

Neutral Citation Number: [2015] EWHC 2658 (Comm)

Case No: 2013 FOLIO 305

IN THE HIGH COURT OF JUSTICE

**QUEEN'S BENCH DIVISION**

**COMMERCIAL COURT**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 25/09/2015

**Before** :

MR JUSTICE LEGGATT

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**Between :**

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|  | **Scottish Power UK Plc** | Claimant |
|  | **- and -** |  |
|  | 1. **BP Exploration Operating Company Limited** 2. **Talisman Sinopec North Sea Limited** 3. **ENI TNS Limited** 4. **JX Nippon Exploration and Production (UK) Limited** | Defendants |

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**John McCaughran QC and Laurence Emmett** (instructed by **Berwin Leighton Paisner LLP**) for the **Claimant**

**Helen Davies QC and Richard Eschwege** (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing dates: 30 June, 1-2 July, 8-9 July 2015

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Approved Judgment

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

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**Mr Justice Leggatt:**

# Introduction

1. The claimant in this case (“Scottish Power”) is a party to four long term Agreements for the Sale and Purchase of Natural Gas under which, as “Buyer”, it has agreed to purchase from the “Sellers” natural gas produced from the Andrew Field, an oil and gas field lying some 230 km north east of Aberdeen in the North Sea. There is a separate Agreement between Scottish Power and each Seller in materially identical terms. The Sellers are the companies which own the rights to produce hydrocarbons from the Andrew Field. The Agreements were originally made in 1994 but have been novated from time to time as the original Sellers have transferred their interests to new parties. The four defendants in this action were the Sellers at all material times until 10 January 2014. I will refer to them as the “Andrew owners”. Their interests in the Andrew Field were in the following shares: the first defendant (“BP”) – 62.75%; the second defendant (“Talisman”) – 9.86%; the third defendant (“Eni”) – 16.21%; and the fourth defendant (“JX Nippon”) – 11.18%. On 10 January 2014 Eni transferred its interest to JX Nippon, which now therefore has a share of 27.39% in the Andrew Field.
2. For over 3½ years from 9 May 2011 until 26 December 2014, the production of natural gas from the Andrew Field was shut down. The main reason for this was so that work could be done to “tie in” the Andrew Field with a nearby oil and gas field known as the Kinnoull Field. This involved modifying the platform and facilities used to handle oil and gas produced from the Andrew Field so that they could also be used to handle oil and gas produced from the Kinnoull Field.
3. The dispute in this action is about the contractual consequences of the shutdown. It is now accepted by the Andrew owners that, at least for much of the relevant period, the failure to deliver gas to Scottish Power amounted to a breach of the Agreements. But it is their case that the consequences of such non-delivery are exclusively provided for by the Agreements themselves, which contain a compensation mechanism involving the supply of gas at a reduced price after deliveries resume (referred to as “Default Gas”). It is Scottish Power’s case that its remedies for breach of contract are not limited to the receipt of Default Gas and that it is entitled to recover damages under the general law measured as the additional cost to Scottish Power of buying replacement gas from elsewhere during the period of the shutdown.
4. The resolution of this central issue depends on the interpretation of certain clauses of the relevant Agreements. At the time when the parties sought directions at a restored case management conference on 5 December 2014, the case had been fixed for a trial of all issues of liability with a time estimate of 5-7 weeks. It seemed to me on that occasion that it would be much more efficient to decide, in the first place, the key questions of interpretation in dispute. Depending on the conclusions reached, there should then either be no need for any further trial or its scope would be substantially narrowed. Following discussions between the parties and a further hearing, I gave directions on 29 January 2015 for the trial of five preliminary issues.
5. Before identifying and addressing these issues, I will first outline the general scheme of the Agreements, the approach to be adopted in interpreting the Agreements and further relevant background to the dispute.

## The Agreements

1. For material purposes, the terms of the Agreements are identical save for the size of each Seller’s interest in the production and ownership of natural gas from the Andrew Field. The Agreements are complex and the following is intended only as a broad overview of their terms. I will focus in more detail later on the particular provisions which are the subject of the preliminary issues.
2. Article 1 of each Agreement contains definitions of more than a hundred words and expressions. For the most part, I will follow in this judgment the practice adopted in the Agreements of signifying by the use of initial capital letters that a word or expression is a defined term.[[1]](#footnote-1)
3. Pursuant to Article 2.1(1), the Contract Period commenced on the date when the Agreements were made – which was 4 February 1994. At that time, however, neither the Sellers nor Scottish Power had completed construction of the facilities needed for the production, delivery and receipt of natural gas. Pursuant to Article 2.7(1), the first Contract Year commenced on the Commencement Date, which in the event was 1 October 1996. Some early deliveries had been made in the summer of 1996 but the Commencement Date was the date when the full contractual regime for the delivery of natural gas under the Agreements began.
4. It is apparent from the provisions dealing with duration and termination in Article 2 that the Agreements are intended to continue for as long as it is economic for the Sellers to produce gas from the Andrew Field. The main termination rights provided in Article 2 are:
   1. a right of either party to terminate the Agreement on 24 months’ notice expiring not before the 25th anniversary of the Commencement Date – Article 2.1(1)(a);
   2. a right of either party to terminate the Agreement on notice if the Seller has tendered no natural gas for delivery for 90 days due to permanent cessation of production from the Andrew Field – Article 2.1(1)(b); and
   3. a right of the Seller at any time after the fourth Contract Year to terminate the Agreement if the Sellers reasonably expect that over a period of one Contract Year Production Costs will exceed Revenue – Article 2.2(1).
5. The basic agreement for the sale and purchase of gas produced from the Andrew Field is contained in Article 3.1:

“Subject to the reservations contained in Clause 5.1 the Seller agrees to sell, tender for delivery and deliver at the Delivery Point and the Buyer agrees to accept and pay for, or if not accepted to pay for (pursuant to Articles 9 and 10), all Natural Gas tendered for delivery by the Seller and produced from the Seller's Interest in the Andrew Field and/or produced by the Seller for delivery to the Buyer by virtue of the rights contained in Clause 5.2 during the Contract Period. The quantities, prices, times and manner in which such Natural Gas shall be sold, tendered for delivery, accepted and/or paid for shall be established under this Agreement.”

1. Article 4 contains various warranties and indemnities, and includes in Article 4.6 an exclusion of liability for certain types of loss. The Andrew owners rely on this clause as allegedly excluding liability for Scottish Power’s claim for damages in this action.
2. Article 5 is headed “Seller’s Reservations”. The rights there reserved to the Seller include:
   1. “without prejudice to its obligations to deliver the quantities of Natural Gas properly nominated by the Buyer under Article 6 through facilities provided, installed, repaired, replaced, maintained and operated under Article 7, the right to decide the manner in which it conducts its operations” – Article 5.1(1); and
   2. the right to have natural gas delivered into the Seller’s Facilities from any field, reservoir or source which is not part of the Andrew Field for processing in and transportation through the Seller’s Facilities – Article 5.2.
3. Article 6 contains detailed provisions establishing the quantities of natural gas to be sold and purchased under the Agreements. The starting point of this regime is to establish for each Contract Year a daily rate by reference to which the Buyer is to nominate quantities of gas for delivery. This daily rate is referred to as the “TDCQ” (an abbreviation for the “total daily contract quantity”). The TDCQ varies according to the stage that has been reached in the life of the Andrew Field. The relevant events in this case occurred during the Plateau Period of production. During this period the TDCQ is 8,269.29 Megawatt hours (MWh). From the TDCQ, there are also arithmetically derived a daily contract quantity (“DCQ”) and an annual contract quantity (“ACQ”) for each Seller.
4. Article 6.11 requires the Sellers to maintain a capacity to deliver natural gas from the Andrew Field to the Buyer on each day at a rate which is 130% of the TDCQ (subject to a right on the part of a Seller to reduce this capacity if and when deliveries made in a Contract Year exceed 115% of the Seller’s ACQ). This Delivery Capacity represents the maximum quantity of gas which the Buyer may nominate for delivery on any day. Article 6.12 contains the obligation of the Seller, subject to the provisions of Article 5, to “deliver on each Day at the Delivery Point the quantity of Natural Gas properly nominated by the Buyer under the Agreements for delivery on such Day”. Article 6.13 sets out the procedure for nominating quantities of gas for delivery. The basic requirement is for the Buyer to give notice to the Seller (by 10am on the Friday of each week) of the amount of natural gas required to be delivered on each day of the following week. Pursuant to Article 6.13(3), if the Buyer fails to give the requisite notice, the daily nomination for each day of the following week is deemed to be the most recent preceding daily nomination in force.
5. Article 6.14 allows the Sellers to specify up to 30 days in each Contract Year (falling in the period May to September) as Maintenance Days necessary for the maintenance, repair, modification and/or replacement of any of their facilities and to reduce the TDCQ to an amount which may be zero for these days.
6. Article 7 imposes obligations throughout the Contract Period on the Seller (under Article 7.1) and the Buyer (under Article 7.2) to provide, install, repair, maintain and operate the facilities necessary for the performance of their obligations under the Agreements, in accordance with the Standard of a Reasonable and Prudent Operator. The claim made by Scottish Power in this action is for compensation for the alleged breach by the Andrew owners of Article 7.1 of the Agreements.
7. The Agreements are “take or pay” contracts. Thus, pursuant to Article 9, as a general principle and subject to certain adjustments, if in any Contract Year Scottish Power takes delivery of less than the ACQ, Scottish Power nevertheless has to pay the Seller for the gas not taken as well as for the gas actually delivered. The total amount of gas for which payment must be made is referred to as the Take or Pay Quantity.
8. Article 10 provides for the Contract Price to be calculated by reference to various published prices and indices. Articles 11-14 deal with, respectively, mechanisms for billing and payment, specification of the quality of the gas tendered for delivery, the pressure at which gas must be delivered and the measurement and testing of the gas to be delivered.
9. Article 15 is a *force majeure* clause. Force Majeure is defined in Article 15.1 as:

“any event or circumstance which is beyond the control of the Person affected acting and having acted as a Reasonable and Prudent Operator resulting in or causing the failure by the person affected to perform any one or more of its obligations under any relevant agreement including this Agreement ...”

The Andrew owners rely on Article 15 in the present case (albeit now only to claim relief from liability for 11 days of the shutdown period) and one of the preliminary issues concerns the proper construction of a reporting requirement contained in Article 15.4.

1. Article 16 establishes a regime whereby, when an underdelivery occurs on any day, the quantity of gas which the Sellers have failed to deliver is classified as Default Gas and the Buyer becomes entitled to receive a like quantity of gas in a subsequent month at the Default Gas Price, which is 70% of the Contract Price. A central issue in the case is whether Article 16 applies to Scottish Power’s claim.

## Approach to interpretation

1. Over the past 45 years the correct approach to the interpretation of contracts has been considered by the House of Lords and Supreme Court in a number of cases, of which the latest is Arnold v Britton [2015] 2 WLR 1593. In what is currently the authoritative formulation of the test, the object of interpretation is said to be to identify “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”: see Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14, quoted by Lord Neuberger PSC in Arnold v Britton [2015] 2 WLR 1593, para 15. When standing in the shoes of such a reasonable person, there are two key assumptions which the court makes. The first is that there is a particular meaning which the parties were using the language of the contract to express – the “true meaning” or “proper construction” of the contract. The second is that this meaning is the meaning which reasonable people in the position of the parties expressing a shared intention would have intended the words to bear. Thus, what, if anything, the actual parties subjectively intended the words of the contract to mean is irrelevant to the task of interpretation. As stated by Lord Wilberforce in Reardon Smith Line Ltd v Hansen-Tangen (The “Diana Prosperity”)[1976] 1 WLR 989, 996:

“When one speaks of the intention of the parties to the contract, one is speaking objectively — the parties cannot themselves give direct evidence of what their intention was — and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.”

1. In ascertaining what reasonable people in the situation of the parties expressing a shared intention would have meant by the words used, the court takes account of (i) the natural and ordinary meaning of the clause in question, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense: see Arnold v Britton at para 15.
2. There are also certain presumptions of law which courts apply in determining what is to be taken as the intention of the parties. A presumption relevant in this case is that each party to the contract is to be entitled to all those remedies for its breach as arise by operation of law, so that sufficiently clear language is required to exclude or modify the availability of such remedies: see Gilbert-Ash Northern Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689, 717 (Lord Diplock); Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 WLR 574, 585; Stocznia Gdynia SA v Gearbulk Holdings Ltd [2010] QB 27, para 23.

## Identifying the factual matrix

1. The present case is not the first time the courts have been asked to decide questions of interpretation of these Agreements. In earlier proceedings brought shortly after deliveries of gas under the Agreements commenced, the Court of Appeal held that, on the proper construction of the Agreements, the Sellers are not entitled (save in very limited circumstances) to sell gas produced from the Andrew Field to third parties: see Scottish Power plc v Britoil (Exploitation) Ltd & Others, 18 November 1997, unreported. In giving the lead judgment in the Court of Appeal, Staughton LJ considered the extent to which, in determining what a contract means, evidence of the background or “factual matrix” can legitimately be taken into account. He expressed the view that the material admissible for this purpose is limited to “facts which both parties would have had in mind and known that the other had in mind when the contract was made”. It seems to me that this limitation necessarily follows from the assumption that the parties were using the language of the contract to express a shared meaning. As Lord Neuberger PSC said in Arnold v Britton at para 21:

“Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.”

1. Given its limited nature, identifying the relevant factual matrix ought not generally to be a difficult or controversial task. All too often, however, attempts are made under the rubric of the factual matrix to adduce material that is not admissible or relevant to the process of interpretation, out of wishful thinking that the court might nevertheless be influenced by it. As Staughton LJ observed in the earlier Scottish Power case:

“it is often difficult for a judge to restrain the enthusiasm of counsel for producing a great deal of evidence under the heading of matrix, which on examination is found to contribute little or nothing to the true understanding of the parties contract.”

1. To seek to curb this tendency, the Admiralty and Commercial Court Guide (9th Edn, April 2014) now requires any feature of the factual matrix which is alleged to be of relevance to be pleaded and for any features of the factual matrix which are agreed to be relevant along with any disagreements as to the relevant features to be addressed in the list of issues. In keeping with this approach, the order for directions made on 29 January 2015 provided for the parties to agree a statement of facts in relation to the factual matrix of the Agreements.

## The factual matrix of the Agreements

1. In accordance with that direction, in addition to the facts about the ownership of the Andrew Field already mentioned, the following background facts have been agreed.
2. The Andrew Field was discovered by BP in 1974. It is primarily an oil field, producing light oil and associated natural gas. The Andrew reservoir lies at a depth of 2,430m below sea level and is contained within the Palaeocene layer of the earth’s crust. The Andrew owners also own a deeper Lower Cretaceous reservoir, which contains only natural gas. The “Andrew Field” as defined in the Agreements comprises only the Palaeocene reservoir and the Agreements provide only for the sale and purchase of natural gas contained in this reservoir. Scottish Power has no rights to the gas contained in the underlying Lower Cretaceous reservoir.
3. The Agreements were entered into before the development of the Andrew Field commenced. At the time of signing the Agreements, it was anticipated that another hydrocarbon accumulation known as the “Cyrus Field”, situated approximately 10km to the north of the Andrew Field was also to be produced via the Andrew facilities. At that time, the Andrew facilities were to comprise (i) a four legged fixed steel production, drilling and quarters platform and associated facilities; (ii) a high pressure separator for use by the Andrew Field; (iii) a high pressure separator for use by the Cyrus Field; and (iv) common (i.e. for both the Cyrus and Andrew Fields) single train processing facilities, in which the Cyrus Field would have dedicated capacity.
4. Scottish Power’s business has at all material times involved electricity generation and other projects which require natural gas. The supply of natural gas pursuant to the Agreements provides Scottish Power with the commercial advantage of having an assured supply of natural gas over a significant period, at a price which varies according to a formula defined in the Agreements. During the term of the Agreements, the contract price will sometimes favour either the Buyer (Scottish Power) or the Sellers (the Andrew owners) of the natural gas in comparison to the price the parties could achieve in the open market.

## The background to the dispute

1. In 2006 BP acquired an interest from Chevron in the Kinnoull Field, which lies approximately 25km north east of the Andrew Field. The acquisition was made as part of a “Hub Developer Strategy” with the aim of developing the Andrew platform as a hub for the processing of oil or gas produced from nearby fields. On 22 May 2008, BP announced the discovery of oil and associated gas in the Kinnoull Field.
2. At that time, two BP companies between them owned some 77% of the whole interest in the Kinnoull Field. The Eni group also owned interests in both fields. The remaining interest in the Kinnoull Field (of 6.27%) was held by Petro Summit Investment Ltd (“Summit”). In 2012, Summit sold its interest to JX Nippon, which in 2013 also acquired Eni’s interest (of 16.67%) in the Kinnoull Field. Accordingly, the current owners of the Kinnoull Field are BP (77.06%) and JX Nippon (22.94%).
3. Beginning in February 2009, the Kinnoull owners and the Andrew owners entered into negotiations to tie-in the Kinnoull Field to the Andrew platform. These negotiations ultimately culminated in a Joint Development Agreement (“JDA”) between the Andrew owners and the Kinnoull owners executed on 23 June 2011.
4. As explained later, for the purpose of the second preliminary issue the Andrew owners rely on the regulatory context in which they agreed to afford access to their infrastructure to the Kinnoull owners. In particular, they place great emphasis on evidence adduced to show that the process of negotiation and agreement of access took place in accordance with an industry Code of Practice on Access to Upstream Oil and Gas Infrastructure on the UK Continental Shelf (“ICOP”).
5. In combination with the work necessary to tie in the Kinnoull Field to their facilities, the Andrew owners also carried out work on the Andrew platform to enable gas to be produced from the Lower Cretaceous reservoir. The whole project was referred to as the Andrew Area Development (“AAD”) works. Some time in the autumn of 2010 the Andrew owners also decided to include the replacement of pipework and certain other maintenance and modifications of the Andrew platform as part of the AAD works.
6. The AAD works necessitated the shut-in of the Andrew Field and shutdown of the facilities on the Andrew platform, with the result that the Andrew owners could not supply gas to Scottish Power under the Agreements. As the plans for the work were developed, the estimated length of the shutdown increased. By late March 2011, the planned shutdown to carry out the AAD works was scheduled to commence on 24 June 2011 and to last for 18 months.
7. On 9 May 2011 a leak was identified in pipework on the Andrew platform which required production to be shut down for safety reasons. On 16 May 2011, BP on behalf of the Andrew owners wrote to Scottish Power giving notice that the Andrew platform was currently shut down due to pipework failure and claiming relief from the obligation to deliver natural gas on the ground of *force majeure*.
8. On 20 May 2011 there was a meeting of BP’s Regional Leadership Team, at which a decision was taken not to attempt to restart production and to keep the Andrew platform shut down until the planned start of the AAD works on 24 June 2011.
9. Under the JDA signed on 23 June 2011, the Kinnoull owners agreed that they would be liable, subject to a cap of £75 million, for 67% of the costs of the AAD works, including losses suffered by the Andrew owners from the deferral of production during the shutdown period and from becoming liable to deliver Default Gas to Scottish Power. The 67% figure represented an agreed allocation of the proportion of the AAD works which related to the tie-in of the Kinnoull Field.
10. In the event, the Andrew platform remained shut down for far longer than expected. Production did not restart for over 3½ years. Intermittent gas deliveries recommenced on 26 December 2014, and full deliveries did not resume until March 2015. Issues relating to the duration of the shutdown and the conduct of the AAD works are outside the scope of the preliminary issues.
11. Throughout the period of the shutdown, Scottish Power continued to make nominations of gas for delivery each week in accordance with the Agreements, without prejudice to its claim for damages made in this action.

## The proceedings

1. Scottish Power commenced these proceedings on 4 March 2013. Its claim in the proceedings is for compensation for loss suffered as a result of the failure of the Andrew owners to operate the facilities necessary to produce gas from the Andrew Field during the period of the shutdown in alleged breach of Article 7.1 of the Agreements.
2. In their Defence served on 29 March 2013, the Andrew owners denied liability on the ground that they were relieved from their obligations to deliver natural gas under the Agreements by reason of a *force majeure* event which was allegedly still ongoing.
3. The Andrew owners maintained this case for some 18 months. Following disclosure, however, and in response to a letter from Scottish Power’s solicitors pointing out reasons why the defence was unsustainable, the Andrew owners abandoned the defence of *force majeure* in relation to all but the first 11 days of the shutdown (from 9 to 20 May 2011). This concession was first made in correspondence on 29 October 2014 and was embodied in a re-amended Defence served on 16 December 2014. The Andrew owners have nevertheless continued to deny that they were in breach of Article 7.1 of the Agreements, on grounds which were first articulated in Further Information dated 19 December 2014.

## The nature of the dispute

1. In broad terms, the dispute between the parties as matters now stand is as follows. The Andrew owners accept that, for much at least of the period when the Andrew Field was shut in, their failure to deliver gas to Scottish Power was a breach of Article 6.12 of the Agreements.[[2]](#footnote-2) It is common ground that the sole remedy for any breach of that clause is Default Gas under Article 16. It is Scottish Power’s case that, during the relevant period, the Andrew owners were also in breach of their obligation under Article 7.1 to operate the Sellers’ Facilities. The Andrew owners deny that they were in breach of Article 7.1 but say that, even if they were, Default Gas is also the sole remedy for the alleged breach of that clause. Alternatively, they assert that Scottish Power’s claim for damages is excluded by Article 4.6 of the Agreements.
2. The first two preliminary issues are concerned with the correct interpretation of Article 7.1 and whether the Andrew owners were in breach of that provision by reason of their decision to shut in the Andrew Field to carry out the AAD works. The third issue concerns whether Article 16 provides the only remedy for all relevant breaches of the Agreements including the alleged breach of Article 7.1. The fourth issue is whether Scottish Power’s claim for damages is excluded by Article 4.6. The fifth issue relates to a different topic, being whether the Andrew owners are precluded from relying on *force majeure* as a defence to liability for the first 11 days of the shutdown by their failure to comply with a reporting requirement contained in Article 15.4(2). This depends on whether, on the proper construction of the Agreements, compliance with the relevant requirement is a condition precedent (or a condition subsequent) to a successful claim for relief from liability under Article 15.2.

## The evidence

1. Four of the five preliminary issues are pure questions of construction. Since the factual matrix has been agreed, no evidence was needed in relation to these issues. The second preliminary issue differs from the others in that it asks not simply what the contract means but whether the Andrew owners in deciding to shut in the Andrew Field complied with a standard of conduct specified in the Agreements and described as the “Standard of a Reasonable and Prudent Operator”.
2. On Scottish Power’s case that issue also turns entirely on a question of construction. The Andrew owners have taken a different view and have adduced a large volume of evidence in support of their case on this issue. In relation to that case, no fewer than 38 chronological files of documents (and two core volumes) were included in the trial bundles. The Andrew owners called four witnesses of fact to give evidence whose statements ran in total to over 100 pages. They also adduced written and oral evidence from an expert on the regulatory environment and industry practice, Mr Charles Simmons, whose report and supplemental report ran to around 80 pages. In response, Scottish Power served expert reports from Mr William Hobbs, although in the event they did not call him to give oral evidence at the trial.
3. When I discuss the second preliminary issue, I will consider whether this evidence was relevant.
4. In addition to expert evidence from Mr Hobbs, Scottish Power served a witness statement from Mr David Cathie, its Head of UK Gas Procurement, Global Energy Management. This statement comprised material of four main kinds. First, the statement asserted various background facts, some but not all of which were contained in the agreed statement of facts in relation to the factual matrix of the Agreements. However, as permission had been given to serve witness statements only in relation to the second preliminary issue and not in relation to the factual matrix (which had been agreed), this evidence was inadmissible. Second, Mr Cathie gave an account of what notification Scottish Power was given of the planned shutdown and complained that it was inadequate. However, this evidence did not relate to any case pleaded by Scottish Power. Third, the statement contained Mr Cathie’s impressions of the Sellers’ reasons for decisions made in relation to the shutdown – of which he had no personal knowledge – together with his opinions about their conduct, expressed in notably tendentious terms. Fourth, Mr Cathie gave some opinions on what the contract meant. Any competent lawyer practising in the field of commercial law must be aware that evidence of opinions of the kind contained in Mr Cathie’s statement is irrelevant and inadmissible, and should never have drafted or permitted to be served a witness statement containing such material.
5. In the course of the oral openings, I invited the representatives of Scottish Power to identify in writing any passages in Mr Cathie’s statement which they maintained were admissible and on which they wished to rely. In the event, counsel for Scottish Power made the sensible decision not to call Mr Cathie.
6. I will now address in turn each of the five preliminary issues.

# Issue 1

“Does the Sellers’ failure to operate the Sellers’ Facilities necessary to produce and deliver at the relevant times the quantities of Natural Gas from the Andrew Field which were required, in accordance with the terms of the Agreements, to be delivered to the Buyer at the Delivery Point (the “required Natural Gas”) since 9 May 2011 by reason of the prolonged shut-in of the Andrew Field amount to a breach of Article 7.1; or is it necessary to conduct an additional inquiry to determine whether the Sellers have complied with the Standard of a Reasonable and Prudent Operator?”

1. The first preliminary issue asks, in substance, whether the Sellers’ failure to operate the facilities necessary to produce natural gas from the Andrew Field was, of itself, a breach of Article 7.1 of the Agreements or whether it amounted to a breach of Article 7.1 only if it is shown to have involved a failure to comply with the Standard of a Reasonable and Prudent Operator.
2. Article 7.1 states:

“Throughout the Contract Period the Seller will, in accordance with the Standard of a Reasonable and Prudent Operator, provide, install, repair, maintain and operate those Seller’s Facilities which are (in the opinion of the Seller and the other Sellers) necessary to produce and deliver at the relevant times the quantities of Natural Gas from the Andrew Field which are required, in accordance with the terms of this Agreement, to be delivered to the Buyer at the Delivery Point.”

1. The Seller’s Facilities are defined in Article 1 of the Agreements to mean:

“the production wells, platforms, separation, processing and treating equipment, pipelines and other equipment … whether or not owned by the Seller and the Other Sellers installed or used for the purpose of producing Natural Gas from the Andrew Field and delivering the same at the Delivery Point under this Agreement.”

A Reasonable and Prudent Operator is defined in Article 1 as:

“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 under the same or similar circumstances and conditions, and the expression the ‘Standard of a Reasonable and Prudent Operator’ shall be construed accordingly.”

1. In their statements of case the Andrew owners have admitted that, by reason of the prolonged shut-in of the Andrew Field that occurred from early May 2011, they failed to operate the Sellers’ Facilities referred to in Article 7.1. They deny, however, that they were thereby in breach of Article 7.1. The Andrew owners contend that, in order to make good its case of breach, it is not sufficient for Scottish Power to prove a failure to operate the relevant facilities: Scottish Power must also prove that such a failure to operate was inconsistent with the Standard of a Reasonable and Prudent Operator (or “RPO”).
2. Scottish Power disputes this. The argument made by Mr McCaughran QC on its behalf is short and simple. He notes that Article 7.1 requires the Seller to carry out, in accordance with the RPO standard, five activities in relation to the relevant facilities – namely, to provide, install, repair, maintain and operate them. Mr McCaughran submits that, in order to carry out any of these activities to the required standard, the Seller must carry them out in the first place. Thus, a Seller who is not operating the facilities at all cannot be operating them in accordance with the RPO standard. A Seller who fails to operate the facilities for any part of the Contract Period is therefore automatically in breach of Article 7.1.
3. This argument interprets Article 7.1 as imposing two separate obligations on the Seller: an absolute obligation to carry out each of the five specified activities in relation to the Seller’s Facilities; and a further obligation, when carrying out each of those activities, to do so in accordance with the Standard of a Reasonable and Prudent Operator. The Andrew owners, on the other hand, interpret Article 7.1 as imposing on the Seller a single obligation, being an obligation to perform each of the five specified activities when and to the extent that a Reasonable and Prudent Operator would do so.
4. Although at first blush Scottish Power’s argument has some appeal, I think it clear that it is not the correct interpretation of Article 7.1, and that the proper construction is that argued for by the Andrew owners. I reach this conclusion for three reasons.
5. First, the language of the clause is not language which parties would naturally have used if they intended to impose two distinct obligations – one absolute and the other qualified. Scottish Power seeks to construe the clause as if it said that “the Seller will provide, install, repair, maintain and operate the Seller’s Facilities and, in doing so, will act in accordance with the Standard of a Reasonable and Prudent Operator”. But that is not what the clause says. It is apparent from the syntax – and in particular the fact that the phrase “in accordance with the Standard of a Reasonable and Prudent Operator” is placed immediately after the word “will” and before the relevant verbs – that the intention is to impose a single obligation which is not absolute but is qualified by the RPO standard.
6. Second, Scottish Power’s interpretation leads to unreasonable results. In particular, counsel for the Andrew owners pointed out that, in order to repair the Seller’s Facilities as required by the clause, it may be necessary to cease operating the facilities for a period while the repairs are carried out. If, however, the obligation to operate the facilities was an absolute one as Scottish Power contends, the Sellers would in these circumstances be subject at the same time to two mutually inconsistent obligations. The Sellers would thus be unavoidably in breach of the clause whatever they decided to do. By performing their obligation under Article 7.1 to repair the facilities they would be in breach of the clause by not operating them, and vice-versa. To place the Sellers in a situation where they must violate the contract in order to perform it is not something that rational parties would have intended.
7. In closing submissions Mr McCaughran attempted to meet this objection by qualifying Scottish Power’s original contention that a failure to operate the Seller’s Facilities is automatically a breach of Article 7.1. He submitted that a failure to operate the relevant facilities is a breach of the clause unless the reason for it is that the Seller, during the period of non-operation, is carrying out repairs or maintenance which are necessary to comply with Article 7.1. There is, however, no basis for this qualification in the language of Article 7.1. In order to maintain its case that the clause imposes absolute obligations to carry out the specified activities while avoiding the absurdity to which this leads, Scottish Power has to read into the clause words which are not there. The simpler and better response to the absurdity is to recognise it as a reason for rejecting Scottish Power’s construction of the clause. On the Andrew owners’ case, there is no need for such contortions. Any potential conflict between the obligation to operate the facilities on the one hand, and the obligations to repair and maintain them on the other, can be resolved by applying the Standard of a Reasonable and Prudent Operator which is expressly built into the clause.
8. My third reason for rejecting Scottish Power’s interpretation is that it is unworkable when applied to some of the activities referred to in Article 7.1 other than operating the relevant facilities. In particular, postulating an absolute obligation to repair and maintain facilities makes little or no sense. If the question is asked “when must the Seller carry out repairs in order to comply with the clause?”, the obvious answer, and the answer which Mr McCaughran QC gave in oral argument, is: “when a Reasonable and Prudent Operator would do so”. Once it is accepted, however, that the question of when to repair facilities as well as the manner in which repairs are carried out is to be determined by reference to the Standard of a Reasonable and Prudent Operator, then the same must logically be true of the question when to operate the facilities. The language of the clause gives no scope for treating the specified activities differently from each other. It follows that not operating the Sellers’ Facilities is a breach of Article 7.1 only when it is inconsistent with the RPO standard.
9. I conclude that, on the proper interpretation of Article 7.1, the Standard of a Reasonable and Prudent Operator governs both when the Seller must perform the specified activities and how it is required to do so. I therefore decide this issue in favour of the Andrew owners and answer it as follows: the failure of the Andrew owners to operate the Sellers’ Facilities necessary to produce and deliver the required Natural Gas at the relevant times since 9 May 2011 by reason of the prolonged shut-in of the Andrew Field did not, of itself, amount to a breach of Article 7.1; rather, in order to decide whether such failure amounted to a breach, it is necessary to conduct an additional inquiry to determine whether the Andrew owners have complied with the Standard of a Reasonable and Prudent Operator.

# Issue 2

“If such additional inquiry is required, did the Sellers comply with the Standard of a Reasonable and Prudent Operator in deciding to shut in the Andrew Field to carry out the AAD works as alleged in their Further Information dated 19 December 2014 (excluding, for the avoidance of doubt, the question as to whether or not the Defendants have carried out the AAD works in accordance with the Standard of a Reasonable and Prudent Operator)?”

1. Scottish Power argues that, if it is necessary – as I have held that it is – to decide whether the Andrew owners complied with the Standard of a Reasonable and Prudent Operator in order to determine whether they were in breach of Article 7.1, the answer to that question is nevertheless straightforward.
2. It is clear that, when on 20 May 2011 they decided to keep the Andrew Field shut in to carry out the AAD works, the Andrew owners knew and intended that, by reason of the shut-in and for as long as it continued, no natural gas would be produced from the Andrew Field and delivered to Scottish Power. They were therefore not seeking to perform their contractual obligations, in particular their obligations to deliver gas to Scottish Power, and indeed were making a deliberate decision not to do so while the works were performed.
3. Scottish Power submits that it necessarily follows that, in not operating the Sellers’ Facilities pursuant to the decision to shut in the Andrew Field, the Andrew owners did not comply with the Standard of a Reasonable and Prudent Operator. That is because, under the definition quoted at paragraph 55 above, a party cannot comply with the RPO standard if it is not seeking to perform its contractual obligations, which the Andrew owners were not seeking to do. It follows that the Andrew owners were in breach of Article 7.1.
4. This is a short and simple point, which seems to me unanswerable. The Andrew owners went to elaborate lengths, however, to argue that in deciding to shut in the Andrew Field to carry out the AAD works they complied with the RPO standard and were therefore not in breach of Article 7.1.

## **The Andrew owners’ case**

1. As pleaded in their Further Information dated 19 December 2014, it is the Andrew owners’ case that, in negotiating and agreeing terms which gave the owners of the Kinnoull Field access to their facilities, they were acting “in compliance with and taking account of their statutory duties and ICOP”. The Andrew owners subsequently identified the statutory provisions on which they rely as certain sections of the Petroleum Act 1998. “ICOP” is an abbreviation for the infrastructure code of practice referred to at paragraph 34 above. It is a voluntary code developed by the trade association for the UK offshore oil and gas industry in consultation with the Department of Energy and Climate Change (“DECC”) to provide guidance to those involved in negotiating third party access to oil and gas infrastructure on the UK Continental Shelf.
2. Although their Further Information refers to “statutory duties”, the Andrew owners did not seek to argue at the trial that they were under any statutory duty to grant access to their infrastructure to the Kinnoull owners. They did, however, maintain that the Secretary of State had a statutory power to order them to provide such access and to decide the terms on which they must do so.
3. Counsel for the Andrew owners emphasised that the RPO standard is objective. What matters, they argued, are not the actual reasons why the Andrew owners decided to shut in the Andrew Field but whether a skilled and experienced operator in the position of the Andrew owners exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from such a person would have done so. They submitted that such an operator would have sought to comply with and take account of (a) ICOP and (b) the possibility of a referral to DECC, and in the light of those factors would or could have decided to shut down the Andrew platform to carry out work to tie in the Kinnoull Field. That is sufficient, they argued, to show that the RPO standard was complied with. They nonetheless further contended that, although the actual reasons for their decision are not determinative of whether the Andrew owners acted in accordance with the RPO standard, as a matter of fact those reasons included both (a) the application of ICOP and (b) the potential for a referral to DECC.
4. In support of their case, the Andrew owners relied on the expert and factual evidence to which I referred earlier.
5. The Further Information also contained an allegation that the work undertaken during the shut-in prolonged the life of the Andrew Field and consequently extended the term of the Agreements. This allegation was not, however, pursued at the trial. Documents disclosed by BP showed that this point was considered internally by BP when preparing a letter sent to Scottish Power in August 2011. Consideration was given to whether BP could say in the letter that the AAD works would extend the economic life of the Andrew Field and thereby increase the total amount of gas that will be sold to Scottish Power under the Agreements, so that it was in Scottish Power’s best interests for the project to go ahead. The view taken, however, was that, although the revenue earned from developing the Lower Cretaceous reservoir and tying in the Kinnoull Field would help to prolong the economic life of the Andrew Field, it would not significantly affect the amount of natural gas recoverable from the Andrew Field over its economic life, which would remain roughly the same. When account was taken of the delay in receiving the gas, it could not be argued that Scottish Power would benefit from the AAD works.

## The meaning of the RPO definition

1. It is Scottish Power’s case that on the plain meaning of the RPO definition the matters relied on by the Andrew owners would not demonstrate compliance with the RPO standard even if proved, and that the evidence adduced by the Andrew owners was therefore not relevant.
2. Counsel for Scottish Power emphasised that there are two elements to the definition of a Reasonable and Prudent Operator, which are not alternatives. Thus, to comply with the definition, a party must:
   1. seek in good faith to perform its contractual obligations; and
   2. in so doing (i.e. in seeking in good faith to perform its contractual obligations) and in the general conduct of its undertaking, exercise that degree of skill, diligence, prudence and foresight which would ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances and conditions.

(As a shorthand, I will refer to a person “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 under the same or similar circumstances and conditions” as a person acting reasonably and prudently.)

1. In relation to the first limb of the definition, Mr McCaughran QC for Scottish Power did not contend that the words “in good faith” add a requirement to perform the contract in accordance with an express duty of good faith to the requirement that the operator must be seeking to perform its contractual obligations. He submitted that the words simply emphasise that the operator must be genuinely seeking to perform its contractual obligations and not merely pretending to do so. But what is plain, he submitted, is that it is impossible to construe the definition in such a way that a party which is not seeking to perform its contractual obligations at all may nevertheless fall within its scope. Such a party has not met the first limb of the definition; and as it has not met the first limb, it also cannot meet the second limb of the definition.
2. On behalf of the Andrew owners Ms Davies QC accepted that, if Scottish Power’s case as to the meaning of the RPO definition is correct, it is conclusive of the preliminary issue and the evidence relied on by the Andrew owners falls away. She argued, however, that the first limb of the definition cannot sensibly be read as meaning that whenever a party deliberately decides not to perform one of its obligations under the Agreement it is not complying with the RPO standard. Rather, the first limb of the definition is to be interpreted as a requirement that the operator must be acting in good faith. As long as the operator is not acting dishonestly or solely as to frustrate the contract or seeking to contrive reasons why it is not required to perform the contract, or otherwise behaving in bad faith, the requirement is satisfied. Ms Davies emphasised that Scottish Power has made no allegation that the Andrew owners acted in bad faith in deciding to shut in the Andrew Field. Provided, therefore, that the decision was one that an operator acting reasonably and prudently would have taken, the Sellers have complied with the RPO standard.
3. The Andrew owners interpret the definition as if it referred, not to “a person seeking in good faith to perform its contractual obligations”, but to a person who, even if not seeking to perform its contractual obligations, is at least acting in good faith. The obvious difficulty with this interpretation is that it focuses on the words “in good faith” and ignores the words “seeking ... to perform its contractual obligations”. The Andrew owners treat the first limb of the RPO definition as adding an express good faith obligation to the RPO standard but as doing no more than that.
4. It is not necessary to decide what, if anything of substance, the words “in good faith” add to the requirement of seeking to perform contractual obligations. What is clear is that those words do not subtract from that requirement: a person seeking to perform its contractual obligations in good faith must on any view be a person seeking to perform its contractual obligations. The approach taken by the Andrew owners effectively tries to read that requirement out of the contract and deprives the words “seeking ... to perform its contractual obligations” of any relevant meaning.
5. I recognise of course that there are cases in which the court is driven to the conclusion that, in Lord Hoffmann’s phrase, “something must have gone wrong with the language”: see Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101, paras 14-15. However, as the House of Lords has emphasised, it requires a strong case to drive the court to this conclusion as we do not easily accept that people have made linguistic mistakes, particularly in formal documents. The expectation is that those responsible for drafting such documents think about what they are saying and use language with care: ibid. In this case the definition of a Reasonable and Prudent Operator is quite elaborate and gives the impression of having been carefully formulated. I see no reason to suppose that it was drafted by a Mrs Malaprop.
6. Nor can I see anything commercially unreasonable in the inclusion in the definition of a requirement that the operator must be seeking to perform its contractual obligations. It seems to me entirely understandable, and only to be expected, that an operator who takes a deliberate decision not to perform its obligations under the Agreement and does not carry out one or more of the activities specified in Article 7.1 because of that decision should be treated as in breach of contract.
7. In support of their argument that the first limb of the definition is not to be read literally, counsel for the Andrew owners repeated the point made in relation to the first preliminary issue that there may be situations in which the obligations on the operator conflict with each other so as to make it impossible to perform mutually exclusive obligations at the same time. For example, undertaking repairs to the Seller’s Facilities may prevent the operation of those facilities. Ms Davies QC and Mr Eschwege submitted that, if Scottish Power’s interpretation were correct and compliance with the RPO standard is to be measured by applying a purely literal construction of its first limb, then the Sellers would be in an invidious position because a Seller could never satisfy the RPO standard in circumstances where it was not possible both to seek to repair and to seek to operate the Seller’s Facilities at the same time.
8. It seems to me that this point would only have force if Article 7.1 imposed absolute obligations on the Seller to provide, install, repair, maintain and operate the relevant facilities – the very interpretation which I have rejected in answering the first preliminary issue. On the interpretation put forward by the Andrew owners, which I have accepted as correct, a Seller which carries out repairs to its facilities is not automatically in breach of contract because it is not operating the facilities. As Ms Davies QC and Mr Eschwege also pointed out, a party seeking in good faith to perform its contractual obligations may not in fact, for a particular reason and a particular period of time, actually perform those obligations. Thus, a Seller seeking in good faith to perform its contractual obligations and acting reasonably and prudently may decide that it is necessary to undertake repairs to its facilities and to shut down the facilities while the repairs are carried out. If so, the non-operation of the facilities while the repairs are carried out is in accordance with the RPO standard and is not a breach of Article 7.1.
9. I accept that, if too fine-grained an approach were adopted to the question whether a Seller is seeking to perform its contractual obligations, the question whether there is a breach of Article 7.1 would become circular. In order to determine whether a Seller is seeking to perform its contractual obligations when applying the RPO definition, it cannot be necessary to have to decide whether there is an obligation under Article 7.1 to operate the facilities which the Seller must be seeking to perform – since the existence of such an obligation depends on whether the Seller is complying with the RPO standard. The question must therefore be viewed more broadly. The basic obligations of the Seller under the contract are, as reflected in Article 5.1(1), to deliver the quantities of natural gas properly nominated by the Buyer. The obligations under Article 7.1 to provide, install, repair, maintain and operate the Seller’s Facilities are expressly directed towards that aim. The Seller’s obligations must, moreover, be performed not just from day to day but over the whole life of this long term contract. Thus, what is necessary in order to comply with the first limb of the RPO standard, as I see it, is that the Seller should be acting with the aim of performing its obligations to deliver natural gas to the Buyer over the remainder of the contract period through facilities fit for that purpose.
10. On any fair reading of the requirement, however, it is plain that the Andrew owners were not complying with it when they decided to shut down production from the Andrew Field for what they knew would be a lengthy period for ulterior reasons which had nothing to do with enabling them to deliver natural gas to Scottish Power through facilities provided, repaired, maintained and operated for this purpose, and which were directly inconsistent with performance of their obligations to deliver natural gas.[[3]](#footnote-3)
11. Counsel for the Andrew owners posed a second hypothetical example of a situation where the Sellers had a concern about the safety of a part of the Andrew platform which affected only the oil processing facilities or oil export equipment but made it necessary to shut down the Andrew platform as a whole so that appropriate investigations could be undertaken. They suggested that in such circumstances it is unlikely that the Sellers would be able to rely on the existence of a Force Majeureevent. Yet it might be the case that an operator acting reasonably and prudently would shut down the platform in such a situation. If so, it would be invidious if, by not operating the facilities to investigate the safety concern, the Sellers automatically rendered themselves in breach of Article 7.1.
12. I do not think it necessary to reach any conclusions about how such a hypothetical case should be decided in order to decide the present case. I would take issue, however, with the suggestion that it is unlikely that the Sellers could rely on Force Majeure. On the facts described, the circumstance giving rise to the concern about safety could not have arisen from any failure by the Sellers to maintain the Sellers’ Facilities in accordance with the RPO standard and would appear to be a circumstance beyond the control of the Sellers. If the circumstance caused the Sellers reasonably to decide not to perform their obligations to operate the Sellers’ Facilities and to deliver natural gas to the Buyer while the concern was investigated, then it would seem to me to fall within the definition of “Force Majeure” (quoted in paragraph 19 above). If for some reason the circumstance did not amount to Force Majeure, it would not relieve the Sellers from liability for failing to deliver natural gas to the Buyer and I do not see anything unreasonable or invidious in the conclusion that it would also not excuse them from their obligation to operate their facilities necessary for that purpose.
13. In my view, the examples posed by the Andrew owners come nowhere near to showing that the first limb of the RPO definition must be read in an unnatural way. I therefore conclude that Scottish Power’s case about the meaning of the RPO definition is correct. It follows that the preliminary issue is to be answered in favour of Scottish Power and the case advanced by the Andrew owners in their Further Information does not arise. The evidence relied on by the Andrew owners in support of that case is therefore not relevant.

## The second limb of the RPO definition

1. There is a second reason why the evidence adduced by the Andrew owners on this issue is not relevant in my view. Supposing in their favour that they had satisfied the first limb of the RPO definition, I see no reason why they needed to refer to ICOP or to any statutory power of DECC in order to demonstrate compliance with the second limb. It is clear that the Andrew owners stood to gain substantial financial rewards from carrying out the AAD works and shutting in the Andrew Field for that purpose. The benefits to be gained from the agreement made with the Kinnoull owners for this purpose included: (i) the fees which the Kinnoull owners agreed to pay for the use of the Andrew facilities to handle oil and gas produced from the Kinnoull Field; (ii) cost savings from carrying out the works needed to develop the Lower Cretaceous reservoir in combination with the work involved in tying in the Kinnoull Field to the Andrew platform; and (iii) the fact that some two-thirds of the costs of carrying out the AAD works and the financial losses incurred as a result of shutting in the Andrew Field for that purpose were to be paid by the Kinnoull owners (subject to a cap). In addition, two of the Andrew owners (BP and Eni) who between them owned almost 79% of the whole interest in the Andrew Field also owned over 93% of the interest in the Kinnoull Field and hence also stood to gain the commercial benefits obtained by the Kinnoull owners from the tie-in.
2. In these circumstances I have no doubt at all that a person exercising, in the conduct of its own business, 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 under the same or similar circumstances and conditions as the Andrew owners would have taken the decision they did to shut in the Andrew Field to carry out the AAD works. No evidence suggesting otherwise was adduced by Scottish Power and no reliance on any of the matters alleged in the Further Information dated 19 December 2014 is needed to make that conclusion good.

## Findings on the Andrew owners’ case

1. Although for the reasons given I do not regard the matters alleged as relevant, I will for completeness and in case I am wrong record my findings on the allegations made by the Andrew owners.
2. I note, first of all, that the AAD works included not only works to tie in the Kinnoull development but also works to develop the Lower Cretaceous reservoir and works to carry out other maintenance and modifications to the Andrew platform. It has not been suggested that either ICOP or the statutory provisions on which the Andrew owners rely had any application to these other works. On any view, therefore, the matters relied on could not justify the shut-in of the Andrew Field in so far as it was attributable to these other works.

### Statutory powers

1. In her oral opening submissions, Ms Davies QC identified the statutory provision on which the Andrew owners chiefly relied as section 17F of the Petroleum Act 1998. This sets out a procedure by which any person who “seeks a right to have things conveyed by a controlled petroleum pipeline of which he is not the owner” may, if agreement is not reached with the owner of the pipeline, apply to the Secretary of State for a notice to secure the right. Subsection (9) provides:

“Where the Secretary of State is satisfied that, if he served a notice under this subsection, the pipeline in question could be operated in accordance with the notice without prejudicing its efficient operation for the purpose of conveying, on behalf of its owner, the quantities of permitted substances which the owner requires or may reasonably be expected to require, the Secretary of State may serve such a notice on the owner and the applicant.”

A notice served under subsection (9) may contain such provisions as the Secretary of State considers appropriate in order to secure the relevant right to the applicant.

1. The Andrew owners averred, and I accept, that the pipelines through which they exported oil and gas from the Andrew platform to the central systems used for the transportation of oil and gas to onshore terminals are “controlled petroleum pipelines” within the meaning of the Act. One aspect of the agreement negotiated between the Andrew owners and the Kinnoull owners was the grant to the Kinnoull owners of the right to have oil and gas from the Kinnoull Field conveyed by those pipelines. The agreement, however, went well beyond this. It is clear that the AAD works were a major construction project which included, notably, the installation on the Andrew platform of a new 700 tonne module containing facilities for processing fluids received from the Kinnoull Field. I assume, in the absence of any suggestion or evidence to the contrary, that the installation of this module along with other substantial modifications to the Andrew platform included in the AAD works were necessary for the purpose of the tie-in. Section 17F of the Petroleum Act 1998 cannot reasonably be interpreted as giving the Secretary of State power to require the owner of a pipeline to provide such facilities or to carry out major construction works of this kind.
2. In closing submissions Ms Davies QC also relied on section 16 of the 1998 Act. This gives the Secretary of State a power, subject to certain conditions, to require the owner of a pipeline to modify “apparatus and works associated with the pipeline” in order to increase the capacity of the pipeline. Again, I cannot see that the construction of new facilities on the Andrew platform including a new facility to process gas could possibly be said to be a modification of the “apparatus and works associated with the pipeline” used to export gas from the platform nor that the purpose of installing the facilities was to increase the capacity of the pipeline.
3. There is separate legislation in section 12 of the Gas Act 1995 under which the Secretary of State has power to give directions to secure to an applicant a right to have gas processed on its behalf by a gas processing facility. The Andrew owners do not rely on this provision because they accept that the gas processing facilities on the Andrew platform do not fall within its scope. Even if they had fallen within its scope, it is clear that section 12 of the Gas Act 1995 only applies to the acquisition of rights to use existing gas processing facilities and does not give the Secretary of State power to order the construction of a new facility. The fact that the use of gas processing facilities is the subject of separate legislation, however, provides additional confirmation – if any is needed – that it falls outside the scope of the Petroleum Act 1998.
4. As it appears that a major part of the works required to tie in the Kinnoull Field to the Andrew platform fell outside the scope of the statutory provisions on which the Andrew owners have sought to rely, I find that they have failed to show that the regulator had power to compel the tie-in to take place in the absence of agreement.
5. In view of this conclusion, it is not relevant to consider the likelihood that the Secretary of State would have ordered the Andrew owners to carry out the works required to tie in the Kinnoull Field to the Andrew facilities. I see no reason to suppose that the Secretary of State would have sought to exercise a power which did not exist.
6. I will, however, mention as it was the focus of some oral evidence and argument a passage in the Guidance on Disputes over Third Party Access to Upstream Oil and Gas Infrastructure issued by DECC. Paragraph 39 of this guidance indicated the approach which the Secretary of State would be likely to take in various scenarios in exercising his statutory powers (including the power in section 17F of the Petroleum Act 1998). Counsel for Scottish Power referred, in particular, to the following scenario:

“**Terms set to cover costs of displacement of own production or contractual commitments**

For infrastructure with insufficient ullage to accommodate a third party’s requirements, given the owner’s rights and existing contractual commitments, the Secretary of State is unlikely to require access to be provided. If he were to do so, the terms would need to reflect at least the cost to the infrastructure owner of backing off their own production and/or another party’s contracted usage to accommodate the third party’s (i.e. be based on the concept of opportunity cost).”

1. It seems to me that this guidance would only have been relevant if the Kinnoull owners, recognising that there was insufficient capacity on the Andrew platform to process gas from the Kinnoull Field and that the Andrew owners could not be compelled to construct a new gas processing facility on the platform, had asked the Andrew owners to reduce their own production of gas in order to create spare processing capacity. There is no evidence that such a possibility was ever contemplated or that a reasonable operator would have contemplated it. Amongst other consequences, “backing off” production from the Andrew Field would presumably have rendered the Andrew owners permanently unable to perform their Agreements with Scottish Power. The only significance of the guidance, in my view, is that – consistently with the scope of the legislation – the scenarios discussed are all concerned with providing access to infrastructure which has already been built and contain no suggestion that the Secretary of State could require owners to construct infrastructure in order to accommodate hydrocarbons produced by a third party applicant.

### ICOP

1. I accept that a reasonable operator of the Andrew facilities would have considered that ICOP applied to the negotiations with the Kinnoull owners regarding the tie-in of the Kinnoull Field. This is supported by the uncontradicted opinion of Mr Simmons, the expert on industry practice called by the Andrew owners. It is also apparent from paragraph 4 of ICOP which defines the scope of the code and states that ICOP applies to (1) all UK oil and gas infrastructure on the UK Continental Shelf and (2) all parties negotiating contracts for access to such infrastructure and the provision of infrastructure services by infrastructure owners.
2. Paragraph 10(1) of ICOP states:

“Infrastructure owners should consider all bona fide requests for services and negotiate and offer terms to third parties in good faith, without favour to any particular company or group of companies.”

Consistently with this, it was also the uncontradicted opinion of Mr Simmons, and I accept, that it was reasonable and in line with industry practice for the Andrew owners to respond positively to the request for access made by the Kinnoull owners and to enter into negotiations with them. Further provisions of ICOP relevant to such negotiations are paragraph 12.1(1), which states that tariffs and terms offered and agreed between parties should be fair and reasonable, such that risks taken are reflected by rewards; and paragraph 12.2, which deals with liabilities and indemnities and indicates (among other things) that “bona fide enquirers should indemnify the owners against liabilities and losses arising out of tie-in or modification activity”, although such indemnities should generally be subject to a reasonable cap.

1. Although, as discussed, I do not consider that the statutory powers of DECC went beyond ordering the provision of access to existing infrastructure and extended to requiring an owner to construct new processing facilities, I accept that ICOP had a broader scope. Paragraph 12.1(3) states (emphasis added):

“Where capacity is not available within the existing infrastructure and the owner does not wish directly to incur the additional capacity, the infrastructure owner is expected to provide the incremental capacity, but it is the responsibility of the bona fide enquirer to fund such investment, including compensation for those costs and exposures agreed by the parties, in line with normal industry practice.”

It seems to me a moot point whether the expectation expressed in this provision of the code extends to the performance of major construction works of the kind carried out in this case, but I think it reasonable for an operator to treat it as doing so.

1. Scottish Power did not challenge the witness evidence adduced by the Andrew owners from individuals involved in the negotiations that it was their understanding that ICOP applied to the negotiations and that it was in fact taken into account. There was ample confirmation of this in the contemporaneous documents, starting with the letter sent on 13 February 2009 on behalf of the Kinnoull owners enclosing their request for an offer of services, which stated that it was their intention “to progress this enquiry with full adherence to the principles contained within the UKCS Infrastructure Code of Practice”.
2. The witness evidence indicated that the perceived relevance of ICOP was in the guidance that it gave with regard to the terms offered by the Andrew owners to the Kinnoull owners and in particular the expectation that these should be fair and reasonable.
3. I accordingly find that the Andrew owners did, as a reasonable operator in their position would have done, take account of and seek to comply with the provisions of ICOP in negotiating the contract made with the Kinnoull owners.

### Referral to DECC

1. The witnesses called by the Andrew owners also gave evidence that they believed that DECC had the power to intervene in the negotiations (on request) and to resolve a dispute by imposing terms for access, and that this was something that BP was keen to avoid.
2. Paragraph 8(1) of ICOP states:

“To ensure that timely action is taken to address issues that might impact on progress, bona fide enquirers undertake to apply for a notice from the Secretary of State to exercise statutory powers regarding access to the infrastructure in question if satisfactory negotiations for access have not been concluded within 6 months of the submission of the automatic referral notice.”

In accordance with this procedure, the Kinnoull owners on 14 April 2010 served such an automatic referral notice (“ARN”) for host services on the Andrew owners. Pursuant to Part 1 of the ARN, the Kinnoull owners undertook to apply for a notice from the Secretary of State to secure access to the infrastructure belonging to the Andrew owners if satisfactory negotiations for access had not been concluded within six months. A copy of the ARN was sent to DECC and DECC was subsequently kept informed of the progress of the negotiations.

1. I accept that the participants in the negotiations believed that, if agreement could not be reached on terms of access, the dispute could in principle be referred to DECC. Indeed, if the dispute was about the terms on which access was to be afforded to the pipelines owned by the Andrew owners, I consider that the Secretary of State would have had the power to impose terms, even though he could not have compelled the Andrew owners to construct new processing facilities. I also accept that a referral to DECC was something that BP was concerned to avoid, both because the outcome of the referral would not be predictable and because BP was anxious to maintain a good relationship with DECC and avoid any risk of criticism.
2. For that very reason, I do not consider that there was ever any real likelihood that the Kinnoull owners would make an application to DECC. I have mentioned that BP owned a substantial majority interest in the Kinnoull Field, as well as in the Andrew Field. For all but the very last period during which the negotiations took place, the Andrew owners and the Kinnoull owners were in fact each represented in the negotiations by BP. For this purpose, different individuals were appointed within BP to represent their interest in each field. Mr Meyer, and later Mr Hasan, represented the Andrew owners, while the Kinnoull owners were represented by Mr Costello. All three individuals were called as witnesses at the trial. I have no doubt that the representatives on each side sought to secure terms favourable to their interest, but it was clear from their evidence that they all regarded themselves as working towards a common goal. It was not of great overall significance to BP what balance was struck between the interests of the Andrew owners and the Kinnoull owners, since a disadvantage to them in one capacity constituted a benefit to them in the other. A key objective of the negotiators in these circumstances was to gain the support of the minority owners on each side for terms on which agreement could be reached so that the project which BP wanted to undertake could proceed. I find it difficult to contemplate in the circumstances that BP would ever have allowed a situation to arise in which DECC was asked to intervene.
3. The evidence of Mr Simmons based on his experience in the industry was that parties to such a negotiation would not normally review the legislation to analyse exactly how far the statutory powers of DECC extended and would simply assume that DECC had power to make a determination, if requested to do so. I accept that it would have been reasonable for an operator in the position of the Andrew owners to proceed on that basis and to treat a referral to DECC as a possibility that they would wish to avoid.

### Commercial considerations

1. It was quite clear from the evidence that the overwhelming motivation of the Andrew owners in negotiating and entering into the agreement made with the Kinnoull owners consisted in the commercial benefits which the Andrew owners expected to derive from the AAD works and from the tie-in. This is cogently illustrated by the documentation prepared in order to obtain approval internally within BP for the project. As explained by Mr Hasan, the Andrew Area Business Manager at BP for part of the relevant period, BP operates a detailed and rigorous approval process, known as the Capital Value Process. There are five stages to this process, known as Appraise, Select, Define, Execute and Operate. At the end of each stage, approval must be obtained to proceed to the next stage. For the purpose of seeking such approval, a detailed decision support package is prepared for those involved in the decision to consider. This documentation sets out in detail the reasons for seeking approval.
2. The documents by which approval was sought at each stage of the project were included in the trial bundles. They are lengthy documents. None of them contains a reference to ICOP or the potential exercise of any statutory power. All the reasons given for requesting approval are commercial reasons.
3. The two key points in the process of reaching agreement for the AAD works and the tie-in were the execution of a (non-binding) term sheet in December 2009 and the execution of the JDA in June 2011. Before the term sheet could be executed, BP’s internal procedures required a document known as an “Authority to Negotiate” to be prepared and signed by senior BP executives. The reasons why BP wished to proceed with the project are set out in this document under the heading “Why This Project?”. The reasons are all commercial. There is no mention of ICOP or the possibility of a referral to DECC. Mr Meyer, who was BP’s Andrew Area Business Manager at the time, confirmed in evidence that the document accurately summarised BP’s reasons and that, for the reasons given, BP considered that the project was in its own commercial interests.
4. Similarly, before the JDA could be executed, BP’s internal procedures required a Finance Memorandum to be prepared and signed by senior executives, giving authority to enter into the agreement. The Finance Memorandum contains a summary, under the heading “Why This Project?”, of BP’s reasons for entering into the JDA. Again, they are all commercial reasons. No mention is made anywhere in the Finance Memorandum of ICOP or the possibility of a referral to DECC. BP’s witnesses confirmed that the document accurately summarised BP’s reasons for entering into the JDA.
5. No witness evidence was adduced to explain the reasons of the other Andrew owners for agreeing to enter into the JDA. There is nothing to suggest that they were influenced by anything other than commercial reasons.
6. I find on the evidence that the decision of the Andrew owners to shut in the Andrew field to carry out the AAD works was reached for reasons which were predominantly if not entirely concerned with their own commercial interests.

## Concluding comments

1. I mentioned earlier that I have no doubt that an operator acting reasonably and prudently in the conduct of its own undertaking would have taken the decision to shut in the Andrew Field to carry out the AAD works given the economic benefits which the Andrew owners stood to gain from the project. The position of the Andrew owners, however, was that economic benefits are not to be taken into account in applying the RPO standard. On their conception, a Reasonable and Prudent Operator in deciding whether to carry out works to tie in another oil and gas field takes account of and seeks to comply with a voluntary industry code of practice and the possibility of a referral to DECC, but takes no account of the costs and benefits of the project for its business. There is nothing in the language of the definition to support such an interpretation. In particular, there is nothing in the definition which provides any basis for disregarding any factor which a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances and conditions would have taken into account. The effect of excluding economic factors from consideration seems to me to be to divorce the RPO standard from commercial reality and render it totally artificial.
2. I can only suppose that the Andrew owners adopted this position because they recognised that, if the first limb of the definition of a Reasonable and Prudent Operator was ‘read down’ in the way they proposed so as to require only that the operator is acting in good faith and the second limb was then given its full reach, the result would be absurd. On that basis, provided only that they do not act in bad faith, the Sellers could decide not to provide, install, operate, repair and maintain the Sellers’ Facilities without violating Article 7.1 whenever it is to their financial advantage not to do so. An interpretation which has that result is manifestly unreasonable. In order to avoid it, the Andrew owners have been led – in addition to emasculating the first limb of the definition – to adopt an untenable interpretation of the second limb as well. That is a yet further reason why their interpretation of the RPO definition cannot be accepted.
3. My answer to the second preliminary issue is therefore that in deciding to shut in the Andrew Field to carry out the AAD works the Andrew owners did not comply with the Standard of a Reasonable and Prudent Operator. In not operating the Sellers’ Facilities at the relevant times since 9 May 2011 pursuant to that decision, they were accordingly in breach of Article 7.1 of the Agreements.

# Issue 3

“On the proper construction of the Agreements, absent an Article 15 Event, does Article 16 provide a comprehensive contractual remedial framework in respect of each breach of the Agreements alleged by the Buyer with the result that, if the Sellers are held to have committed any such breach the Buyer’s remedy is limited to delivery of Default Gas at the Default Gas Price?”

1. Although the third issue is framed in general terms, the only breaches of the Agreements alleged by Scottish Power are breaches of Article 7.1 in failing by reason of the shut-in of the Andrew Field to maintain and operate the Sellers’ Facilities necessary to produce and deliver the required natural gas at the relevant times since 9 May 2011.[[4]](#footnote-4) In paragraph 27 of the Re-Amended Particulars of Claim, Scottish Power claims damages for loss caused by these breaches calculated as:

“the difference between the price that would have been payable under the Agreements in respect of the quantities of natural gas that should have been delivered in respect of the period from 8 May 2011 to early July 2014, if the Agreements had been performed, and the cost to the claimant of acquiring the same quantities of natural gas from alternative sources …”[[5]](#footnote-5)

I observe in passing that – assuming, as I do, that there was at all relevant times an available market – the cost of acquiring gas from alternative sources should in principle be assessed by reference to the market price of natural gas. Thus, while the cost actually incurred by Scottish Power in buying gas from alternative sources may be relied on as evidence of the market price, it is not itself the measure of Scottish Power’s loss.

1. The Andrew owners maintain that Scottish Power’s claim for damages is excluded by the terms of Article 16. It is their case that Article 16 provides a comprehensive contractual remedial framework which applies in any circumstances where the Seller fails to deliver the required natural gas including circumstances where the failure to deliver occurs as a result of a breach of Article 7.1. As mentioned earlier, under the Article 16 regime the Buyer’s sole remedy is an entitlement to receive Default Gas in a like quantity as the Sellers have failed to deliver the Default Gas Price (defined as 70% of the Contract Price) once deliveries resume.
2. Before examining the parties’ arguments on this issue, I will first outline the regime established by Article 16 in more detail.

## The Article 16 regime

1. Article 16.1 provides:

“In respect of any Day … on which an underdelivery occurs, a quantity equal to the difference between the amount properly nominated under this Agreement … and the amount delivered by the Seller shall be calculated and such quantity shall be classified (subject to the provisions of Clause 16.3) as ‘Default Gas’.”

1. Article 16.2 provides a mechanism whereby quantities of Default Gas to which Scottish Power becomes entitled are aggregated on a monthly basis and are then drawn down when deliveries are next made so that the Default Gas Price is payable until all the gas classified as Default Gas has been delivered.
2. Article 16.3 provides that there shall not be treated as Default Gas any amount which the Seller did not deliver by reason of Force Majeure.
3. Article 16.4 deals with the situation where the Agreement is terminated at a time when there is an outstanding amount of Default Gas which has not been delivered. The clause provides for a payment to be made by the Seller to the Buyer in that event in accordance with a set formula – which is, broadly, the difference between the Contract Price and the Default Gas Price as at the date of termination of the Agreement multiplied by the quantity of Default Gas which is outstanding.
4. Article 16.5 establishes a procedure whereby, in respect of any day on which there is an underdelivery and for which the Sellers had notified the Buyer before the Buyer was required to make its nomination for that day that their ability to deliver natural gas on that day would or might be restricted for any reason, the Sellers may challenge the amount nominated by the Buyer. Such a challenge may be made if the Sellers:

“are of the opinion that the amount nominated by the Buyer is greater than the maximum amount which it is reasonably to be anticipated that in the absence of the Seller’s notice ... and the knowledge thereby obtained by the Buyer of the restriction in the Seller’s ability to make deliveries the Buyer would have properly nominated for the purposes of and in the ordinary course of its business (‘the amount actually required by the Buyer’).”

The object of this provision is plainly to prevent the Buyer from exploiting knowledge that there is going to be an underdelivery by nominating more natural gas for delivery than it would otherwise have done, so as to get the benefit of the lower Default Gas Price. If there is a dispute about whether the amount nominated was greater than the amount actually required by the Buyer and the parties cannot reach agreement, the clause provides for an expert to determine how much natural gas is to be classified as Default Gas.

1. The provision at the centre of the dispute is Article 16.6. This states:

“The delivery of Natural Gas at the Default Gas Price and the payment of the sums due in accordance with the provisions of Clause 16.4 shall be in full satisfaction and discharge of all rights, remedies and claims howsoever arising whether in contract or in tort or otherwise in law on the part of the Buyer against the Seller in respect of underdeliveries by the Seller under this Agreement, and save for the rights and remedies set out in Clauses 16.1 to 16.5 (inclusive) and any claims arising pursuant thereto, the Buyer shall have no right or remedy and shall not be entitled to make any claims in respect of any such underdelivery.”

## The dispute

1. It is apparent from the width of the language used that, within its field of operation, Article 16.6 is intended to leave no room for any remedy apart from the delivery of Default Gas (or payment in lieu under Article 16.4 if the Agreement is terminated). However, the field of operation of the clause is limited. It does not apply to all rights, remedies and claims but only to rights, remedies and claims “in respect of underdeliveries by the Seller under this Agreement”.
2. The term “underdelivery” is defined in Article 1.1 to mean:

“a failure by the Seller to deliver an amount of Natural Gas which the Seller was obliged to deliver in accordance with the Buyer’s proper nomination and of which the Buyer was able to accept delivery and ‘underdeliver’ and ‘underdelivered’ shall be construed accordingly.”

The obligation to deliver an amount of Natural Gas in accordance with the Buyer’s proper nomination is contained in Article 6.12 of the Agreements, which provides that (subject to the provisions of Article 5):

“the Seller shall deliver on each Day at the Delivery Point the quantity of Natural Gas properly nominated by the Buyer under this Agreement for delivery on such Day.”

1. During the period of the shut-in, Scottish Power continued to nominate quantities of natural gas for delivery on each day, although no natural gas was being produced. (As mentioned earlier, even if no such nominations had been made in respect of any week, there would have been deemed nominations pursuant to Article 6.13(3) for each day in that week consisting in the most recent preceding daily nomination in force.) There is no suggestion that the nominations were not “proper nominations” (as defined in the Agreements) nor that Scottish Power was unable to accept delivery of any gas which it nominated. There was, therefore, on each day when the Andrew owners did not deliver the amount of natural gas which they were obliged to deliver under Article 6.12, both a breach of Article 6.12 and an “underdelivery”, as that term is defined. It is common ground that, pursuant to Article 16.6, Scottish Power is not entitled to make a claim for damages for these breaches of Article 6.12 of the Agreements and that the only remedy available for them is the remedy of Default Gas.
2. The issue is whether Scottish Power’s claim for damages for breach of Article 7.1 of the Agreements is also a claim (or involves the assertion of a right or seeks a remedy) “in respect of underdeliveries” within the meaning of Article 16.6. The Andrew owners contend that it is and that the only remedy available to Scottish Power for this breach too is therefore the remedy of Default Gas. Scottish Power disputes this and argues that under the scheme of the Agreements there is a distinction between a failure to deliver gas which results from a breach of Article 7.1 and a failure to deliver gas which occurs despite compliance with Article 7.1. Scottish Power accepts that in the latter case the only remedy is Default Gas but contends that in the former case the injured party is entitled to claim damages. Counsel for Scottish Power submitted that this is a commercially sensible contractual scheme whereas, by contrast, the contractual scheme put forward by the Andrew owners lacks commercial sense as it makes the inclusion of Article 7.1 in the contract pointless and the question of whether or not it has been complied with it essentially irrelevant as the financial remedy is the same in each case.
3. The dispute therefore turns on what is meant by a claim (or right or remedy) “in respect of” an underdelivery and whether Scottish Power’s claim for damages for breach of Article 7.1 is connected with the underdeliveries which occurred during the period of the shut-in in such a way as to fall within this description.

## Scottish Power’s case

1. Scottish Power’s case is that a claim “in respect of” an underdelivery is a claim for which it is necessary to establish, as part of a cause of action, an underdelivery as defined in the Agreements. A remedy in respect of an underdelivery is a remedy in circumstances where, in order to establish the claim or right to which the remedy attaches, it is necessary to establish an underdelivery as defined. In many cases, the right in question will be asserted by a claim – in which event there is no practical distinction between a claim in respect of an underdelivery and a right in respect of an underdelivery. But there may be cases in which the Buyer asserts a right of set-off as a defence to a claim by the Sellers for amounts due under the Agreements; and in such circumstances, if the Buyer’s right of set-off is dependent upon alleging an underdelivery, it will be covered by Article 16.6.
2. I do not accept Scottish Power’s contention that the underdelivery needs to be an ingredient of the claimant’s cause of action. Where a claim is made for breach of contract, it is not necessary for the claimant, in order to establish a cause of action, to prove that it has suffered any loss. I cannot see, however, that the characterisation of a claim for the purpose of Article 16 could sensibly be meant to depend on the legal technicality that loss is not an element of a cause of action in the law of contract (although it is in tort). Furthermore, although Scottish Power could establish a cause of action by proving a breach of Article 7.1 without proof of loss, Scottish Power is seeking substantial and not merely nominal damages. If on analysis proof of underdeliveries is necessary to establish the loss which is the subject of the claim, then I think it clear that the claim actually made by Scottish Power is one “in respect of underdeliveries”, even if a different claim for breach of Article 7.1 would not have been. In any case the remedy sought in that event would clearly be a remedy in respect of underdeliveries.
3. I am not sure whether Scottish Power in fact sought to rely on the point that proof of loss is not a necessary element of a cause of action in contract. The point did not feature explicitly in its counsel’s submissions. The case which they made in relation to the quantum of Scottish Power’s claim, which I will consider soon, was that the claim does not come within Article 16.6 because proof of underdeliveries is not necessary to establish the loss for which damages are claimed by Scottish Power.

## Is proof of an underdelivery necessary to prove a breach of Article 7.1?

1. Although the Andrew owners do not accept Scottish Power’s contention that a claim in respect of an underdelivery is a claim for which it is necessary to establish an underdelivery as part of the Buyer’s cause of action, they advanced an argument that Scottish Power’s claim is indeed such claim. They argued that it is necessary to prove an underdelivery in order to establish a breach of Article 7.1. If this argument were sound, then Scottish Power’s claim would be caught by Article 16.6 even on its own interpretation of the clause.
2. The argument is based on the wording of Article 7.1 which obliges the Seller (in accordance with the Standard of a Reasonable and Prudent Operator) to operate those Seller’s Facilities which are necessary to produce and deliver at the relevant times “the quantities of Natural Gas from the Andrew Field which are required, in accordance with the terms of this Agreement, to be delivered to the Buyer at the Delivery Point.” Under Article 6.12 (quoted at paragraph 131 above), the quantity of natural gas which the Seller is required deliver on each day at the Delivery Point is the quantity of natural gas properly nominated by the Buyer for delivery on that day. Counsel for the Andrew owners submitted that, in order to establish a breach of Article 7.1, it is therefore necessary for Scottish Power to prove that a quantity of gas has been properly nominated by the Buyer for delivery in accordance with the Agreement which has not been delivered because of the Seller’s failure to operate the Seller’s Facilities in accordance with the RPO standard – in other words that there has been an underdelivery. Thus, proof of an underdelivery is a necessary element of the cause of action alleged by Scottish Power.
3. Although this is a possible interpretation of the words of Article 7.1, it is not one which in my view gives a coherent meaning to the clause. If it was always necessary to prove a breach of Article 6.12 in order to establish a breach of Article 7.1, it is difficult to see that Article 7.1 would add anything meaningful to the delivery obligations of the Seller under Article 6.12 or what point there would have been in including it in the Agreement at all. (Of course, it would add something significant if a breach of Article 7.1, unlike a breach of Article 6.12, entitled the Buyer to claim damages at common law rather than being limited to the remedy of Default Gas; but it is common ground that this would not be so if the interpretation of Article 7.1 which I am currently discussing is correct.)
4. Furthermore, as counsel for Scottish Power pointed out, the interpretation makes no sense in a situation where the Seller fails to provide or install the relevant facilities at the outset of the contract in accordance with the Standard of a Reasonable and Prudent Operator. Pursuant to Article 6.13, the right to nominate quantities of gas for delivery did not arise until the Commencement Date, which occurred only when the Sellers’ Facilities had been installed, and therefore did not apply during the installation period. Thus, the interpretation put forward by the Andrew owners leads to the absurd result that there would have been no breach of Article 7.1 and Scottish Power would have had no remedy if the Sellers had simply done nothing after signing the Agreements and made no attempt to provide or install the facilities.
5. The critical point, as I see it, is that Article 7.1 is not itself an obligation to produce and deliver natural gas; rather, it is an obligation to do certain things which are necessary for that purpose. Thus, any breach of the clause is committed when there is a failure to carry out one of the five specified activities in accordance with the RPO standard. But at that stage the Buyer will not (save at most for the following week) have properly nominated quantities of natural gas the delivery of which is prevented by the Seller’s failure to provide, install, repair, maintain or operate the Seller’s Facilities. It makes no sense that a breach of the clause should depend on nominations which have not yet been made (and the size of which is therefore not known) at the time when the Seller’s default occurs – and which the Seller’s default may indeed prevent from being made.
6. In his closing oral submissions Mr McCaughran QC suggested that what is being targeted in Article 7.1 when the clause refers to “the quantities of Natural Gas from the Andrew Field which are required ... to be delivered to the Buyer” is the Delivery Capacity established by Article 6.11. As described earlier, this is the capacity for delivering natural gas from the Andrew Field which the Seller is required to maintain and represents the maximum quantity of gas which the Buyer is entitled to nominate for delivery on any day. However, unless the Buyer does in fact nominate the maximum quantity, the Delivery Capacity is not the quantity which is required to be delivered to the Buyer at the Delivery Point. Moreover, pursuant to Article 6.11 the obligation to maintain the Delivery Capacity only applies from the Commencement Date. In the case posed by Scottish Power, therefore, of a failure to install the Seller’s Facilities at the outset of the contract, the same absurdity would result from this interpretation as from the interpretation put forward by the Andrew owners.
7. In my view, in order to reflect the fact that Article 7.1 is – as Mr McCaughran observed – forward-looking,[[6]](#footnote-6) the reference to the quantities of gas “which are required ... to be delivered” needs to be understood as meaning the quantities of gas which, viewed at the time when the obligation arises to provide, install, operate, maintain or repair the Seller’s Facilities as the case may be, it is reasonably to be anticipated that the Buyer will nominate and the Seller will therefore be obliged to deliver at the relevant future times. I recognise that this interpretation does some violence to the language of the clause – but no more than is necessary, in my opinion, in order to make sense of it.
8. I therefore conclude that it is not necessary for Scottish Power to prove that there has in fact been any underdelivery in order to establish a breach of Article 7.1.

## The Andrew owners’ wide case

1. On the widest formulation of their case, the Andrew owners maintained that Article 16.6 applies – and defines the sole remedy to which the Buyer is entitled – in any situation where there is an underdelivery because the Seller, in breach of an obligation for which the Buyer is claiming relief, fails to deliver natural gas to the Buyer that the Buyer has properly nominated. Thus, as it is not in dispute that Scottish Power made proper nominations and that underdeliveries occurred during the period of the shutdown, Scottish Power has no right or remedy and is not entitled to make any claim, save for Default Gas.
2. In support of their contention that the clause should be given a broad interpretation, counsel for the Andrew owners emphasised the wide language used in Article 16.6. Thus, the clause encompasses “all rights, remedies and claims howsoever arising” (emphasis added) – with the further words “whether in contract or in tort or otherwise in law” added for good measure. These are certainly very wide words, but I cannot see that their scope is relevant to the point in dispute. The use of these words shows that, if the claim is of the relevant kind and the necessary link between the claim and an underdelivery is present, there is intended to be no possible escape from Article 16.6. But it does not follow that the necessary link is intended only to be a loose one. The words emphasised by the Andrew owners seem to me to be of no help one way or the other in identifying the meaning of the phrase “in respect of underdeliveries”.
3. Nor do I regard it as being of any consequence that it is very difficult to see how a claim in tort or otherwise than for breach of contract could involve an underdelivery as a necessary ingredient of the cause of action. As counsel for Scottish Power noted, arguments based on redundancy of language are seldom of much weight in the interpretation of commercial contracts. The inclusion of surplus words is a common consequence of what Hoffmann LJ once described as a determination when drafting “to make sure that one has obliterated the conceptual target”: see Arbuthnott v Fagan [1995] CLC 1396 at 1404D-E; and see also Total Transport Corp v Arcadia Petroleum Ltd [1998] 1 Lloyd’s Rep 351, 357;Beaufort Developments v Gilbert Ash (NI) Ltd [1999] 1 AC 266, 274; Macquarie Internationale Investments Ltd v Glencore UK Ltd[2010] EWCA Civ 697 at para 70 (Lord Neuberger MR).
4. I cannot accept that, for a claim to fall within Article 16.6, it is enough that the same breach of the Agreement has given rise to the claim and also to an underdelivery, if neither the breach which has given rise to the claim nor the loss for which a remedy is claimed depends upon the fact that there has been an underdelivery. In such a case the existence of an underdelivery would simply be a by-product of the breach on which the claimant relies (or a spandrel, to borrow a metaphor from evolutionary biology[[7]](#footnote-7)). It seems to me that the requirement for the claim to be one “in respect of” an underdelivery clearly signifies the need for a closer connection than that.

## The Andrew owners’ narrower case

1. As with the wider version of Scottish Power’s case, I am not sure whether or how seriously counsel for the Andrew owners sought to maintain the position that I have just discussed. Their principal contention was that the necessary connection to bring a claim within Article 16.6 is established if the loss which is the subject of the claim or for which a remedy is sought results from an underdelivery, and that the loss for which Scottish Power claims compensation in this case is caught by Article 16.6 because it is such a loss.
2. The Andrew owners rely on the fact that throughout the period of the shutdown Scottish Power continued to nominate quantities of natural gas for delivery on each day. Assuming these were proper nominations, the fact that no gas was being produced did not (in the absence of Force Majeure) relieve the Sellers of their obligation to deliver the nominated quantities. The failure of the Sellers to deliver the nominated quantity of natural gas on each relevant day thus constituted an “underdelivery” within the definition quoted at paragraph 131 above. Counsel for the Andrew owners pointed out that neither the definition of an “underdelivery” nor Article 16 is concerned with the reason why the underdelivery has occurred. In particular, there is nothing within the definition or the provisions of Article 16 to restrict their scope to the breach of any particular clause of the Agreements. On each day, therefore, when failure to deliver the nominated quantity of gas was caused by the Sellers’ failure to operate the Andrew facilities in breach of Article 7.1, the loss caused by the breach was the result of an underdelivery. The Andrew owners argue that in these circumstances Scottish Power’s claim to recover for compensation for loss caused by the Sellers’ breach of Article 7.1 is a claim “in respect of underdeliveries” which falls within Article 16.6.
3. The answer given by Mr McCaughran QC to this argument is that Scottish Power’s claim is not a claim “in respect of underdeliveries” because, although there were underdeliveries during the period of the shutdown, they do not establish the quantum of Scottish Power’s loss caused by the breach of Article 7.1. As defined in the Agreements, an “underdelivery” is a failure by the Seller to deliver “an amount of Natural Gas which the Seller was obliged to deliver in accordance with the Buyer’s proper nomination”. The existence and size of any underdelivery is therefore determined by the nomination actually made by the Buyer (or, if no nomination is actually made, by the nomination which the Buyer is deemed to have made) under the Agreements. Mr McCaughran submitted that, by contrast, Scottish Power’s damages claim is based on the hypothetical nominations which Scottish Power would have made if the contract had been performed. He argued that the nominations actually made by Scottish Power during the period of the shut-in will be relevant evidence on the question of what nominations would have been made if Article 7.1 had been complied with and the Sellers’ Facilities had been operated, but they are not conclusive of that question. It is ultimately a factual issue whether, if Article 7.1 had been complied with, Scottish Power would have made the same nominations or not.
4. Mr McCaughran further submitted that the point can be tested by asking what the position would have been if Scottish Power had chosen not to make nominations during the period when the Andrew Field was shut in and no natural gas was actually being produced. In that event, there would have been deemed nominations of the same quantity of natural gas for delivery on each day, set by reference to whatever the last daily nomination happened to be. It could not sensibly be suggested that the amounts of these deemed nominations would represent the amounts of natural gas which Scottish Power would actually have nominated for delivery if the Agreements had been performed. This illustrates, he submitted, that proof of underdeliveries is not necessary in order to prove Scottish Power’s loss.

## The crux of the arguments

1. The essential difference between these rival interpretations of Article 16.6, as I see it, is that on the Andrew owners’ case it is sufficient for a claim or remedy to come within the clause that the loss for which the remedy is claimed was in fact caused by an underdelivery, whereas Scottish Power contends that the underdelivery must be a matter which has to be proved in order to establish the loss. The reason why the difference is critical is that it is not, as I accept, necessary as a matter of law for Scottish Power to prove the nominations that it actually made during the period of the shutdown in order to establish the loss which it suffered as a result of the Sellers’ breach of Article 7.1. Since underdeliveries are defined by reference to amounts of natural gas actually nominated, it is therefore not necessary for Scottish Power to prove that there have been underdeliveries. However, it is clear that at least part of the loss that Scottish Power has suffered as a result of the breach of Article 7.1 was caused by the non-delivery of amounts of gas which were in fact the subject of proper nominations, and was therefore caused by underdeliveries.
2. Both interpretations seem to me to be possible meanings of the words used in Article 16.6. The phrase “in respect of” is not one of great precision. A claim for damages for loss caused by an underdelivery is capable of being described as a claim “in respect of an underdelivery” without straining that language beyond its natural and ordinary meaning. Likewise, the remedy claimed for the loss in such a case can fairly be described as a remedy “in respect of an underdelivery”. At the same time, the phrase is capable of being interpreted more narrowly, as it is by Scottish Power, so as to apply only where an underdelivery is something that has to be proved in order to establish the claim or justify the remedy.
3. To decide which interpretation is correct, it is necessary to consider the scheme and commercial purpose of the clause.

## Commercial purpose

1. In her oral closing submissions on behalf of the Andrew owners, Ms Davies QC made the important point that the Default Gas regime is mandatory and applies automatically (subject only to the Force Majeure clause) whenever there is an underdelivery – as it is agreed that there has been on each day during the period when the Andrew owners failed to operate the Sellers’ Facilities in breach of Article 7.1. The question is therefore not whether Scottish Power is entitled to claim damages for losses caused by the Andrew owners’ breaches of Article 7.1 during the relevant period rather than Default Gas. Scottish Power has acquired an entitlement to Default Gas anyway by reason of the underdeliveries which occurred. The question is whether Scottish Power is entitled to claim damages for losses caused by the breach of Article 7.1 in addition to the remedy of Default Gas which it has obtained as compensation for the underdeliveries.
2. It seems to me that Scottish Power’s case, persuasively as it was put by Mr McCaughran, loses much of its force once it is recognised that the Agreements required Default Gas to be calculated throughout the period of the shutdown, and that Scottish Power could not opt out of that process. Mr McCaughran accepted in argument that there cannot be a double recovery but submitted that this can be avoided by taking into account in calculating damages the value of the Default Gas which has accrued to Scottish Power. In other words, Scottish Power will be entitled to damages only for the additional loss suffered by reason of having to buy gas at the market price after credit has been given for the monetary value of the entitlement to Default Gas which Scottish Power has received.
3. I am sure that Mr McCaughran was right to make this concession, as it would be manifestly unjust if Scottish Power could recover damages in the full amount claimed as well as Default Gas as compensation for not receiving natural gas during the period of the shutdown. The concession also recognises that the loss caused by the failure of the Andrew owners to operate the relevant facilities in breach of Article 7.1 during the period of the shutdown is, at least in part, a loss caused by underdeliveries, since if the loss was different there would be no reason why Scottish Power should not receive the benefit of both remedies. However, accepting that there cannot be a double recovery does not in my view cure the objection to the interpretation of Article 16.6 for which Scottish Power contends. It would be an improbable intention to attribute to the parties that, in relation to a quantity of gas for which the Buyer has automatically received an equivalent amount of Default Gas as compensation for its non-delivery, the Buyer should also be free to pursue a claim for another remedy for the failure to deliver that same quantity of gas. The only interpretation which in my view makes coherent sense of the scheme of Article 16 is that Article 16.6 is intended to dovetail with Article 16.1 such that where the loss for which compensation is claimed results from an underdelivery and therefore attracts the remedy of Default Gas, this is the sole remedy available for that loss.
4. I accept that if and in so far as Scottish Power would have nominated amounts of gas if the contract had been performed which it did not in fact nominate for delivery and for which it has therefore not received Default Gas, there is no reason why it should not claim the remedy of damages. However, if and in so far as the quantities of gas that would have been nominated if the contract had been performed were actually nominated and have been compensated by Default Gas, I consider that this is intended to be the exclusive remedy. I cannot see that the hypothetical possibility that the nominations could have been different should affect the remedy available in so far as in fact they were not.

## Constraints on the Buyer’s nominations

1. I would see reason to doubt this interpretation if the Buyer had unfettered freedom to choose what amounts of gas to nominate for delivery, and whether to nominate any amounts for delivery at all, at a time when the Sellers’ Facilities are not in operation. If Scottish Power could have engineered a right to damages by electing not to nominate any amounts of gas for delivery or by making zero nominations, a contractual scheme which prevents damages from being claimed for losses which have in fact resulted from underdeliveries would seem somewhat arbitrary. It would be difficult to see why Scottish Power should be worse off just because it did in fact continue to make positive daily nominations throughout the period of the shutdown.
2. Under the terms of the Agreements, however, Scottish Power did not have such unfettered freedom of choice. In the first place the provisions of Article 6.13 relating to nominations do not merely give the Buyer a power or right to make daily nominations but place an obligation on the Buyer to do so. Moreover, the Buyer is not released from the obligation by notice or knowledge that the Seller will not be able to deliver natural gas. Secondly, as mentioned earlier, the contract specifically addresses the situation where the Buyer fails to give the required notice for any day by providing in Article 6.13(3) that, in that event, the nomination for that day is deemed to be the most recent preceding daily nomination in force. It follows that there always will be an amount of natural gas treated as properly nominated under the Agreement for delivery on any day, irrespective of whether the Buyer has complied with its obligation to nominate a quantity of gas for delivery on that day or not.
3. Mr McCaughran, as I have indicated, emphasised the possibility that, if the contract had been performed, Scottish Power might have nominated different quantities of gas from the quantities actually nominated. Assuming that the nominations in fact made were Scottish Power’s genuine estimates of its requirements, however, this is hardly a contention that Scottish Power could make. The Andrew owners might wish to make it, if they consider that Scottish Power was nominating larger amounts of natural gas during the shut-in than it actually required, knowing that the nominated quantities would not be delivered, in order to get the benefit of more Default Gas or a larger claim for damages. As mentioned earlier, however, Article 16.5 of the Agreements contains a procedure which allows the Sellers to challenge nominations made by the Buyer on precisely such grounds. Thus, if during the period of the shutdown the Andrew owners considered that the amount of gas nominated by Scottish Power for any day was greater than the amount actually required by Scottish Power for the purposes and in the ordinary course of its business, there are three possibilities: the Andrew owners must either (i) have exercised their right to challenge the nomination and succeeded in having the nominated quantity adjusted or (ii) have challenged the nomination unsuccessfully or (iii) have chosen not to exercise their right of challenge under Article 16.5. In any of these circumstances it would seem unreasonable that they should be able to reopen the question in the context of a damages claim. That possibility does not arise if any such claim for damages is excluded by Article 16.6. It also seems to me to make no sense that a possibility – supposing that it does exist – of arguing that Scottish Power would have nominated a lower quantity of gas if the contract had been performed and therefore suffered a smaller loss than the loss for which it has been compensated through the remedy of Default Gas should create scope for a claim for damages which would not otherwise be available.
4. The reason why this is not in my view a possibility is that a claim for damages based on the failure to deliver only part rather than the whole quantity of natural gas nominated for delivery on any particular day is still, to that extent, a claim for compensation for a loss resulting from an underdelivery. Suppose that the nomination actually made by Scottish Power for a particular day was for 10,750 MWh of gas (nearly the maximum set by the Delivery Capacity) but that, if the Andrew owners had been operating the relevant facilities in accordance with Article 7.1 of the Agreements, Scottish Power would have nominated an amount equal to the TDCQ of 8,269 MWh. In that case the failure by the Andrew owners to deliver the amount of natural gas which they were obliged to deliver in accordance with Scottish Power’s proper nomination was not caused by their breach of Article 7.1 as regards the full quantity but only as regards 8,269 MWh. The 8,269 MWh would still, however, be an amount of natural gas which the Andrew owners had underdelivered within the contractual definition, albeit not the whole underdelivered amount. By the same token, a claim for damages for loss caused by the failure to deliver that quantity of 8,269 MWh would still be a claim in respect of an underdelivery.
5. It remains to consider the opposite possibility – that Scottish Power would have nominated larger quantities if the contract had been performed. It is difficult to see how Scottish Power could credibly make such a claim on the facts of the present case or why the Sellers would ever want to do so. It is possible to envisage a situation, however, in which the Buyer chose to make lower nominations of gas for delivery during a period when the Sellers’ Facilities were shut down in breach of Article 7.1 than it would otherwise have done with the aim of claiming damages for the Sellers’ breach rather than receiving the remedy of Default Gas.
6. There are constraints on the Buyer’s freedom to adopt such a strategy resulting from the take or pay provisions in Article 9. Pursuant to Article 9.1(2), any daily quantities properly nominated by the Buyer which the Seller does not deliver for any reason and which are classified as Default Gas are excluded from the Take or Pay Quantity. However, if the Buyer nominates for delivery over the course of a Contract Year less gas than its ACQ, it will as a general rule be obliged to pay for the shortfall irrespective of whether the Seller would in fact have delivered more gas if larger quantities had been nominated. In order, therefore, to avoid incurring a liability to pay for gas which was not delivered and which the Andrew owners were not in a position to deliver during the period of the shutdown, Scottish Power had to nominate for delivery sufficient quantities of gas to reach the Take or Pay Quantity for each relevant Contract Year.
7. It could nevertheless be the case, and I shall assume to test the argument that it was the case, that the Buyer would have nominated larger quantities of gas than these minimum Take or Pay Quantities if the Sellers’ Facilities had been operated and gas had actually been delivered during the relevant period. If the amount of natural gas which the Sellers were obliged to deliver in accordance with the Buyer’s proper nomination for a particular day was zero, there could be no “underdelivery” of gas for that day. I will suppose, however, that the Buyer could show that, had the facilities been operating, it would have nominated a particular, positive amount of gas for delivery. The question is whether the Buyer can then claim damages for loss caused by having to buy this quantity at the market price rather than at the contract price.
8. It seems to me that in such a case the Buyer would be entitled to claim damages and that its claim would not be a claim in respect of an underdelivery since *ex hypothesi* there would be no underdelivery. But I do not think that the Buyer would be entitled to recover, without deduction, the difference between the contract price and the market price of the gas that it would have purchased if the contract had been performed. If the Buyer had nominated the quantity of gas that it actually required, it would not have received delivery of that quantity but it would have received a compensatory benefit in the form of an entitlement to Default Gas. On the facts I have assumed, the cause of the Buyer’s failure to receive that benefit is not the Sellers’ breach of contract; it is the Buyer’s own tactical choice not to nominate the amount of natural gas that it actually required for use in its business, and to make a zero nomination instead. The Buyer would in those circumstances have to give credit for the value of the Default Gas which it had chosen not to receive.

## Further hypothetical scenarios

1. Counsel for Scottish Power raised some further hypothetical scenarios to test the interpretation of Article 16. They submitted that, on the Andrew owners’ interpretation of the clause, it effectively gives the Sellers the option, whenever they are so minded, deliberately to withhold a delivery and incur a future liability in respect of Default Gas. For example, they might do so if they believed that they could make a greater profit by selling the gas to a third party (in breach of Article 3.3) and incurring a consequent liability to deliver Default Gas than the profit they would have made by selling the gas to the Buyer at the contract price. It was submitted that an interpretation which leaves it open to the Sellers to profit from such a deliberate breach of contract is not reasonable.
2. There is no rule of law that prevents the exclusion of liability arising from a deliberate act by a contracting party. It is always a matter of construction of the clause in question, and whether or to what extent the deliberateness of a breach is a relevant factor depends on the circumstances: see Suisse Atlantique Société d’Armement Maritime v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361, 435 (Lord Wilberforce); Astrazeneca UK Ltd v Albemarle International Corp [2011] EWHC 1574 (Comm), paras 288-301. Article 16 is not in any event a clause that excludes liability. Rather, it is a clause that excludes common law remedies for the breaches to which it applies and replaces them with a special contractual remedy. The fact that a breach of contract is deliberate or that the party in breach makes a profit from it does not, save in very exceptional circumstances, affect the remedy available at common law. It is a basic principle that the object of an award of damages for breach of contract is to compensate the claimant for loss sustained as a result of the defendant’s breach and not to deprive the defendant of any gain. Moreover, this principle applies and the measure of damages is the same irrespective of whether the breach was deliberate, careless or entirely innocent. I see no reason to infer that the contractual remedy with which the remedy of damages is replaced by Article 16 was intended to operate differently. In particular, I see no reason to infer that the applicability of the Article 16 regime is intended to depend on whether the breach of contract which has given rise to a claim (or to a right or remedy) was deliberate or one from which the Seller calculated that it would profit.
3. A final scenario raised by counsel for Scottish Power is the case mentioned earlier where the Sellers fail to install the facilities in the first place in breach of their obligation under Article 7.1. Such a failure, had it occurred, could potentially have constituted a repudiatory breach of the Agreements, leading to their termination by the Buyer. Such a repudiatory breach might also occur if, at a time when they were not contractually entitled to terminate the Agreements, the Sellers simply decided to close down the Andrew facilities permanently, or announced their intention to shut down the Andrew Field for several years without making any commitment as to whether or when they would restart production.
4. If Scottish Power accepted such a repudiatory breach of contract as bringing the Agreements to an end, then under ordinary common law principles, unless the claim is excluded, Scottish Power would be entitled to claim damages quantified as the difference between the price that it would have paid for the gas that should have been delivered and the cost of obtaining the same quantity of gas from alternative sources during the remaining period of the Agreements. On behalf of the Andrew owners, Ms Davies QC accepted that such a claim would not fall within the scope of Article 16.6. In my view, that concession was rightly made. An underdelivery only occurs when there has actually been a proper nomination of gas for delivery, so that a claim by Scottish Power to recover damages for the lost benefit of future deliveries of gas during the remaining period of the Agreements would not be a claim in respect of underdeliveries and therefore would not fall within the regime of Article 16.6. The claim would relate to prospective non-deliveries which had not yet occurred and could never do so as a result of the termination of the Agreements. Since the Buyer would not receive the delivery of Default Gas (or payment in lieu) in compensation for its loss, it makes sense that it is free in this situation to pursue its common law rights and remedies.

## Conclusion

1. For the reasons given, I do not accept that there can only be a breach of Article 7.1 when there is an underdelivery. Nor do I consider that Default Gas is the only remedy which is ever available for loss caused by a breach of Article 7.1. As discussed, there can be cases where a breach of Article 7.1 causes loss otherwise than by way of an underdelivery, and for such losses – which do not give rise to the remedy of Default Gas – the remedy of damages is in my view available. The fact that the remedy of Default Gas is not available for every breach of Article 7.1 and that there are circumstances in which the Buyer is entitled to recover damages for breach of that clause shows that its inclusion in the Agreements is not pointless or otiose and answers that objection raised by Scottish Power. But in circumstances where a breach of Article 7.1 causes loss by way of an underdelivery for which the Buyer automatically receives compensation pursuant to Article 16 in the form of Default Gas, that remedy is in my opinion intended to be the sole remedy available for the loss. Thus, in so far as the loss caused to Scottish Power by breach of Article 7.1 has been compensated by an entitlement to Default Gas, any claim to recover damages for that loss is a claim “in respect of underdeliveries” which is excluded by Article 16.6.
2. On the facts of this case it is not in doubt or dispute that the failure of the Andrew owners to operate the Andrew platform in breach of Article 7.1 resulted in failure to deliver amounts of natural gas properly nominated for delivery by Scottish Power. I conclude that, in so far as it is seeking compensation for loss caused by the failure to deliver those amounts of natural gas, Scottish Power’s claim in this action is a claim “in respect of underdeliveries” within the meaning of Article 16.6. Accordingly, Scottish Power is not entitled to maintain a claim for damages for such loss and is limited to the remedy of Default Gas provided by Article 16. Scottish Power will only be entitled to maintain a claim for damages if and in so far as it is able to show that the amounts of gas that it would have properly nominated for delivery during the relevant period if Article 7.1 had been complied with are greater than the amounts which it in fact properly nominated (and which have been replaced by equivalent amounts of Default Gas). Even then, if the discrepancy was the result of a tactical choice, Scottish Power would have to give credit (as I have outlined) for the value of the Default Gas which it has chosen to pass up.
3. In reaching my conclusions on this issue, I have not overlooked the presumption that parties do not intend to abandon remedies that arise by operation of law. It seems to me that the presumption must be less strong where the common law remedy is not simply excluded but is replaced by a different (and valuable) contractual one. I am satisfied in any case that – to the extent I have indicated – the terms of the Agreements make it sufficiently clear that this was intended.

# Issue 4

“Is the Buyer’s claim for damages pursuant to paragraph 27 of the Re-Amended Particulars of Claim excluded by Article 4.6?”

1. The Andrew owners contend that, even if they are wrong in maintaining that Scottish Power’s only remedy for the Sellers’ breaches of Article 7.1 is the delivery of Default Gas under Article 16, then the Court should still not award Scottish Power any damages because Scottish Power’s claim for damages is in any event excluded by Article 4.6 of the Agreements.
2. Article 4.6 provides:

“Save as expressly provided elsewhere in this Agreement, neither Party shall be liable to the other Party for any loss of use, profits, contracts, production or revenue or for business interruption howsoever caused and even where the same is caused by the negligence or breach of duty of the other Party.”

1. The Andrew owners contend that Scottish Power’s claim is one for “loss of use” within the meaning of Article 4.6. They submit that the nature of the claim is that Scottish Power lost the benefit expected to be derived from the use of gas which the Andrew owners had agreed to supply. Alternatively, they contend that the loss for which damages are claimed is a “loss of production”.
2. In my view, these contentions are untenable. It is clear that Article 4.6 is not intended to exclude liability for all losses caused by the other party’s breach of duty – otherwise it would have said so. Rather, it excludes liability for certain specified types of loss. What these types of loss have in common is that they do not represent the basic or normal measure of loss caused by a breach of contract, but are all kinds of further loss that a party may suffer which go beyond that basic measure.
3. Although the breach of Article 7.1 of the Agreements alleged by Scottish Power in this case is not a breach of an obligation to deliver goods, the loss suffered was caused by non-delivery and the measure of damages is the same. Pursuant to section 51(2) of the Sale of Goods Act 1979, the general measure of damages in an action for damages for non-delivery is “the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract”. Subsection (3) goes on to provide that, where there is an available market, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market price of the goods at the time or times when they ought to have been delivered. Applying the distinction drawn in *McGregor on Damages* (19th Edn, 2014) at paras 3-008 – 3-012, the difference between the contract price and the market price of the goods is the normal loss. All losses going beyond the normal measure may naturally be described as “consequential losses” – which is the description adopted by *McGregor*. There is, however, a line of authority which has interpreted the term “consequential loss” where it appears in contractual exclusions of liability more narrowly, as referring only to losses which fall within the second limb of the test of remoteness of damage formulated in Hadley v Baxendale (1854) 9 Ex 341: that is, losses that could be expected to follow from the breach of contract under special circumstances known to both parties. I respectfully agree with the late Harvey McGregor that, as he maintained over many editions of his treatise, this unnatural interpretation of the term “consequential loss” is to be deprecated: see *McGregor on Damages* (19th Edn, 2014) at paras 3-013 – 3-016. The term “consequential loss” is not used in Article 4.6 and so the problems which can occur when this term is used do not arise in the present case. To avoid any ambiguity, however, I shall use a different label to describe all losses which go beyond the normal measure of loss, and will refer to such losses as “secondary losses”.
4. In the present case, the damages claimed by Scottish Power represent only the normal loss which arose from the need for Scottish Power to buy alternative supplies of gas in the open market to replace the natural gas which the Andrew owners should have delivered under the Agreements. Had there been difficulty or delay in procuring replacement gas, various types of secondary loss might also naturally have been suffered. Such losses would potentially have included losses resulting from Scottish Power’s inability to use the gas for the purposes of its own business. I think it clear that this is what is meant by “loss of use” in Article 4.6. The reference to “loss of profits” is directed at the possibility that, if Scottish Power was not able to buy gas to replace the gas which the Andrew owners should have delivered, it could lose profits which it would otherwise have made from selling the gas or using it in its business. “Loss of contracts” addresses the possibility that Scottish Power could suffer the cancellation of contracts or lose the opportunity to enter into contracts because of the Sellers’ failure to deliver natural gas which Scottish Power needed in order to perform those contracts. I interpret “loss of production” as meaning loss resulting from inability to produce other products (for example, to generate electricity) because gas is not delivered under the Agreements. “Loss of revenue” covers similar ground to “loss of profits”. The last item in the list, “business interruption”, again overlaps with other items and further indicates the general type of loss which the clause is concerned to exclude.
5. There is no claim made by Scottish Power in this case that it lost revenue or profits or any other benefit expected to be derived from the use of the natural gas which the Andrew owners should have delivered. That is presumably because Scottish Power was at all times able timeously to acquire natural gas from other sources in substitution for the gas which the Andrew owners failed to deliver. The only expected benefit which Scottish Power claims to have lost is the benefit of buying the gas which should have been delivered under the Agreements at a price below the market price. That is not a “loss of use”. Nor is it “loss of production”, which in my view plainly refers to production lost by Scottish Power, not to the Seller’s failure to produce gas which was a cause of loss to Scottish Power. Accordingly, Scottish Power’s claim does not fall within the exclusion.
6. I have reached this conclusion without relying on the principle that appropriately clear words are needed to exclude a remedy for breach of contract that would otherwise arise as a matter of law. But that principle further reinforces my conclusion. So too does reference to authority.
7. In Ease Faith Ltd v Leonis Marine Management Ltd [2006] 1 Lloyd’s Rep 673 the claimant hired a tug from the defendant to tow a vessel which the claimant had sold as scrap and undertaken to deliver to the purchaser. The defendant was found to be in breach of a contractual obligation to proceed “at utmost dispatch”, with the result that the vessel was delivered late and the claimant received a reduced price. The defendant argued that its liability for this loss was excluded by a clause in the hire contract which provided that “neither the tug owner nor the hirer shall be liable to the other party for loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever”. Andrew Smith J rejected this defence, interpreting the expression “loss of profit” on which the defendant sought to rely as referring to losses similar in kind to “loss of use” and “loss of production” and as directed to protecting the tug owner from a claim of loss of productive use of the tow or the hirer from a claim of loss of productive use of the tug (see paras 142–144).
8. In Transocean Drilling UK Ltd v Providence Resources plc[2014] EWHC 4260 (Comm) at paras 164–165, Popplewell J similarly interpreted the expression “loss of use” as connoting the loss of expected profit or benefit to be derived by the claimant from the use of property or equipment which the defendant had contracted to supply. The relevant claim in that case was a claim by Providence to recover certain “spread costs”, comprising the costs of personnel, equipment and services contracted by Providence from third parties, which were wasted as a result of delay by Transocean in supplying a drilling rig that Providence had hired from Transocean. Popplewell J rejected the arguments of Transocean that the claim was for loss of use of the personnel, equipment and services provided by third parties or alternatively was for loss of use of the rig, noting (at para 167) that, if the clause were to be construed as Transocean contended, the exclusion would cover all losses which Providence might conceivably suffer by way of damages for which Transocean would otherwise be liable.
9. It seems to me that in the present case too, if Article 4.6 were to be construed as the Andrew owners contend, the exclusion would cover all losses which Scottish Power might conceivably suffer rather than, as is plainly the intention, excluding only certain types of loss. Furthermore, the approach of Andrew Smith J in Ease Faith and that of Popplewell J in Transocean Drilling support the conclusion that the expressions “loss of use” and “loss of production” are directed to future use of the natural gas which the Sellers agreed to deliver. Those expressions do not apply to the cost of buying gas from alternative sources to replace the gas which the Andrew owners ought to have supplied.
10. Counsel for the Andrew owners made a further argument. They submitted that if – as I have concluded – the expressions “loss of use” and “loss of production” are to be construed as relating only to future benefits that Scottish Power might have obtained had it received the natural gas, Scottish Power on its own case avoided such losses by purchasing replacement quantities of gas. Hence Scottish Power’s claim is for costs incurred in mitigating losses which on its own construction are excluded by Article 4.6. Ms Davies QC and Mr Eschwege cited authority for the proposition that loss incurred in mitigating a kind of loss for which liability is excluded is caught by the exclusion. On this basis they argued that Scottish Power’s claim is excluded by Article 4.6.
11. If this argument worked, it would perform the conjuring trick of extracting from an exclusion of liability for secondary losses (only) an exclusion of liability for the normal loss flowing from a breach of contract as well: in other words it would convert an exclusion of liability limited to certain types of loss into an exclusion of all losses. The perversity of that notion itself shows that something must be wrong with the argument. I take no issue with the starting point that incurring the costs of buying replacement gas which Scottish Power is claiming as damages mitigated types of loss which are excluded by Article 4.6. There is indeed a close connection between the mitigation principle and the normal measure of damages in, amongst other cases, a claim for loss caused by the non-delivery of goods. It is because, where there is an available market, the buyer is reasonably expected to resort to the market to mitigate its loss that the loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract is *prima facie* to be assessed as if the buyer had immediately purchased substitute goods.[[8]](#footnote-8) I cannot, however, accept that, as a matter of law, a loss incurred in mitigating an excluded loss must itself be regarded as a loss of the kind that is sought to be avoided, and therefore as caught by the exclusion.
12. The first and principal authority cited for this proposition is a statement of Rix J in BHP Petroleum Ltd v British Steel plc [1999] 2 All ER (Comm) 544; [1999] 2 Lloyd’s Rep 583. In that case a contract for the supply of steel for a gas pipeline contained a clause (clause 14.5) which excluded liability for (amongst other types of loss) “loss of production”. The pipeline failed and had to be replaced allegedly because the steel supplied was defective and did not comply with the contractual specification. The pipeline was intended to be used by the claimant (BHP) in the production of oil and gas. At a trial of preliminary issues one of the issues was whether various losses allegedly suffered by BHP fell within clause 14.5. Rix J introduced his discussion of the categories of loss claimed by stating (at 568e):

“It will be seen below, when I come to consider individual claims, that in many instances losses are claimed on the basis of mitigation; a greater loss of one kind is avoided by the incurring of a lesser loss of another kind in mitigation of the first. In my judgment, such mitigated loss [*sic*] must be regarded as though it was, for the purpose of cl 14.5, a loss of the kind sought to be avoided.”[[9]](#footnote-9)

1. This statement has to be seen, however, in the context of the discussion which then follows. The first category of loss claimed by BHP was the cost of replacing the pipeline, which Rix J held was not within the scope of clause 14.5. This is consistent with my conclusion that “loss of production” refers to loss resulting from the claimant’s inability to produce other products using the goods which the defendant failed to supply in accordance with the contract and not, as the Andrew owners contended, to loss of the production of those goods by the defendant. It also demonstrates that Rix J did not intend to suggest that the normal loss resulting from the failure to deliver goods in accordance with the contract consisting in their replacement cost must be regarded as though it was a secondary loss for the purpose of a clause excluding secondary losses because incurring that cost has the effect of avoiding such excluded losses.
2. It was in discussing the second category of losses claimed by BHP that Rix J held certain losses which he characterised as mitigation costs to be excluded by the relevant clause. The losses in question appear to have consisted in costs allegedly incurred by BHP in the production of oil and gas which were incurred in consequence of the pipeline failure. Rix J regarded such losses as falling within the scope of “loss of production”. I have no difficulty with the notion that an exclusion of “loss of production” covers not only profits lost by the claimant from production which did not take place because of the defendant’s breach of contract but also additional costs of production incurred by the claimant in order to avoid such loss of profits. As indicated, however, the cost of replacing the goods which the defendant failed to supply (or which were supplied in a defective condition) cannot itself be regarded as a cost of production for this purpose.
3. There was an appeal in the BHP Petroleum case. On the approach taken by the Court of Appeal, the issue as to the scope of clause 14.5 did not arise. The Court of Appeal considered that there was in any event insufficient information on which to decide whether the heads of loss claimed fell within the exclusion before the facts had been found at a trial. Evans LJ observed in passing:

“It is not apparent why the judge was wrong in law to hold that the cost of mitigating losses which had they occurred would not have been recoverable as damages for breach of contract [was not recoverable].”[[10]](#footnote-10)

See [2000] 2 All ER (Comm) 133; [2000] 2 Lloyd’s Rep 277, para 55. I do not regard this observation as affecting the analysis. The same applies to the *obiter* *dicta* in GB Gas Holdings Ltd v Accenture (UK) Ltd [2009] EWHC 2734 (Comm) at para 91 (Field J), and on appeal at [2010] EWCA Civ 912, para 69 (Longmore LJ), to which counsel for the Andrew owners also referred.

1. My answer to this preliminary issue is accordingly that Scottish Power’s claim for damages for breach of Article 7.1 is not excluded by Article 4.6.

# Issue 5

“On the proper construction of the Agreements, is compliance with the reporting requirements of Article 15.4(2) a condition precedent or a condition subsequent to a successful claim for relief under Article 15.2?”

1. Article 15.2 of the Agreements provides that:

“The Parties shall, except where otherwise specified in this Agreement, be relieved from liability under this Agreement:

1. In the case of the Seller, to the extent that owing to Force Majeure it has not delivered the quantities of Natural Gas which it should have delivered under this Agreement or has not performed any one or more of its obligations under this Agreement ...”
2. As mentioned earlier, the Andrew owners rely on this clause to claim relief from liability for their failure to operate the Sellers’ facilities and to deliver natural gas to Scottish Power during the period of 11 days from 9 to 20 May 2011 when production at the Andrew Field was first shut down. The question raised by the final preliminary issue is whether the Andrew owners are precluded from making this claim as a result of their failure to comply with a reporting requirement contained in Article 15.4(2).
3. Article 15.4 imposes a number of requirements on a party claiming relief on the ground of Force Majeure. To put the preliminary issue in context, I will quote Article 15.4 in full:

“A Party, when claiming relief under Clause 15.2 shall: -

1. within ten (10) Days of the failure or inability to fulfil in [sic] obligation hereunder for which relief is sought, notify the other Party thereof and shall within five (5) Working Days of such notification provide an interim report which shall furnish such relevant information as is available appertaining to the event including the place thereof, the reasons for the failure and the reasons why obligations under this Agreement were affected, and give an estimate of the period of time required to remedy the failure;
2. within twenty (20) Working Days of such notification, if requested, provide a detailed report which shall amplify the information contained in the interim report and contain such further explanation and information relevant to the event causing the failure as may be reasonable [sic] required;
3. upon request, as soon as is reasonably practicable, give or procure access at the risk of the Party seeking access, for a reasonable number of representatives of the other Party to examine the scene of the vent causing the failure and/or the installation, machinery or equipment which has failed, provided that the reasonable costs of transportation to the scene shall be at the expense of the Party seeking access, if such event is agreed or adjudged to give rise to relief from liability under Clause 15.2, and shall otherwise be at the expense of the Party seeking relief;
4. subject in the case where the Seller or the Buyer is seeking relief under Clause 15.2(1) or Clause 15.2(2) (as the case may be) to the provisions of Article 7, take as soon as reasonably practicable all reasonable steps to rectify the cause of the failure and to recommence performance of its obligations under this Agreement ...;
5. keep the other Party informed, on an ongoing basis, of the actions being taken under Clause 15.4(4).”
6. In the present case, the Andrew owners maintain that they complied with Article 15.4(1) by notifying Scottish Power of their claim of Force Majeure by a letter dated 16 May 2011 and by providing an interim report to Scottish Power on 20 May 2011. They admit, however, that they did not provide a further detailed report pursuant to Article 15.4(2). Scottish Power contends that compliance with Article 15.4(2) is a condition precedent (or subsequent) to a successful claim for relief under Article 15.2. If this contention is correct, it follows that the defence of Force Majeure must fail.

## Authorities

1. In Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd’s Rep 109, 113, Lord Wilberforce considered the nature of a notice provision in a clause providing for cancellation of a sale contract in the event that shipment proved impossible by reason of prohibition of export. He said:

“Whether this clause is a condition precedent or a contractual term of some other character must depend on (i) the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general considerations of law.”

This statement has been cited in three more recent cases, in which judges of this Court have expressed differing views on the effect of failure to comply with notice provisions in *force majeure* clauses.

1. In Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD [2003] 1 Lloyd’s Rep 1, the defendant sought to rely on a *force majeure* clause to avoid responsibility for its failure to perform a long term contract for the supply and handling of crude oil. The clause required the party invoking *force majeure* to give “prompt notice” to the other party. The defendant accepted that it had not given prompt notice of the alleged *force majeure* event but argued that this did not prevent it from relying on the clause. Aikens J rejected the defence of *force majeure* on the facts. He therefore did not need to decide what the effect was of failure to comply with the notice requirement. He nevertheless said (at para 134) that he “would have been inclined to hold that the notice provision ... is a condition precedent”. He gave three reasons:

“The form of the notice provision is imperative; a party ‘invoking *force majeure* shall give prompt notice to the other party’. The implication behind that imperative is that if the party does not then it cannot rely on *force majeure*. The reason for requiring notice to be given must be that the ‘other party’ can then investigate the alleged *force majeure* at the time. It can challenge whether it does prevent performance or delay in performance by the party invoking *force majeure*. Alternatively it can see if there are other means of enabling performance to be continued. Lastly, if the notice provision is only an innominate term, then I find it difficult to see when the innocent party could allege it had suffered additional damage as a result of not being told promptly of the *force majeure* event other than the very damages that it would wish to recover for the first party’s failure to perform the contract at all. These factors would all lead me to conclude that the parties intended the notice provision to be a condition precedent.”

1. The finding of Aikens J that there had not been an event constituting *force majeure* was upheld on appeal: see [2003] EWCA Civ 1031. In the Court of Appeal, therefore, the question about the effect of failure to give prompt notice again did not have to be decided. Longmore LJ, with whom Arden LJ and the Vice-Chancellor agreed, observed (at para 34) that there was “much to be said” for the judge’s view on this point on the basis that “there is no obligation to serve a notice, it is just that until such notice is given, it cannot be relied on.” However, the Court preferred to leave the question undecided, as the appeal did not turn on the point.
2. In SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc (the “Azur Gaz”) [2005] EWHC 2528 (Comm); [2006] 1 Lloyd’s Rep 163 Christopher Clarke J considered the effect of a notice provision in a *force majeure* clause in a contract for the sale of a cargo of butane. The provision stipulated that the party whose performance was affected “shall immediately notify the other party”, indicating the nature of the cause of its failure to perform and the expected duration of the *force majeure* event. As in the Mamidoil case, the judge’s observations on this point were *obiter*. The question only arose if the judge was wrong on three prior points, the last of which was his finding that the notice provision had in fact been complied with. Nevertheless, Christopher Clarke J (at para 39) inclined to the view that compliance with the notice provision was not a condition precedent, for four reasons:

“First, the clause does not, but easily could have, said that notice was a condition precedent or that reliance on *force majeure* was only available provided such notice was given. Second, the clause does not contain any clear implication that that must have been intended. Third, the demurrage time bar clause provides a specific cut off point beyond which a demurrage claim is not possible. The *force majeure* clause does not contain such a provision. Fourth, I find it difficult to accept that, in a contract such as this, the parties contemplated that the failure by one party to inform the other immediately of the cause of its failure to perform, or a failure to give all possible details as to the expected duration of the cause, should disentitle the affected party from any reliance on the *force majeure* event.”

Referring to the decision of Aikens J in the Mamidoil case, he continued:

“I see the force of the observations made by Aikens J, particularly in relation to the long-term contract that he had to consider, whilst recognising that the considerations that caused him to reach the view that he did (the imperative nature of the clause, the need for the ‘other party’ to be able to challenge the existence of *force majeure* or mitigate its effect, and the difficulty of proving loss as a result of non-notification) could be said to apply in very many cases and leave little scope for the considerations set out in Bremer.”

1. Most recently, in Great Elephant Corporation v Trafigura Beheer BV[2012] EWHC 1745 (Comm); [2012] 2 Lloyd’s Rep 503, Teare J held that the seller of a cargo of crude oil was entitled to rely on a *force majeure* clause in the contract. The clause contained a notice provision stating that the party claiming to be affected by *force majeure* shall:

“immediately on the occurrence of *force majeure* … promptly notify the other party in writing stating the details of the event or act constituting *force majeure* and stating also the measure being adopted by it to minimise or to remedy the consequences of the *force majeure* on the performance of this contract.”

Teare J concluded (at paras 121–122) that this provision was not to be construed as a condition precedent to reliance upon the *force majeure* clause for three reasons:

“i) The clause is not framed as a condition precedent.

ii) The requirement is not for notice within a clear and specified number of days but notice which is immediate and prompt. What is immediate and prompt will depend upon factual context. Here, the notice requires not only the ‘details’ of the event but also the ‘measures’ being adopted to minimise the consequences of the event. Both of these requirements suggest that some delay in giving notice must be permitted. Thus identifying when a notice is not immediate or prompt may be difficult. This is not the context in which the parties are likely to have intended that failure to provide immediate or prompt notice would debar a party from relying upon a *force majeure* event.

iii) Where a specific sanction is intended the parties tend to say so expressly. ...”

1. This view must also be regarded as *obiter*, as the judge’s finding that the seller was entitled to rely on the *force majeure* clause was reversed on appeal: see [2013] EWCA Civ 905; [2014] 1 Lloyd’s Rep 1. The Court of Appeal did not discuss the effect of the notice provision.

## Discussion

1. At one stage of the argument I thought that I was in the unenviable position of having to decide whether the view of Aikens J or that of Christopher Clarke J and Teare J is correct. I have reminded myself, however, that the issue for decision in this case is one of construction of a particular clause in a particular contract, and that consideration of how courts have construed differently worded clauses in different contracts is necessarily of limited assistance. It seems to me that, while taking note of the reasoning in the authorities cited, the correct approach is to focus on the precise terms of the Agreements with which the present case is concerned and ascertain their meaning applying the ordinary principles of contract interpretation.
2. Approaching the issue in this way, I have come to the clear conclusion that, for the reasons which follow, compliance with Article 15.4(2) is not a condition precedent (or a condition subsequent) to a successful claim for relief under Article 15.2.
3. First and most simply, there are no words in the contract which say that the consequence of failure to comply with any of the requirements of Article 15.4 is to preclude a claim for relief under Article 15.2. Article 15.4 requires a party to do various things “when claiming relief under Clause 15.2”. It does not say, as it easily could have, that a party must do those things in order to claim relief under Clause 15.2. Nor is there any other language which indicates that the right to claim relief from liability under Article 15.2 is conditional on doing the things set out in Article 15.4. The absence of any such language seems to me to be all the more significant in the context of what is a very detailed and elaborate contract that has obviously been professionally drafted.
4. Counsel for Scottish Power submitted that, even though Article 15.4 does not say in terms that compliance with its requirements is a condition precedent to a successful claim for relief, this is implied by the imperative force of the word “shall”. The clause says that a party “when claiming relief under Clause 15.2 shall” do the various things then set out (my emphasis). Mr McCaughran QC and Mr Emmett argued that the clear implication of the imperative is that, if a party does not comply, it cannot claim relief under Article 15.2. I do not accept that this is the implication of the word “shall”. The use of that word signifies that the requirements of the clause are mandatory: they are contractual obligations. But the word “shall” does not say or imply anything about what the consequence is intended to be of failing to perform those obligations. Certainly, if compliance with Article 15.4 was not obligatory – if, for example, the clause had used the word “may” rather than “shall” – it would be impossible to argue that compliance was a condition precedent to a claim for Force Majeure relief. But the inverse proposition does not follow. The fact that Article 15.4 imposes contractual obligations does not dictate or indicate what is to happen if there is a breach of any of the relevant obligations. It is simply the starting point for that discussion – a feature of the contract which must exist in order for the question to arise.
5. There is also no room in the present case for an interpretation similar to that which seems to have attracted the Court of Appeal in the Mamidoil case. Although I am doubtful that it was what Aikens J had in mind, I have mentioned that Longmore LJ saw force in the contention that “there is no obligation to serve a notice, it is just that until such notice is given, it cannot be relied on.” I take this to mean that it is only when notice is given that the period for which *force majeure* relief is claimed can start to run. Such an approach cannot apply to Article 15.4(2), however, as the time within which that clause requires a detailed report to be provided does not commence until notification of a Force Majeure event has been given. Indeed, by the time the detailed report is required to be served, the period of non-performance for which Force Majeure relief is claimed may already have ended. That is so in the present case as the period for which relief is now claimed ended on 20 May 2011 whereas the detailed report had to be served within 20 working days of 16 May 2011 (the date when notification was given) – that is, by 13 June 2011.
6. There are of course cases in which it is so clear that reasonable people entering into the contract would have intended something to be the case that this is understood to be the effect of the contract even though it is not expressly stated. I cannot see, however, that this can be said here. As mentioned, the obligation to provide a detailed report pursuant to Article 15.4(2) arises only after the other party has already been notified of an event for which Force Majeure relief is claimed (and provided with an interim report), and then only if such a further report is requested. It seems far from obvious that reasonable people in the position of the parties would have thought it appropriate to make compliance with this requirement a condition of the right to claim relief for Force Majeure. Certainly, it is not so obvious that they would have thought it unnecessary to say so expressly.
7. A factor seen as important in the cases cited is whether it is clear what has to be done in order to comply with the relevant provision – it being unlikely that parties would intend to make compliance a condition precedent to the right to claim relief if it is unclear exactly what such compliance requires. For example, in the Bremer case, where the clause in question required notice to be given “without delay”, Lord Wilberforce observed (at 113) that:

“the generality of the words ‘without delay’ tells against the buyer’s contention: if a condition were intended a definite time limit would be more likely to be set.”

Similarly, Lord Salmon stated (at 128):

“Had it been intended as a condition precedent, I should have expected the clause to state the precise time within which the notice was to be served ...”

1. Counsel for Scottish Power emphasised that Article 15.4(2) specifies a set number of days within which the detailed report must be provided rather than using a less precise phrase such as “without delay”. There seems to me, however, to be considerable room for uncertainty about whether the clause has been complied with. For example, although the obligation to provide a detailed report arises only if such a report is requested, the clause does not specify when any such request must be made. It cannot sensibly be made until an interim report has been provided, which under Article 15.4(1) must be within five working days of notification of the failure or inability to fulfil an obligation for which Force Majeure relief is sought. But what if the request for a detailed report is not made for, say, another 12 working days? As the 20 day time period for providing a detailed report runs from the original notification and not from receipt of the request for the report, this could leave the party claiming relief a very short time in which to have to produce the detailed report. It might be argued that there is an implied requirement to make the request promptly upon receipt of the interim report; but the existence and scope of any such requirement and whether it has been satisfied in any given case are themselves areas of uncertainty. There is also potentially significant scope for argument about what degree of detail and amplification of the interim report is necessary in order to satisfy the clause. In addition, the detailed report must contain “such further explanation and information relevant to the event causing the failure as may be reasonably required”, and there is again potential uncertainty about whether an explanation or information provided satisfies what was required and/or whether what was required was reasonable. All these points seem to me to tell against the notion that a failure to comply with Article 15.4(2) is intended to disqualify a party from claiming Force Majeure relief.
2. This conclusion is reinforced when the focus is widened to consider other provisions of Article 15.4. These include a requirement in Article 15.4(4) to “take as soon as reasonably practicable all reasonable steps to rectify the cause of the failure”, together with a requirement in Article 15.4(5) to keep the other party informed, on an ongoing basis, of the actions being taken to do this. It would be a strong thing to agree that, for example, failure to keep the other party informed, at any stage, of actions being taken to rectify the cause of a party’s failure to perform its obligations under the Agreement should have the result that the party automatically loses its right to claim relief. That is particularly so when the precise level of information required and exact time within which it must be provided are not specified. Such a consequence would be potentially unfair to the party claiming Force Majeure relief and seems unlikely to have been intended.
3. There is nothing in the language of Article 15.4 which provides any basis for treating any of its sub-clauses differently from others such that some of the requirements specified are conditions precedent to a successful claim for relief and yet others are not. On the face of it, either all the requirements are conditions precedent or none of them is. It is not plausible that parties who intended only some requirements to be conditions precedent but not others would have thought it unnecessary to specify which requirements fall into which category, leaving this somehow to be inferred. That would, apart from anything else be a recipe for confusion. It would defeat the purpose of the clause which, whatever its intended contractual status, appears to be aimed at seeking to reduce uncertainty by enabling the other party to know, as far as possible and as soon as possible, where they stand when a claim is made for relief on the ground of Force Majeure.
4. Counsel for the Andrew owners further drew attention to the decision of the Court of Appeal in Heritage Oil & Gas Ltd v Tullow Uganda Ltd [2014] EWCA Civ 1048, [2014] 2 CLC 61, paras 39-40, where a similar point concerning the structure of the relevant clause was regarded as providing important assistance. The question in that case was whether a provision in a sale and purchase agreement which required the purchaser of a company to give notice of a tax claim against the company within a specified period was a condition precedent to the right to an indemnity against the claim. Beatson LJ (with whose judgment the other members of the Court of Appeal agreed) attached importance to the fact that the notice provision was one of two sub-clauses both forming part of the same sentence and introduced by the word “shall”. He considered that in those circumstances it could not be the case that compliance with one of the sub-clauses was a condition precedent but compliance with the other was not. The same logic applies here.
5. The strongest argument in favour of interpreting the Article 15.4 requirements as conditions precedent, as I see it, is that reasonable people in the position of the parties would be unlikely to have intended the only remedy for breach of the requirements to be a claim for damages because damages are not an adequate remedy.
6. If, for example, no detailed report is provided as required by Article 15.4(2), it may be difficult or impossible to prove that the failure to comply with this requirement has caused the other party financial loss which can be compensated by an award of damages, even though the breach has deprived the other party of the assistance which it was intended to have in reaching an informed view at an early stage of whether or not the claim of Force Majeure is justified.
7. This argument can, however, be said to cut the other way. Thus, in the Heritage Oil case (at para 38) Beatson LJ considered that, if a breach might cause no loss or no obvious financial loss, that is a good reason why the parties would not have agreed that any breach of the clause in question, however minor, should lead to the loss of a valuable right.
8. It is certainly possible to envisage cases in which failure to comply with Article 15.4 could cause serious prejudice. Counsel for Scottish Power posed the example of a claim for Force Majeure relief first made years after the events in question. They argued that, if failure to comply with the requirements of Article 15.4 does not prevent the Sellers from making such a claim and the claim of Force Majeure were justified, it would then force the parties to re-calculate the contractual effect of all nominations, deliveries and payments that had been made since the events in question. This could cause serious prejudice to Scottish Power and would create significant administrative disruption. They submitted that this is most unlikely to be what the parties intended.
9. This example illustrates, however, that failure to comply with the notification requirements of Article 15.4 could cause financial loss which is capable of being compensated by an award of damages. Article 16.3 provides for the re-classification of amounts previously classified as Default Gas and financial adjustments to be made if it is subsequently agreed or adjudged that the Seller did not deliver those amounts of gas by reason of Force Majeure. But it does not preclude a claim for damages for losses suffered as a result of relying on the original classification in circumstances where the Seller had failed to notify or provide information about the Force Majeure event in accordance with Article 15.4.
10. Another example of a breach of Article 15.4 which could give rise to a claim for damages is failure to take steps to rectify the cause of the failure as required by Article 15.4(4). A further example given by counsel for the Andrew owners is a situation where the failure to provide a detailed report, when requested, pursuant to Article 15.4(2) causes the other party to incur costs which it would not otherwise have incurred of exercising its right under Article 15.4(3) to examine the scene of the failure and the failed equipment for itself. Article 15.4(3) puts responsibility for such costs on the party seeking access, if the event is later agreed or adjudged to give rise to relief for Force Majeure; but it does not prevent that party from claiming them as damages. Of course, the party seeking relief might refuse access in breach of Article 15.4(3), but this could itself trigger a damages claim.
11. In short, it cannot in my view be said that Article 15.4 gives no worthwhile protection if the only sanction for non-compliance is the remedy of damages.
12. It may also have some evidential significance. A party which fails to comply with the requirements of Article 15.4 when claiming relief under Article 15.2 will need to explain its failure to do so. Unless there is some good alternative explanation, the inference may be drawn that the reason why it did not was that its claim for relief was not justified. Thus, the failure to comply, in the present case, with a request for a detailed report as required by Article 15.4(2) lays the Andrew owners open to the suggestion that providing information about the cause of the failure to deliver gas would not have substantiated the claim that it was beyond the Seller’s control, albeit that the inference may be rebutted.
13. Looked at overall, it seems to me that parties considering whether or not to make compliance with the requirements of Article 15.4 a condition precedent would see merits and drawbacks in either choice. I do not think it apparent that making compliance a condition precedent is inherently more sensible or commercially reasonable than not doing so. If anything, the opposite is true. In these circumstances I find it impossible to conclude that reasonable parties would have intended the requirements of Article 15.4 to constitute conditions precedent (or subsequent) to a claim for relief without thinking it necessary to say so expressly.

## Is Article 15.4(2) an intermediate term?

1. At the end of the oral closing submissions, counsel for Scottish Power advanced an alternative argument that, even if Article 15.4(2) is not a condition precedent such that any failure to comply with its terms precludes a claim for Force Majeure relief, a sufficiently serious failure will do so. This argument was developed in an additional written note which I gave Scottish Power permission to file after the hearing and to which the Andrew owners responded. Although not specifically raised in the formulation of the preliminary issue, the point is one of law which has been argued on both sides, and I think it right to decide it.
2. Counsel for Scottish Power founded this alternative argument on the decision of the House of Lords in Bremer Handelsgesellschaft mbH v Vanden Avenne [1978] 2 Lloyd’s Rep 109. As mentioned earlier, Lord Wilberforce in that case identified three factors relevant to whether the clause in question was a condition precedent, the third of which was “general considerations of law”. In discussing that factor, Lord Wilberforce said (at 113):

“Automatic and invariable treatment of a clause such as this runs counter to the approach, which modern authorities recognise, of treating such a provision as having the force of a condition (giving rise to rescission or invalidity) or a contractual term (giving rise to damages only) according to the nature and gravity of the breach. The clause is then categorised as an innominate term.”

After citing authorities which established this doctrine, starting with Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26, Lord Wilberforce continued:

“In my opinion the clause may very appropriately and should be regarded as such an intermediate term: to do so would recognise that while in many, possibly most, instances, breach of it can adequately be sanctioned by damages, cases may exist in which, in fairness to the buyer, it would be proper to treat the cancellation as not having effect. On the other hand, always so to treat it may often be unfair to the seller, and unnecessarily rigid.”

1. Two of the other law lords (Viscount Dilhorne and Lord Salmon) did not address the possibility of regarding the clause as an “intermediate term”, deciding simply that compliance with the clause was not a condition precedent and that the only potential remedy for non-compliance was a claim for damages. Lord Russell, however, appears to have taken a similar view to Lord Wilberforce, since he described the notice requirement (at 130) as “a term of the contract which may be so seriously breached as to deprive the seller of the right to rely upon [the clause in question]”. Lord Keith agreed with the speech of Lord Wilberforce. A majority of the House, therefore, endorsed the approach of treating the notice provision in that case as an intermediate term.
2. Counsel for Scottish Power drew attention to various cases and text books on the law of contract which refer to the Bremer case as authority for the proposition that a clause requiring notice to be given of an event relied on as constituting *force majeure* may be an intermediate term: see e.g. *Chitty on Contract Law* (31st Edn, 2012) at para 12-039.
3. Counsel on both sides also drew attention to two cases in the field of insurance in which a similar question has arisen regarding the status of a notice provision, albeit not in connection with an argument of *force majeure*. In Alfred McAlpine plc v BAI (Run-Off) Ltd [2000] 1 Lloyd’s Rep 437; [2000] 1 All ER (Comm) 545, paras 32-34, the Court of Appeal (Waller LJ, with whom Buxton and Peter Gibson LJJ agreed) expressed the view that a requirement to give notice to the insurer “as soon as possible” in the event of any occurrence which may give rise to a claim under the policy, although not a condition precedent to the insurer’s liability, was an “innominate term”, such that a sufficiently serious breach would entitle the insurer to reject the claim. The Court of Appeal found, however, that on the facts the insured could not establish a breach of the clause which was serious enough to have this consequence. In those circumstances the views expressed about the potential effect of the clause were *obiter*, and inthe later case of Friends Provident Life & Pensions Ltd v Sirius International Insurance [2005] EWCA Civ 601; [2005] 2 Lloyd’s Rep 517, a differently constituted Court of Appeal declined to follow them. Mance LJ, with whom Sir William Aldous agreed, was “unable as a matter of construction or implication” to find in a similar clause “any provision that insurers will be free of liability in the event of a serious breach and/or a breach with serious consequences” (see para 32). The third member of the Court was Waller LJ who dissented, preferring his own reasoning in the BAI case and maintaining that conceptually there is no difficulty in construing a notice provision as an innominate term which gives the insurer a right to reject the claim if there is a breach of sufficient gravity – which he identified as a breach which has caused serious prejudice to the insurer (paras 46–48).
4. No reference was made in either of these cases to the Bremer case. Counsel for Scottish Power submitted, however, that the Bremer case is binding authority that the court can classify Article 15.4 as an innominate or intermediate term, should the court consider that it is not a condition; and that the effect of so doing is that a sufficiently serious breach of Article 15.4 will deprive the party seeking to claim relief for Force Majeure of any right it might otherwise have had to do so.

## Discussion

1. I accept that a clause which requires a party wishing to claim a particular contractual benefit or protection – be it relief from liability on the ground of *force majeure* or indemnification against a loss or anything else – to follow a certain procedure (such as giving notice to the other party) is capable in principle of constituting an “intermediate term” – in the sense that, although a breach of the clause will not automatically deprive the party of the right to claim the relevant protection, a sufficiently serious breach will have that consequence. If, however, the label “intermediate term” is used to describe such a clause, it is important to recognise that this designation is not being used in the same sense as when classifying contract terms for the purpose of deciding whether a breach of a particular term gives the innocent party a right to terminate the contract.
2. Contracts are made in the expectation of performance and it is very common for contractual documents, particularly those of a less detailed and sophisticated kind, to set out obligations without providing what the consequence of failure to perform the obligations will be. The law of contract contains a set of rules which govern this situation. These rules operate for the most part as default rules, which apply unless the parties agree otherwise. The general consequence of a breach of contract provided by law is of course a liability to pay damages to compensate the innocent party for any financial loss caused by the breach. Other rules of law determine when a breach of contract entitles the innocent party to terminate the contract. The traditional approach of the common law is to classify a term of the contract either as a condition, breach of which gives the innocent party the right to terminate the contract (as well as claiming damages for any loss caused by the breach), or as a warranty, breach of which only entitles the innocent party to claim damages. The parties may classify a term as a condition or a warranty themselves. But if they have not done so, the courts will classify the term by assessing its commercial importance – the general test of a condition being that it is an essential term, the performance of which goes to the root of the contract.
3. The doctrine developed in the line of authority to which Lord Wilberforce referred in the Bremer case involves identifying a third category of term which is neither a condition nor a warranty. A term classified as an “intermediate” or “innominate” term under this doctrine differs from a condition in that breach of the term does not automatically entitle the innocent party to terminate the contract and differs from a warranty in that the remedy of the innocent party is not limited to damages: the right to terminate will arise where the breach is of a sufficiently serious character.
4. As Mance LJ pointed out in the Friends Provident case (at para 29), it is difficult to conceive of circumstances in which breach of an ancillary term such as a claims notification clause in an insurance contract could be regarded as sufficiently serious to justify termination of the contract, such that it would be appropriate to categorise the clause as an intermediate or innominate term in this sense. The same applies to a clause requiring notice to be given or other procedural steps to be taken by a party wishing to rely upon *force majeure*. In any event it is not and could not sensibly be suggested that a breach of Article 15.4 would entitle the other party to terminate the Agreement. Thus, the doctrine which allows a contract term to be classified as an intermediate or innominate term is not applicable. Its only potential relevance can be as an analogy. It was in that way that Lord Wilberforce referred to the doctrine in the Bremer case. The train of thought in the passage from his speech quoted earlier, as I read it, is that, just as the possibility that breaches of a contract term may be of variable gravity may justify classifying the term as an innominate term for the purpose of deciding whether its breach entitles the other party to terminate the contract, so, by analogy, it may be appropriate to regard the consequence of breach of a procedural requirement in a *force majeure* clause as depending on the seriousness of the breach.
5. As brought out clearly in the judgment of Mance LJ in the Friends Provident case, however, such an analogy is limited – and it must be said potentially misleading – in an important way. The classification of a term as an innominate term is, unless the parties have agreed its status, a matter of law for the court and not a question of interpretation of the contract. By contrast, there is no rule of law whereby the consequence of a breach of a procedural requirement specified in the contract is loss of the right to claim relief on the ground of *force majeure*. Thus, unless the parties in the present case have provided for this consequence themselves in the Agreements, it is not a consequence that can follow from a breach of any of the obligations in Article 15.4. The only basis, therefore, on which a sufficiently serious failure to comply with Article 15.4(2) could be treated as precluding a claim for Force Majeure relief, even though a less serious failure would not, is if this is what the parties have agreed on the proper construction of the contract.
6. Approaching the question again, therefore, purely as a matter of construction, Scottish Power’s alternative case seems to me to encounter essentially the same difficulties as its primary contention that Article 15.4 is a condition precedent (or subsequent) to a successful claim for Force Majeure relief. The one advantage over that contention of construing the clause as an intermediate term is that it avoids the objection that a trivial or minor breach would have the disproportionate consequence of barring a claim for relief. But all the other objections remain. In particular, it does nothing to remove or reduce the problems of uncertainty. There is no obvious way of knowing when – if it be the case – a breach of the requirements of the clause is to be treated as sufficiently serious to prevent the party in breach from claiming relief on the ground of Force Majeure, nor even how the seriousness of a breach is to be measured. Is the relevant test the extent of the breach (e.g. how late notice is given), or the nature and/or extent of prejudice caused by the breach, or the commercial importance of the particular requirement breached, or some combination of these factors? There is wide scope for disagreement about these matters. I find it difficult to accept that reasonable parties who intended some breaches of Article 15.4 but not others to prevent reliance on Force Majeure would think it unnecessary to say so expressly or to give any indication in the wording of the clause of when that consequence was intended to ensue.
7. If an argument that a breach of Article 15.4 might be so serious that reasonable parties must have intended that it should preclude a claim for Force Majeure relief has any traction, it seems to me that this could only be in an extreme case such as Scottish Power’s example of a claim of Force Majeure made long after the relevant events without any notification given at the time. I am not able to conceive, however, how a breach of Article 15.4(2) could fall into that category, given that the requirement to provide a further report can only arise when notification of a claim for Force Majeure relief has been given and the party notified of the claim has already been provided with an interim report. I see no reason to infer that there are any circumstances in which the parties must be taken to have intended the language of Article 15.4 to mean that the failure to provide a further, detailed report will prevent a party from claiming Force Majeure relief.
8. I therefore conclude that Article 15.4(2) is not in the sense suggested (let alone in the original sense of the expression) an “intermediate term”.

# Conclusions

1. For the reasons given in this judgment, my answers to the questions raised by the preliminary issues are as follows:
   1. The failure of the Andrew owners to operate the Sellers’ Facilities necessary to produce and deliver the required natural gas at the relevant times since 9 May 2011 did not automatically amount to a breach of Article 7.1 of the Agreements, but did so only if the failure to operate the facilities was inconsistent with the Standard of a Reasonable and Prudent Operator.
   2. In deciding to shut in the Andrew Field to carry out the AAD works the Andrew owners did not comply with the Standard of a Reasonable and Prudent Operator as in so acting they were not seeking to perform their contractual obligations to deliver natural gas to Scottish Power under the Agreements but were taking a deliberate decision not to do so.
   3. In so far as the amounts of natural gas which the Andrew owners failed to deliver as a result of their failure to operate the Sellers’ Facilities at the relevant times in breach of Article 7.1 are amounts which were properly nominated by Scottish Power, its claim for compensation for loss caused by the breach is a claim “in respect of underdeliveries” within the meaning of Article 16.6. Accordingly, Scottish Power is to that extent not entitled to maintain its claim for damages and is limited to the remedy of Default Gas provided by Article 16.
   4. Scottish Power’s claim for damages for breach of Article 7.1 is not excluded by Article 4.6.
   5. On the proper construction of the Agreements, compliance with the requirements of Article 15.4(2) is not a condition precedent or a condition subsequent to a successful claim for relief from liability under Article 15.2, and the only remedy for breach of that provision is a claim for damages.

1. Two defined terms relevant in this case for which, exceptionally, initial capital letters are not used in the Agreements are “properly nominated” and “underdelivery” (and cognate words). [↑](#footnote-ref-1)
2. It was suggested by both sides in argument that there was also a breach of Article 3.1 (quoted at paragraph 10 above). This does not seem to me to be correct, however, since, as I understand the facts, at the relevant times no natural gas was produced from the Andrew Field or tendered for delivery by the Sellers. [↑](#footnote-ref-2)
3. I leave aside the work said to have been done to carry out repairs to the Sellers’ Facilities and the question whether some part of the period of the shutdown can be justified by reference to such work. [↑](#footnote-ref-3)
4. It has not been suggested that the allegation of failure to maintain the facilities – which is disputed and outside the scope of the first two preliminary issues – would, if proved, add anything material to the breach in failing to operate the facilities which I have found to be established. [↑](#footnote-ref-4)
5. The date of July 2014 corresponds to when the statement of case was last amended, at which point the shut-in was still continuing, and has not yet been updated. [↑](#footnote-ref-5)
6. This is explicit in the equivalent obligation placed on the Buyer by Article 7.2, where the corresponding words refer to the quantities of gas “which are to be tendered for delivery” (my emphasis). [↑](#footnote-ref-6)
7. See SJ Gould and RC Lewontin, “The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme”, Proceedings of the Royal Society (1979). [↑](#footnote-ref-7)
8. See e.g. Andrew Dyson and Adam Kramer “There is No ‘Breach Date Rule’: Mitigation, Difference in Value and Date of Assessment” (2014) 130 LQR 259, 264-5. [↑](#footnote-ref-8)
9. From the sense, I take the words “mitigated loss” in this passage as intended to refer to loss incurred in mitigation. [↑](#footnote-ref-9)
10. I have added the words in square brackets, which are not in the report, to complete the sentence in the way that seems to have been intended. [↑](#footnote-ref-10)