the DNO agreement, in my judgment that is misplaced by reason of that agreement having been entered into after the FOA. It is only facts and matters known or that ought reasonably to have been known to both parties down to the date of the agreement being construed that are relevant to a construction issue.

The Interest Issues

35. When I circulated this judgment originally I had thought that no interest issue arose that it would be necessary for me to address in this judgment in light of the conclusions expressed above and payments that had been made. I had thought it had been agreed that interest was in the end to be left over until after judgment on the main issue had been handed down – see Transcript, page 126. However, Counsel for the claimant asked me to address that issue by an email of 2 December 2019 on the basis of the arguments of the parties at the hearing. The issue was fully argued during the trial and I address the issue below.

36. By clause 11.2 of the FOA, it was agreed that:

> "if any amount payable pursuant to this Agreement is not paid when due, the defaulting Party shall pay interest on such amount from the due date of payment (after as well as before judgment) at the Default Rate (on an compounded basis)."

The default rate is 4% above LIBOR as defined in the FOA. Interest is payable from the "*due date"*. The issue between the parties concerns the true meaning and effect of that phrase.

37. The claimant maintains that the due date for these purposes was by no later than 10 days from the date of the relevant invoice – see clause 3.1.4 of the FOA (set out above) and paragraph 4.4 of the Accounting Procedure set out in Schedule 1 to the VJOA, which provides:

> "Each Participant shall settle the Invoice on or before the due date specified on the Invoice, which shall not be less than ten (10) days from the date of issue of the Invoice…"

38. ANSL rendered invoices on various dates between 12 February and 9 May 2018 for sums that included the full cost of the Rig. ANSL maintains that it is entitled to interest at the contractual rate on the various sums from 10 days after the date of the invoice by which payment was claimed. In light of the conclusions reached above, that claim cannot succeed in relation to the full cost of the Rig. As I understand it, ANSL maintains a claim from those dates for the sum that in the end EEL admitted was due. EEL denies that interest is payable on that sum from that date, maintaining that the invoices were not prepared in accordance with the Accounting Procedure because they included a claim for payment for the Rig in excess of what ANSL was entitled to charge and that the true sum to which ANSL was entitled became clear only following the exchange of pleadings and disclosure in these proceedings. I reject EEL's case on this issue for the following reasons.

39. Invoices were payable in accordance with clause 3.1.4 of the FOA. In so far as is material, that clause provided that EEL would pay all sums payable " … *within the applicable time periods set out in the relevant JOA ….".* The invoices were otherwise rendered in accordance with the Accounting Procedure but erroneously included a claim for sums in excess of what ANSL was entitled to recover in respect of the Rig.

40. The fact that there is a dispute as to the correctness of the amount being claimed is not material. This is clear from paragraph 4.5 of the Accounting Procedure, which provides:

> "Payment of any Invoices shall not prejudice the right of any Participant to protest or question the correctness of any amount included in any Invoice or billing schedule. Any queried or disputed amount in relation to any Invoice shall be promptly brought to the attention of the Operator, who shall address the query or dispute promptly. In the event that a query or dispute arises with an Invoice the undisputed part of such Invoice shall be settled. The part subject to query or dispute may be withheld until the query or dispute is resolved. If a full payment is made prior to settlement of the query or dispute, such payment shall not constitute a settlement of the query or dispute or otherwise waive or affect the rights of any Participant or the Operator. If a Participant fails to settle the undisputed part of the Invoice by the due date, the provisions of clause 17 shall apply in respect of the unpaid amount. If the query or dispute is resolved in favour of the Operator, a financing fee covering the period between the date on which the queried or disputed expenditure was incurred and the date on which such expenditure is settled by the disputing Participant, may be applied by the Operator."

41. As is apparent from this provision, a non-operator participant can pay the full amount of an invoice under protest as to some or all of the amount claimed. In that event, if the dispute is resolved in favour of the Operator then no interest will be payable by the paying party because the invoice sums will have been paid in accordance with the

Accounting Procedure. Alternatively, the paying party must pay at least the element of the invoice not in dispute whilst being entitled to withhold the element in dispute. In that event, if the issue is ultimately resolved in favour of the Operator, then interest is payable from the date when the relevant invoice became payable. If this was not so, then the paying party could delay payment and avoid paying interest by raising unmeritorious disputes. It is for that reason that paragraph 4.5 entitles a paying party to withhold the part of the sum claimed that is in dispute whilst saying nothing about the incidence of interest, which is addressed by clause 11.2 of the FOA and paragraph 4.4 of the Accounting Procedure. A similar mechanism applies under clause 3.1.3 of the FOA in relation to Reconciliation Statements. It provides that payment is due 30 days from the date of issue of the statement whilst providing for the resolution of disputes in accordance with the JOA.

42. It was submitted on behalf of EEL that it was not in a position to work out what sum was due until much later. In my judgment that is not material. It was open to EEL to make a payment on account if necessary on advice. Any such payment would have reduced the impact of interest in circumstances where on any view a significant sum was payable in respect of rig hire costs. These difficulties have no impact on when interest starts to accrue under the terms of the agreement between the parties.

Conclusions

43. EEL is correct in the construction for which it contends and in consequence ANSL's claim is dismissed. I will hear the parties at the hand down of this judgment as to the amount if any of the interest payable in light of the conclusions set out above.