



Neutral Citation Number: [2018] EWHC 1640 (Comm)

Case No: CL-2016-000646

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 03/07/2018

Before :

MR. JUSTICE TEARE

Between :

SEADRILL GHANA OPERATIONS LIMITED
- and -
TULLOW GHANA LIMITED

Claimant

Defendant

Richard Jacobs QC, John Snider and Gemma Morgan (instructed by **Haynes and Boone**
CDG LLP) for the **Claimant**
Sean Wilken QC, Adam Robb QC and Stephen Kosmin (instructed by **Holman Fenwick**
Willan LLP) for the **Defendant**

Hearing dates: 8-10, 14-17, 21, 23 and 24 May 2018

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.

.....

Approved Judgment**Mr. Justice Teare:**

1. Drilling for oil is a risky business. Oil companies seek to protect themselves against the financial consequences of risk by appropriate clauses in their contracts, for example, by a force majeure clause. This case concerns a contract for the hire of an expensive oil rig which contained such a clause. During the course of a territorial sea dispute between neighbouring states the arbitration tribunal determining that dispute required drilling to cease in the disputed sea where drilling was to take place. Other, perhaps more usual, risks also materialised: a technical problem occurred with a related marine structure, a Floating Production Storage and Offloading unit (a converted vessel used for the processing and storage of oil, an “FPSO”), which significantly affected the amount of oil which could be extracted from the well; a government failed to give approval for drilling in a particular location; and there was a fall in the market value of oil which changed the economic landscape of the oil business. After these risks had materialised the oil company decided to bring the contract to an end, relying upon the order of the arbitration tribunal as a force majeure. The question to which this case gives rise is whether the oil company was entitled to rely upon the force majeure clause in that way.
2. Tullow Ghana Limited (which, although a subsidiary, I shall refer to as “Tullow”) had interests in two offshore petroleum licences or concessions about 60kms. off the coast of Ghana. One, known as West Cape Three Points, included the Jubilee oilfield, an asset described by one witness as Tullow’s “flagship asset”. Jubilee has been in production since December 2010. The other, known as Deepwater Tano, included three oilfields collectively known as TEN (Tweneboa, Enyenra and Ntomme). Oil was discovered in TEN in 2009 and first produced in August 2016. Part of the Jubilee field was also in in Deepwater Tano so that Jubilee straddled both concessions. Tullow was the operator of both TEN and Jubilee on behalf of joint venture partners.
3. Both concessions had been granted by the Government of Ghana. They were to the east of the boundary between Cote d’Ivoire and Ghana and hence in water claimed by Ghana.
4. The West Cape Three Points concession also included other oil fields, Mahogany, Teak and Akasa (collectively known as MTA). They were operated by another oil company Kosmos, one of Tullow’s joint venture partners. Tullow had plans to replace Kosmos as the operator of MTA (with, I was told, the consent of Kosmos) and to obtain approval from the Government of Ghana to a plan for the development of MTA, known as the Greater Jubilee Full Field Development Plan (the “Greater Jubilee Plan”).¹
5. Tullow hired from Seadrill Ghana Operations Limited (which, although a subsidiary, I shall refer to as “Seadrill”) a 6th generation ultra deepwater water semi-submersible rig, West Leo. The contract, initially entered into on 3 November 2011, was for one year but a three year contract was later agreed with an option to increase by a further two years. That option was exercised by Tullow on 15 December 2012 so that the three year contract was amended to a 5 year contract. Pursuant to the contract Tullow was obliged to pay a daily operating rate of hire of the order of US\$600,000.

¹ I was however told by counsel that Akasa was not proposed to be part of the Greater Jubilee Plan area, which I shall refer to in this judgment as the Greater Jubilee Field.

Approved Judgment

6. In May 2013 the Government of Ghana approved the TEN Plan of Development (“the TEN POD”). “First Oil” (the date when oil first flows from TEN) was scheduled to be August 2016.
7. At the outset of the contract Tullow intended to use West Leo in TEN and to use another rig, Stena Drillmax, in the Greater Jubilee Field. But when it was decided no longer to use the services of Stena Drillmax in the Greater Jubilee Field Tullow decided to use West Leo initially in TEN and then later in the Greater Jubilee Field.
8. Tullow purported to enter into the contract on behalf of itself and its joint venture partners. Seadrill said that Tullow did not have authority to do so but Tullow said that it did. There does not however appear to be a dispute that Tullow needed to obtain joint venture partner approval on an annual basis when the partners approved the “work programme and budget”. This arrangement appears to have been a deliberate decision taken to maximise flexibility in the use of the rig. Tullow obtained such approval on an annual basis through to the completion of the wells in TEN necessary to get to “First Oil”.²
9. In September 2014 Ghana and Cote d’Ivoire entered into an arbitration pursuant to the United Nations Convention on the Law of the Sea (“UNCLOS”) to resolve a dispute between them as to precisely where the offshore boundary between the two states lay. Cote d’Ivoire maintained that it lay further to the east than Ghana maintained. If Cote d’Ivoire were correct in this contention TEN would lie in the waters belonging to Cote d’Ivoire. In support of its claim Cote d’Ivoire sought and, on 25 April 2015, obtained from the tribunal a Provisional Measures Order (“PMO”) pursuant to which the tribunal ordered that “Ghana shall take all necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area.”
10. It was understood that the effect of the PMO was that whilst the “completion” of “spudded” wells could continue in TEN, no new wells could be “spudded”. (Spudding is the drilling a hole in the sea bed. Completion is the work which is undertaken thereafter to enable oil to be pumped from the well.) This was fortunate for Tullow because several spudded wells remained to be completed in TEN and West Leo was scheduled to be used for such completions. However, it was expected that the last such well would be Completed in September 2016. Thereafter it was envisaged by Tullow that West Leo would be used in the Greater Jubilee Field (upon the assumption that approval had been given by the Government to the Greater Jubilee Plan).
11. In February 2016 an unexpected event occurred, namely, a technical problem was found with the “turret” on the FPSO being used in the Jubilee field. In consequence, according to Tullow, Ghana was unwilling to approve the Greater Jubilee Plan. Thus, said Tullow, there was no further work for the West Leo to do as from October 2016. Tullow ceased to pay the daily rate of hire and terminated the contract for the hire of the rig. Tullow justified its refusal to pay hire by reference to the “force majeure” clause in the contract for the hire of the West Leo and also by reference to the

² I have amended this paragraph to reflect Tullow’s insistence in its comment on the draft judgment, perhaps not made clear during the trial, that it did not accept that it lacked authority to enter into the contract on behalf of its joint venture partners.

Approved Judgment

doctrine of frustration. The latter argument was abandoned shortly before the start of this trial.

12. Seadrill does not accept that the “force majeure” clause has any application to the facts of the case and therefore claims the sums due under the contract, some US\$277.4 million, essentially the sums due under the contract from September 2016 through to June 2018. Seadrill says that Tullow’s refusal to pay hire is not unconnected with the collapse in the oil price in 2014 which led to a reduction in demand for rigs such as West Leo and, in consequence, to a substantial reduction in the daily market rate of hire for such rigs, from about \$600,000 per day to \$150,000 to \$200,000 per day at the end of 2016. (This court’s sister, the Admiralty Court, is familiar with the fall in the demand for 6th generation ultra deep water drillships; see *Deutsche Bank Trust Company Americas v The Owners of the SERTAO* [2018] EWHC 1013 (Admlty)).
13. Thus, in essence, the question which the court must resolve is whether Tullow’s reliance on “force majeure” is justified. Seadrill says that in truth the question is a short one. Nevertheless the parties have called seven witnesses of fact and two witnesses of expert opinion and have placed before the court some 111 lever arch files containing over 33,000 pages of contemporaneous documents. At the end of the evidence the documents which had been referred to during the course of the examination of the factual witnesses were placed in 1 file. That suggests that there remains much to be done to ensure (a) that the process of disclosure is restricted to that which is reasonably necessary to determine a dispute fairly and (b) that a grossly disproportionate and unnecessary number of documents is not copied for trial.
14. A great many issues were the subject of submissions by counsel but there were two overarching issues. The first issue (“the force majeure” issue) is whether the cause of Tullow’s failure to comply with its obligations under the contract in October 2016 was a force majeure, namely, a drilling moratorium imposed by the Government of Ghana. If it was not, then Tullow is liable to Seadrill for the sums due under the contract for standby services and for a termination “for convenience”. The second issue (“the reasonable endeavours issue”), which strictly arises only if the force majeure issue is answered in Tullow’s favour, is whether Tullow had exercised its reasonable endeavours to remedy or avoid the force majeure. That depends, in particular, upon whether Tullow’s obligation to use reasonable endeavours required it to direct West Leo to work on any of a number of wells, namely, two wells in TEN, namely, EN13 and TW01, three wells in Jubilee, J13, J15 and J36 and certain wells in MTA. If Tullow did not exercise its reasonable endeavours then it could not rely upon the force majeure clause and it would be liable to Seadrill for the sums due under the contract for standby services and for a termination “for convenience”. There was another suggested failure of reasonable endeavours, namely, a failure to proceed promptly with Tullow’s efforts to obtain the Government’s approval to the Greater Jubilee Plan. This issue took up much time in the in the cross-examination of Tullow’s witnesses. Finally, there were some very curious issues concerning the law relating to VAT and withholding tax in Ghana.

Seadrill’s witnesses of fact

15. Seadrill adduced evidence from 2 witnesses, Mr. Morrow, Seadrill’s Senior Vice President of Africa and the Middle East, and Mr. Jha, Seadrill’s Director of

Approved Judgment

Operations for Africa North. There was however little to dispute in their statements and accordingly their cross-examination was very short. The witnesses answered the few questions put to them clearly and without hesitation.

Tullow's witnesses of fact

16. Tullow adduced evidence from 5 witnesses of fact. They were cross-examined for over 4 days on a number of issues, in particular whether Tullow did not wish the Greater Jubilee Plan to be approved because use of the rig West Leo at the contract rate of hire was, after the collapse of the oil price, uneconomic, whether Tullow had sought to “manipulate” the operation of the force majeure clause so as to terminate the contract for the hire of West Leo and whether there was further work for West Leo to do.
17. David Lawrie joined Tullow in 2011 and from 2014-2017 was Vice President West Africa, responsible for leading Tullow's upstream production and development businesses in West Africa and Europe, based in London. He was the most senior witness from Tullow to give evidence. For that reason counsel for Seadrill put to him Seadrill's case. Mr. Lawrie, unsurprisingly, was careful in his replies. The care he took meant that he often gave the impression of not answering the question put to him. However, although this was at times irksome, I think it would be unfair to conclude that he had no answer to give to those questions. In the course of his business life he is no doubt careful not to have words put into his mouth and he carried that practice with him into the witness box. It must also be borne in mind that, as the senior witness from Tullow to whom Seadrill's case was put, he was often asked whether he agreed with statements made in emails or memoranda which were neither written by him nor sent to him. In that context it was perhaps inevitable that he was reluctant to accept that adjectives or phrases used by others to describe certain matters were ones that he would use and that he would substitute his own. Nevertheless, I cannot avoid the conclusion that in some respects the care he took over his answer arose from his appreciation of the significance of the question and that his answer sometimes owed more to the advocate than to the witness. His evidence with regard to mitigating the effect of the force majeure by considering work in the Greater Jubilee Field was, as will become apparent in this judgment, mistaken and illustrates why his evidence must be regarded with care. As is done in almost all commercial cases where there is a voluminous documentary record of events (as there certainly is in this case) I concluded that, where there was a clear conflict between the contemporaneous documents and Mr. Lawrie's evidence, the safer and more reliable course was to rely upon the former in preference to the latter.
18. Charles Darku joined Tullow in 2013 and since then has been the Managing Director of Tullow (that is Tullow Ghana Limited) based in Accra. Like Mr. Lawrie there were times when he chose to answer a different question from that which had been put. However, what struck me during his cross-examination was that there were some questions which he could not answer because he could not recollect what the position had been. Whilst it is understandable that some matters may not be recalled some of the matters he could not recollect concerned his aims and strategy which I would have expected him to recall. I therefore formed the view that for that reason it would be sensible to rely upon the contemporaneous documents.

Approved Judgment

19. Harry Turnbull joined Tullow in 2011 as “engineering team lead” but in December 2013 became the Drilling Engineering Supervisor and Drilling Engineering Team Leader for Ghana. He was in some ways an impressive witness. His evidence largely concerned the technical reasons underlying commercial decisions taken by others within the Tullow organisation. He answered questions clearly and without hesitation, always giving, where required, reasons for his answers. As his cross-examination proceeded he developed a tendency to give long answers. But those long answers were in the nature of detailed reasoning for his answers. I formed the impression, having listened to him, that the court would only be able to reject his answers if there was compelling reason to do so. A conflict between the contemporaneous documents and his evidence would be such a reason. Counsel for Seadrill criticised his evidence on the basis that much of it concerned illegitimate statements of opinion. Part of it did. However, when technical people give evidence of fact it is often difficult to disentangle fact from opinion.
20. Anthony Clark joined Tullow in 2008 and was a Drilling Superintendent and In-Country Well Engineering Manager from 2008 to 2012 in Ghana. Thereafter he was based in London as the Ghana Well Engineering Manager before becoming the Group Well Engineering Manager in 2017. As a witness he seemed careful, always checking the context of documents put to him. He gave firm and clear replies. It appeared to me at the end of his evidence that, as with Mr. Turnbull, there would have to be a compelling reason to reject his testimony. Again, as with Mr. Turnbull, a conflict between the contemporaneous documents and his evidence would be such a reason. Counsel for Seadrill suggested that there was much that he knew but did not wish to tell, for example, about “Project Voldemort” (said to be a plan to bring about the end of the contract for the hire of West Leo). Perhaps there was but he answered the questions put to him about it.
21. Mark MacFarlane joined Tullow in 2013 as Director, Development and Operations, based, I think, in Ghana. From 2017 he has been Executive Vice President, East Africa, based in London. By the time he came to give evidence most of the documents relevant to his evidence had been aired in court with other witnesses and Seadrill’s case with regard to those documents was clear. Mr. MacFarlane had thus had considerable opportunity to consider and form his answers to the questions which he knew would be put to him. He gave those answers with firmness and confidence, though on a few occasions he had to be reminded to answer the question which had been put. In respect of certain documents there was an apparent tension between their terms and the answers he gave to questions put to him based on those documents. He accepted that there were such tensions and sought to explain them by reference to matters within his own knowledge or which were apparent from other documents. Whether his evidence and his explanations are reliable will depend upon a review of the documents in question, their context and the probabilities. Counsel for Seadrill suggested that he was an advocate, that some of his answers did not stand up to scrutiny and that his evidence should be treated “with the utmost caution”. Whilst some of his answers had the flavour of the advocate this was perhaps inevitable given the circumstances in which he gave his evidence. Nevertheless, I considered, as with other Tullow witnesses, that conflicts between his evidence and the contemporaneous documents must be resolved in favour of the latter.

Approved Judgment

22. Both parties called an expert witness to give evidence as to whether it was “reasonable” for Tullow to have made use of certain other drilling opportunities in TEN and Jubilee in October 2016. Both experts, Mr. Zambonini for Seadrill and Mr. Paver for Tullow, were qualified to give evidence on that subject. However, the contemporaneous documents were generally of more assistance on that subject than the opinions of the experts.

The contract for the hire of West Leo

23. Before considering the facts relating to the force majeure issue it is necessary to refer to the contract. The contract, once extended to 5 years, was due to run until 2018. In essence the contract was for the provision by Seadrill to Tullow of drilling services by West Leo. In return for such services Tullow paid Seadrill a daily rate of hire. A number of the contract’s features require to be mentioned.
24. The “contract area” was defined as Ghana in Section 1(A), Contract Particulars. Reference was there made to Section 2 (A), clause 1.14, which defined the Contract Area as Tullow’s “concession area and any area used in association therewith”. The concession area was not defined but there did not appear to be any dispute that the concession areas were Deepwater Tano and West Cape Three Points. Thus, as a matter of contract, Tullow was able to use West Leo offshore in either concession, in particular in TEN, Jubilee or the Greater Jubilee Field.
25. Section 2A, clause 23, provided that Tullow had entered into the contract for itself and on behalf of its joint venture partners. In fact it had not done so but there was a practice by which the joint venture partners agreed to the yearly budget, which included West Leo, and in the result they were bound by the contract for the period covered by the budget. It is common ground that by this process the joint venture partners approved the use of West Leo for the work she did until 1 October 2016; see Tullow’s Closing Submissions fn. 7 and Seadrill’s Closing Submissions paragraph 12.
26. Tullow was obliged, pursuant to clause 18, prior to the spud of any well to provide Seadrill with the Drilling Programme.
27. Section 2A, clause 25, provided that Tullow had the right to suspend work to suit its convenience. If it did so a daily suspension rate of 70% of the daily operating rate was payable pursuant to section 4(B). Section 2A, clause 26, provided that Tullow had the right to terminate the contract to suit its convenience. If it did so Tullow was obliged by section 4(B) to reimburse Seadrill with 60% of the daily operating rate multiplied by the number of days remaining of the term of the contract. Section 4A, clause 2.2(a), also provided for a daily standby rate of 95% of the operating rate in the event that Seadrill was unable to conduct operations due to a failure by Tullow to issue instructions or a specific instruction by Tullow to standby. These clauses recognise that drilling for oil is risky and that circumstances may arise which may cause Tullow to decide to request the rig to stand by or to suspend or terminate the contract. However, if and when Tullow does so, it must still pay Seadrill but at a lesser rate than if the rig had been directed to drill.
28. Section 2A clause 27, the force majeure clause, also recognises the risks involved in drilling for oil and confers certain rights, obligations and immunities on the parties. Clause 27 provides as follows:

Approved Judgment

“27.1 Neither COMPANY nor CONTRACTOR shall be responsible for any failure to fulfil any term or condition of the Contract if and to the extent that fulfilment has been delayed or temporarily prevented by an occurrence, as hereunder defined as FORCE MAJEURE, which has been notified in accordance with this Clause 27 and which is beyond the control and without the fault or negligence of the party affected and which, by the exercise of reasonable diligence, the said party is unable to prevent or provide against. Both parties shall use their reasonable endeavours to mitigate, avoid, circumvent, or overcome the circumstances of FORCE MAJEURE.”

27.2 For the purpose of the Contract, Force majeure shall be limited to the following:

.....

(h) Drilling moratorium imposed by the government

.....

27.5 In the event of force majeure occurrence, the party that is or may be delayed in performing the Contract shall notify the other party without delay giving the full particulars thereof and shall use all reasonable endeavours to remedy the situation without delay.

.....

27.8 In the event that a FORCE MAJEURE condition prevails for a period of sixty (60) consecutive days then COMPANY may terminate the CONTRACT forthwith by giving notice, or may elect keeping CONTRACTOR under CONTRACT and keep paying the DAILY FORCE MAJEURE RATE.”

29. A number of matters are to be noted about clause 27.1 and the reliance placed by Tullow on it. First, there must be an occurrence within the list of matters defined as force majeure by the contract. The list in clause 27.2 includes “drilling moratorium imposed by the government”; that is the occurrence relied upon by Tullow. Second, that occurrence will only excuse a party from a failure to perform a term of the contract if it delays or temporarily prevents the party from fulfilling that term of the contract. Tullow alleges that a drilling moratorium imposed by the government temporarily prevented it from performing two terms of the contract; first, clause 3.6 which required it to provide Seadrill with “sufficient rights of ingress and egress to the Drill Site” and, second, clause 18.1 which required Tullow “prior to the spud of any well” to provide Seadrill with “the Drilling Programme”. Third, the force majeure occurrence must have been beyond the control of the party seeking to rely upon it. Tullow says that it was and any contention that it was not has not been pursued. Fourth, both parties must use their reasonable endeavours to mitigate, avoid, circumvent or overcome the circumstances of force majeure occurrence. Tullow says that it did but Seadrill maintains that had Tullow done so the rig would have been

Approved Judgment

instructed to work, in particular, on any of two wells in TEN, three wells in Jubilee and certain of the wells in MTA.

30. A further reasonable endeavours obligation is imposed by clause 27.5 upon the party whose performance of an obligation is delayed. This does not appear to add anything to the reasonable endeavours obligation in clause 27.1 which is imposed on both parties. I shall refer primarily to clause 27.1. It was not suggested that there was any material difference between clause 27.1 and clause 27.5 save that the former applied to both parties.
31. Clause 27.8 confers on Tullow a right to terminate the Contract in the event that a “force majeure condition” prevails for a period of 60 days. In my judgment the “force majeure condition” is that state of affairs which exists where (i) there has been a force majeure occurrence within the meaning of clause 27.1 and (ii) that force majeure occurrence has prevented a party from fulfilling a term of the contract for 60 consecutive days. Tullow purported to exercise this right of termination. Seadrill says that Tullow was not entitled to do so.
32. Counsel for Tullow submitted in opening that the right to terminate pursuant to clause 27.8 arises if there is a force majeure occurrence which continues for 60 days. He suggested that there was no need to show that the force majeure occurrence impacted on the performance of any obligation. In my judgment this is not correct. The error in this construction is to equate the “force majeure condition” in clause 27.8 with a force majeure occurrence within clause 27.2. I understood from counsel’s oral closing submissions that this construction was not maintained.

Tullow’s plans before and after the PMO

33. Although it was (correctly) said to have been Tullow’s original intention to use West Leo in TEN and that it was envisaged that there would be enough work in TEN to occupy West Leo through to 2018 it is clear that those intentions had changed by 2015 as a result of the refusal of the joint venture partners to support two rigs, West Leo and Stena Drillmax.
34. Thus, immediately before the PMO, which was issued on 25 April 2015, Tullow’s plans for the use of West Leo through to the end of her contract in June 2018 were to use her in TEN and then in the Greater Jubilee Field. These plans are apparent from a rig schedule dated 5 May 2015 but which, it is common ground, represented Tullow’s plans immediately before the PMO. Thus, from May 2015 until October 2016 it was planned to use West Leo (predominantly) on completions of 10 wells in TEN (to get to First Oil), and from October 2016 until May 2018 it was planned to use West Leo (predominantly) on the drilling and completion of wells in the Greater Jubilee Field.
35. After the PMO had been issued on 25 April 2015 the Government of Ghana, by letter dated 4 May 2015, provided Tullow with a copy of the PMO. The Government invited Tullow “to read the Order carefully and take appropriate steps to ensure that [Tullow’s] activities comply with it.” A meeting took place between the Government and Tullow on 14 May 2015 and by letter dated 15 May 2015 Tullow assured the Government of its “commitment to working with the Government of Ghana to resolve all the issues emanating from the ITLOS Ruling on provisional measures.” Tullow then sought written confirmation from the Government that it may continue to drill

Approved Judgment

wells which had been started as per the TEN POD including well NT07 and that Tullow may carry out completion work on already drilled wells under the TEN POD. That confirmation was given by letter dated 11 June 2015.

36. Tullow produced a “Rig Schedule Plan” on 24 June 2015 which took account of the PMO. That also provided for West Leo to be used through to the end of her contract in June 2018 both in TEN and in the Greater Jubilee Field. Thus from June 2015 until September 2016 West Leo would be used (predominantly) on completion of 10 wells in TEN (to get to First Oil) and from September 2016 until May 2018 West Leo would be used (predominantly) on the drilling and completion of wells in the Greater Jubilee Field. The one casualty caused by the PMO was well EN10 in TEN which, before the PMO, was to have been drilled by another rig, Stena Drillmax, in June 2015 and completed by West Leo in September 2016. That work was removed from the schedule after the PMO.
37. Thus it is apparent that after the issue of the PMO Tullow planned to use West Leo through to the end of her contract in much the same way as it had planned to do before the issue of the PMO. The rig schedules do not suggest that Tullow anticipated any difficulty in issuing drilling programmes for West Leo as a result of the PMO. It was, as Mr. Lawrie (the most senior witness called to give evidence from Tullow) said in an email dated 25 April 2015, “business as usual”. Of course, as stated by Mr. Lawrie when cross-examined on these matters, the PMO had a material impact on Tullow’s plans to drill and complete as many as 24 wells in TEN. But as regards Tullow’s intended use of West Leo the PMO had little effect.
38. It was submitted in Tullow’s closing submissions that “to mitigate the situation arising from the occurrence of force majeure Tullow planned to provide West Leo with work in Jubilee” (by which was meant the Greater Jubilee Field, see paragraphs 58-60 of Tullow’s Closing Submissions). That is not correct. As the rig schedules before and after the PMO demonstrate Tullow’s plans were essentially the same before and after the PMO. Mr. Lawrie also gave evidence that it was the PMO which caused Tullow to look to use West Leo in the Greater Jubilee Field. That evidence was mistaken as he eventually accepted in cross-examination when he agreed that there was no change in Tullow’s approach as result of the PMO.

The Greater Jubilee Plan

39. Tullow was required to submit the Greater Jubilee Plan to the Government for approval by 26 September 2015. However, by letter dated 1 September 2015 the Government said that the plan need not be provided until 1 December 2015 in order to enable the plan to incorporate details of the subsea infrastructure which would be required to connect the MTA wells to the Jubilee field. The plan was submitted on 1 December 2015 but on 29 December 2015 the Government said that it was not approved. Amongst its concerns were the proposed gas price and Tullow’s internal rate of return which were regarded as “rather high”.
40. There is evidence that Tullow continued to engage with the Government as to the Greater Jubilee Plan. Thus on 12 January 2016 Tullow wrote to the Government seeking permission to discuss the gas price with the Ghana National Petroleum Company (GNPC) and proposing a meeting to discuss the Government’s other concerns. The gas price was discussed with GNPC on 2 February 2016 and in

Approved Judgment

correspondence thereafter, in particular by letter dated 31 March 2016 from Tullow to GNPC.

41. However, in February 2016 a problem was discovered with the turret of the FPSO operating in Jubilee. The FPSO rotates around the turret under the influence of wind and sea conditions. The bearing in the turret was found to be damaged and (in March) locked, which meant that the amount of oil which could be processed by the FPSO was significantly limited. This was a major problem which it was estimated would cost \$335 million to repair. That repair is still ongoing.
42. It is Tullow's case that in the light of that development the Government of Ghana was unwilling to approve the Greater Jubilee Plan until the problem with the turret had been resolved with the result that West Leo could not be used to drill and complete wells in the Greater Jubilee Plan area as from October 2016 as had been intended.
43. That case is not accepted by Seadrill. However, the Ministry of Petroleum informed Tullow by letter dated 18 April 2016 that the turret event had led to "a curtailment of production and gas export" which was "having unbearable effects on the economy." At a meeting of Tullow and its joint venture partners on 20 April 2016 GNPC (the Ghana National Petroleum Company and one of Tullow's joint venture partners) said that the Minister may request that the Greater Jubilee Plan be deferred until there was "greater clarity around the FPSO". Although Tullow wrote to the Minister on 31 May 2016 advising him of developments and expressing the hope that his "guidance will expedite approval" of the Greater Jubilee Plan, no reply was received. A chasing letter was sent on 4 August 2016. Eventually, on 28 September 2016 there was a meeting between the Minister, Tullow and the joint venture partners. By an email dated 3 October 2016 Mr. Darku reported that the Minister was concerned about the FPSO which has "serious financial implications for the country" and was also concerned that "major decisions" were being taken (concerning the FPSO) without his knowledge or approval. Tullow addressed the Minister's concerns and explained the "permanent spread mooring" solution to the FPSO problem to the Minister. At the end of the meeting the Minister's remarks were reported by Mr. Darku to be "positive and conciliatory". The Minister is recorded as having stated that "there is a need for the changes as per the Permanent Solution [which I was told was a reference to the permanent spread mooring plan] to be approved by the POD [the Greater Jubilee Plan]".
44. Although Seadrill relies on evidence which it suggests shows that Tullow also favoured delay in the approval of the Greater Jubilee Plan (to which evidence I will shortly refer) the documentary record supports Tullow's case that the Government did not progress approval of the Greater Jubilee Plan because of the FPSO problem. It is true that that was not formally stated until September 2016 but it appears to me more likely than not that the FPSO problem was the reason why the Government did not respond to Tullow's letters dated 31 May and 4 August 2016.

Tullow's attitude to the Greater Jubilee Plan

45. Tullow claimed that it wanted to obtain the Government's approval of the Greater Jubilee Plan in 2016. Seadrill alleged that Tullow's strategy was not to obtain approval because it was anxious to reduce its expenditure.

Approved Judgment

46. There is documentary evidence that from January 2016 (and before) Tullow was investigating how it could best reduce its expenditure. Deferring the drilling of wells in the Greater Jubilee Field was the best way of doing that and would in turn cause a deliberate slow down of the Greater Jubilee Plan process. It was thought that the West Leo contract could be terminated in January 2017 and the rig moved to Las Palmas. Thus in March 2016 Tullow accepted a recommendation to defer the start of drilling in the Greater Jubilee Field as a means of saving expenditure. Mr. MacFarlane wanted “some colour” on the Government’s reaction. I infer that he was concerned as to how the Government might react. He noted that at the current price of oil the Greater Jubilee Plan was not an attractive project to progress. It was at about this time that Tullow gave notice to Seadrill that there may be no more drilling from October 2016.
47. Once consideration was given to the effect of the FPSO problem Tullow and Kosmos (another of Tullow’s joint venture partners) agreed on 20 April 2016 that the Government was unlikely to approve the Greater Jubilee Plan and therefore they suggested suspending that plan. On 28 April 2016 the same point was put to the GNPC. In May 2016 further calculations were made of the expenditure savings which would be made if drilling in Greater Jubilee were deferred. Another joint venture partner, Anadarko, confirmed its support for the suspension of the Greater Jubilee Plan. It was proposed that Tullow draft a letter to the Government “clarifying suspension of POD until impact of turret issue is clear.”
48. However, when Tullow wrote to the Government on 31 May 2016 it expressed the hope that the Government’s guidance would “expedite the approval” of the Greater Jubilee Plan. That letter shows that whatever Tullow’s actual preferences they did not in fact suggest to the Government that approval be delayed. No doubt Tullow wished to give the impression to the Government that it was still keen on pressing on with seeking approval of the Plan, notwithstanding that it also informed the Government by another letter dated 31 May 2016 that it was likely that there would be no production benefits from the Greater Jubilee Field until 2018. The distinction between seeking approval of the plan and delaying any investment underlay the submission made on behalf of Tullow that Seadrill’s case confused “the obtaining of approval for the GJFFDP [the Greater Jubilee Plan] and the investment decisions to be made once the GJFFDP was approved.” It may be that the distinction explained the insistence of Tullow’s witnesses, in particular, that of Mr. MacFarlane, that Tullow wished to expedite the approval of the Greater Jubilee Plan. However, I do not consider that such distinction was clearly drawn at the time by Tullow when it considered the matter internally.
49. The day after Tullow wrote to the Government, 1 June 2016, Mr. MacFarlane noted that Tullow had already commenced implementing its cashflow maximisation work including “letting the Jubilee GSA negotiations run at GNPC’s pace (no progress)”. He noted “all planning on the basis of no GJFFD [Greater Jubilee Plan] in 2016/7”.
50. Mr. Lawrie summarised his understanding of the position on 19 July 2016 in an email to the board when he said that in the light of “Project Yellow”, the FPSO problem, it was beneficial to push Greater Jubilee drilling out to 2018 and even without that problem “we should have been thinking about trying to defer Greater Jubilee “due to low oil prices/high rig rates”.

Approved Judgment

51. My conclusion on these internal contemporary materials is that Tullow saw much economic sense in 2016 in delaying approval of the Greater Jubilee Plan as well as in delaying any investment in the Greater Jubilee Field. In so far as Tullow's witnesses denied that that was the case I am unable to accept their evidence. But the contemporary materials also suggest that the Government, as a result of the FPSO problem, was unwilling to approve that plan. So, if Tullow had been keener on securing approval and had pressed harder than it did, for example by pressing for agreement on gas prices, it is more likely than not that the Government would have delayed giving approval because of the FPSO problem. The Minister made his position clear at the meeting on 28 September 2016.

Project Voldemort

52. In the "Harry Potter" novels Lord Voldemort is, so I was informed, an evil and destructive character. The documents contained isolated references to "Project Voldemort" which Seadrill alleged was a project to bring an end to the contract for the hire of West Leo. The evidence suggested that this project was known to management in Ghana but perhaps not to management in London. Mr. Lawrie claimed ignorance of it although at least one email sent to him referred to it. Mr. Clark said that it was not a project but an "understanding amongst some members of the team that force majeure may be an option for a possible route for going ahead in this situation we found ourselves." He said that "the work surrounding that was about what circumstances would lead to force majeure." He accepted that "Voldemort is all about the West Leo rig and termination for force majeure."
53. Mr. MacFarlane was not asked about Project Voldemort. However, he was asked about an email in which he had asked Mr. Clark whether "with a bit of manipulation" it was possible to use the PMO "to call FM [force majeure]" on either the West Leo or Drillmax." Mr. MacFarlane said that his choice of words was "very poor" but what he meant was "to have a look at the contracts to understand what rights and obligations that we had under those contracts." Mr. Darku said that Mr. MacFarlane led Project Voldemort.
54. It seems clear that consideration was given by Tullow to how Tullow might extract itself from the contract for the hire of West Leo. That is not at all surprising given the fall in the market rate for the hire of an oil rig. It would be surprising if consideration had not been given to that matter. The important question is not who knew about "Project Voldemort" and what was its aim but whether Tullow's reliance on the force majeure clause is, on the facts of this case, legitimate or not.

Tullow's invocation of force majeure and its termination of the contract

55. On 15 March 2016 Tullow wrote to Seadrill advising it of "events which may result in Force Majeure.....which may prevent Work from being performed in Ghana". Reference was made to the PMO and to the Government's letter dated 11 June 2015. Reference was also made to the Government's letter dated 29 December 2015. It was said that the Government had "rejected" the Greater Jubilee Plan and that Tullow was working to understand and respond to the reasons for the rejection and to seek approval for further drilling. Tullow then said:

Approved Judgment

“Given, however, the rejection of the Jubilee Development Plan, drilling must de facto cease within the Jubilee field area. As things currently stand, therefore, it is no longer possible to conduct Jubilee field work under the Drilling Contract. It is [Tullow’s] position that the above both individually and cumulatively may result in Force Majeurewhich may prevent Work from being performed in Ghana. Based upon our current estimates, if unresolved, the Force majeure occurrences will mean that drilling activity will cease around 3 October 2016.”

56. On 1 September 2016 Tullow gave notice of a force majeure occurrence “which will occur” on completion of the NT-07 well which is expected to be on or around 5 October 2016 when a “moratorium on drilling within the Contract Area will arise.” Particulars of the Force Majeure Occurrence were given in 21 paragraphs. Reference was made to the PMO and to the Government’s letter dated 11 June 2015, which was referred to as an instruction to comply with the PMO. It was said that after 5 October 2016 when work on NT-07 is complete any further work in TEN would be barred by the PMO and the Government’s instruction. It was further said that on 29 December 2015 the Government rejected the Greater Jubilee Plan thereby imposing a moratorium on future drilling in the Jubilee Field. It was concluded that Tullow would be unable to fulfil its obligations under the contract due to the PMO, the Government’s instruction and the rejection of the Greater Jubilee Plan which “either individually and/or cumulatively, give rise to a Force majeure occurrence”.
57. It is to be noted that the case now advanced by Tullow is that the only moratorium on drilling imposed by the Government was the “instruction” dated 11 June 2015 and that that moratorium occurred on 1 October 2016 when those wells in TEN which required completion had been completed. It is no longer maintained that the Government’s rejection of the Greater Jubilee Plan was a moratorium on drilling.
58. When work on NT-07 ended on 1 October 2016 Tullow confirmed that the Force Majeure was in effect. On 10 November 2016 West Leo left Ghanaian waters en route for Las Palmas where she arrived on 24 November 2016. Since there were no other employment opportunities for West Leo (in common with other rigs) she was “cold stacked,” that is, laid up. On 1 December 2016 Tullow advised Seadrill that the contract was terminated pursuant to clause 27.8 of the contract, the moratorium having continued for 60 days, or that the contract had been frustrated, or that the contract had been terminated for convenience pursuant to clause 26.3 of the contract.
59. If Tullow is unable to rely upon the force majeure clause Seadrill is entitled to payment for the unexpired term of the contract from 1 December 2016 at the “termination for convenience” rate. In addition it is entitled to the standby rate for the period from 1 September to 1 December 2016. Once Tullow abandoned its frustration argument it had no defence to the standby rate for that period.

The force majeure issue

60. The first question to be resolved is whether there was a “drilling moratorium imposed by the government”. Tullow submits that there was such a moratorium imposed by the

Approved Judgment

Government of Ghana. By reason of the Government's letter to Tullow dated 11 June 2015 Tullow was not permitted to carry out any further drilling in TEN.

61. Seadrill does not accept that there was a moratorium imposed by the Government of Ghana. It is said that the Government gave no order or direction following publication of the PMO which suspended drilling in TEN.
62. It is correct that when the Government of Ghana wrote to Tullow on 4 May 2015 it did not, in terms, issue an order or a direction to Tullow. However, realistically there can be no doubt that the Government of Ghana, when writing to Tullow, expected Tullow to comply with the PMO. In a communique issued by Ghana and Cote d'Ivoire on 18 May 2015 the agent of Ghana stated that it had ordered the oil companies to comply with the PMO. Equally there can be no doubt that Tullow appreciated that that was what they were expected to do by the Government of Ghana. Whilst the PMO, as between the tribunal and the Government, was a moratorium imposed by the tribunal, as between the Government and Tullow the Government's letter dated 4 May 2015 was a moratorium imposed by the Government.
63. The second question is when that moratorium was imposed by the Government. Seadrill said that it was imposed in May 2015 and Tullow said that it was not imposed until October 2016. In my judgment the moratorium was imposed by the Government when it wrote its letter dated 4 May 2015 inviting Tullow to take appropriate steps to comply with the PMO. As a result of that letter, and as clarified by its later letter dated 11 June 2015, no wells in TEN could be drilled (as opposed to being completed). For that reason the intended drilling by Stena Drillmax of EN10 (and hence the completion of that well by West Leo) could not take place as intended. The submission that the moratorium was imposed in October 2016 is based upon the suggestion that it did not "bite" on West Leo until October 2016. But that submission is not correct. The moratorium was imposed in May 2015; it was of immediate effect. There was no further letter in October 2016 purporting to bring it into effect. Fortunately for Tullow the moratorium when issued did not prevent the completion of already spudded wells in TEN and so did not prevent Tullow from issuing a drilling programme for West Leo at that time. Nor was it expected to do so once that work had been finished because West Leo was then intended to work on wells in the Greater Jubilee Plan area. It is true that it prevented drilling in TEN in October 2016 but such drilling had been prevented since May 2015 (as demonstrated by the non-drilling and completion of EN10).
64. The third question to be resolved is whether Tullow failed to fulfil a term or condition of the contract within the meaning of clause 27. Tullow said that it did in that it was prevented from or delayed in issuing a drilling programme in October 2016. Seadrill said that this contention was unsustainable. The contract was a term contract during which Tullow had a discretion as to how and when to use the rig. Thus there was no obligation to provide a constant and uninterrupted flow of drilling programmes.
65. The clause refers to "any failure to fulfil any term or condition of the Contract". I accept that Tullow had under the contract a discretion as to how and when to use the rig and also that it was not obliged to provide a constant and uninterrupted flow of drilling programmes. Thus if, for whatever reason, Tullow chose to put the rig on standby and not to issue any drilling programme, Tullow would not breach any

Approved Judgment

obligation under the contract. In that sense it can be said that it was not a term or condition of the contract that Tullow issue a drilling programme in October 2016.

66. Tullow's counsel did not, I think, grapple with Seadrill's submission (cf paragraphs 3 and 118 of his closing submissions). The submission was made for the first time in closing submissions but flowed directly from the question I asked Tullow's counsel in the course of opening submissions as to what term or condition Tullow had been prevented from performing. I consider that the following argument is available to Tullow. If one assumes that Tullow intended to issue a drilling programme but was prevented from doing so because of a drilling moratorium imposed by the Government Tullow can say that it had failed to fulfil a term of the contract, namely, clause 18.1 which required it to provide Seadrill with a drilling programme, notwithstanding that failure to issue a drilling programme would not, in all cases, render it in breach of contract. I shall assume, without deciding, that this argument is correct. That enables me to consider and decide the important question of causation which was fully debated before me.
67. That is the fourth question to be resolved, namely, what was the cause of Tullow being unable in October 2016 to issue any further drilling programmes pursuant to clause 18.1 of the contract. Tullow submitted that the cause was the moratorium. Seadrill submitted that the only effective cause of Tullow being unable to issue drilling instructions in October 2016 was the failure of the Government to approve the Greater Jubilee Plan. Alternatively, if the moratorium was one of two effective causes, that was insufficient because the moratorium had to be the sole cause.
68. Before resolving this dispute I should mention a submission made by Tullow to the effect that the cause of there being no work for West Leo was the wrong question. The only question was said to be whether the moratorium was a force majeure; see paragraphs 12-14 and 232-234 of Tullow's closing submissions. I am unable to accept that submission. Clause 27.1 of the contract requires Tullow to have been prevented from or delayed in fulfilling its obligations by an occurrence which is a force majeure. Thus there is a clear causation requirement between the force majeure and Tullow's failure to provide drilling instructions to Seadrill.
69. Questions of causation are sensitive to the legal context in which the question arises; see *ENE Kos v Petroleo Brasileiro* [2012] 2 AC 164 at paragraph 12 per Lord Sumption and at paragraph 76 per Lord Clarke. They are to be resolved by reference to common sense; see *The Eurys* [1998] 1 Lloyd's Reports 351 at p.361-2 per Staughton LJ and also *ENE Kos v Petroleo Brasileiro* at paragraph 74 where Lord Clarke approved a statement in an earlier case that causation was to be determined by a "broad common sense view of the whole position".
70. The present context is a force majeure clause where the question is whether a force majeure was the cause of Tullow being unable to fulfil its obligations.
71. I do not consider that the only effective cause of Tullow being unable to provide drilling instructions to Seadrill was the failure of the Government to approve the Greater Jubilee Plan. It is true that that failure was a much greater impediment to Tullow's plans than the moratorium. The moratorium prevented Tullow from drilling EN10 (using Stena Drillmax) and then completing it with West Leo. But the failure of the Government to approve the Greater Jubilee Plan (itself caused by the FPSO

Approved Judgment

problem) caused Tullow to be unable to drill and complete wells A-E in the Greater Jubilee Field as Tullow had intended to do. Both the moratorium and the failure of the Government to approve the Greater Jubilee Plan were, on a broad common sense view of the position, causative of Tullow's inability. The moratorium prevented Tullow from drilling and completing EN10 as had been intended and the failure of the Government prevented it from drilling and completing wells in the Greater Jubilee Field as had been intended. Similarly, if one has regard, not to intentions, but to the areas of the sea in which Tullow was entitled to provide drilling instructions the moratorium prevented Tullow from (new) drilling in TEN and the failure of the Government prevented Tullow from drilling and completing wells in the Greater Jubilee Field. This conclusion can hardly be a surprise to Tullow. In its letter dated 1 September 2016 Tullow stated that it was unable to fulfil its obligations due to the moratorium and the failure of the Government to approve the Greater Jubilee Plan.

72. The submission made on behalf of Tullow was that the failure of the Government to approve the Greater Jubilee Plan was not a relevant cause. That submission was put in a number of ways. It was said that because Tullow never had the right to do any work in the Greater Jubilee Field it is not "a legal cause". It was said that the rejection of the Greater Jubilee Plan had the effect that an assumption underpinning future work "fell away". In oral closing submissions it was said that "the continued absence of a thing cannot be a "but for" or effective cause".
73. I was not persuaded that for any of these reasons the failure of the Government to approve the Greater Jubilee Plan was not a relevant or legal cause. It is true that Tullow never had the right to work in the Greater Jubilee Field but Tullow expected that it would obtain approval to do so; that is apparent from the rig schedules. When the Government failed to approve the Greater Jubilee Plan in December 2015 Tullow expected that agreement on terms would be reached. Mr. Lawrie thought by the spring or early summer of 2016. Mr. MacFarlane thought by the end of March 2016. But approval never came because of the FPSO problem in February/March 2016. Thus it was that Tullow's expectations could not be fulfilled.
74. Had an observer of the events in October 2016, with knowledge that Tullow had initially planned to use West Leo in the Greater Jubilee Field, been asked why it had not done so he or she would have replied that it was because, contrary to the assumption made by Tullow, the Government, in the wake of the FPSO problem, had not approved the Greater Jubilee Plan. The suggestion that "the continued absence of a thing cannot be a "but for" or effective cause" runs counter to the comment of Staughton LJ in *The Eurys* at p.362 that "common sense is not fettered by rules of law". But in any event the description of the Government's failure to approve the Greater Jubilee Plan events as "the continued absence of a thing" is not apt; it takes no account of the FPSO event which, on Tullow's own case, caused the Government to be unwilling to approve the Greater Jubilee Plan. The description also sits uneasily with Tullow's own change of mind, in the light of the fall in the oil price and the FPSO problem, as to the desirability of drilling in the Greater Jubilee Field in October 2016. Moreover, as I have already observed, Tullow's letter of 1 September 2016 recognised that the Government's failure to approve the Greater Jubilee Plan was a cause of its inability to perform its obligations.
75. There were, therefore, two effective causes of Tullow being unable to provide drilling instructions in October 2016, one being a force majeure, and the other not. Thus the

Approved Judgment

question arises whether, on the true construction of clause 27, Tullow can show that it was delayed in or prevented from doing so by a force majeure.

76. Questions of this nature can arise in different contexts. Where an insured event is caused by two matters, one for which the insurer is exempted from liability and the other from which he is not, the insurer is exempted from liability; see *Wayne Tank v Employers Liability* [1974] QB 74 at p.66-67 (per Lord Denning) p.69 (per Cairns LJ) and at p.74-75 (per Roskill LJ). By contrast where goods being carried by sea are lost or damaged by two matters, one of which is unseaworthiness for which the carrier is liable and the other is an excepted peril for which he is not liable, then the carrier is liable; see *The Torenia* [1983] 2 Lloyd's Reports 210 at p.218-9 per Hobhouse J.
77. In the present case Tullow seeks to rely upon a force majeure clause, in effect an exceptions clause, in circumstances where its failure to provide drilling instructions in October 2016 was caused by two matters, one a force majeure, the other not. Tullow assumed an obligation to provide drilling instructions to Seadrill. In the business of drilling for oil there are many risks which, if they materialise, may prevent Tullow from being able to fulfil its obligation. If the risk which materialises is a force majeure within the meaning of clause 27 the consequences were agreed to be borne in the manner provided by clause 27. But if the risk which materialises is not a force majeure then Tullow has to bear the consequences save to the extent that it elects to suspend work or terminate the contract "for convenience" as provided by the other clauses of the contract.
78. Clause 27.1 contains a causation requirement in these terms: "if and to the extent that fulfilment has been delayed or temporarily prevented by an occurrence, as hereunder defined as Force Majeure". Tullow had intended to drill and complete wells in the Greater Jubilee Field from October 2016. That intention was not frustrated by a force majeure but by an event which was not a force majeure, namely, the failure of the Government to approve the Greater Jubilee Plan. Tullow's own intention with regard to drilling in the Greater Jubilee Field in October 2016 had also changed. Thus, with regard to the Greater Jubilee Field, a force majeure event did not to any extent delay or prevent Tullow from drilling there in October 2016. Accordingly, in my judgment, Tullow is unable to rely upon the force majeure clause notwithstanding that a force majeure prevented it from using West Leo to complete EN10 in TEN. Any other conclusion would mean that Tullow could terminate the contract pursuant to clause 27 where the effective cause of its failure to perform was not a force majeure within the meaning of the clause.
79. That approach is consistent with the approach of the Court of Appeal in *Intertradex v Lesieur* [1978] 2 Lloyd's Reports 509 where it was held that where two causes operated to prevent a seller from shipping goods a force majeure notice had to be given in respect of each of them. Where notice had only been given of one the seller could not rely upon the force majeure clause. That decision is regarded as one which establishes the proposition that a force majeure event must be sole cause of the failure to perform an obligation; see *Frustration and Force Majeure* by Sir Guenter Treitel, 3rd ed at paragraph 12-032. Ultimately, however, (and as Sir Guenter Treitel also accepts; see paragraph 12-032) the question is one of construction of the contract before the court. For the reasons I have given in the preceding paragraph I do not consider that clause 27.1 permits Tullow to rely upon it to excuse its failure to fulfil its obligations in October 2016.

Approved Judgment

80. I have therefore concluded that Tullow is unable to rely upon the force majeure clause.
81. The fifth question, did Tullow give proper notice of the force majeure event, is thus academic. I shall deal with it shortly. I accept that the several references to the need for notice in clauses 27.1, 27.4 and 27.5 would reasonably be understood as requiring notice to be given as a condition precedent to reliance upon clause 27. For example, it is only if notice is given that there can be a duty on *both parties* to avoid or mitigate the force majeure as provided in clause 27.1. That shows, it seems to me, that the provision of notice is a condition precedent to reliance upon the clause. Seadrill's principal point was that notice ought to have been given by Tullow in 2015 and that it was not; it was only given in March 2016. However, I do not regard clause 27.5 as requiring a notice to be given when there is no more than a possibility that delay may be caused by a force majeure. In 2015, following the PMO, Tullow did not anticipate that it would be delayed or prevented from providing Seadrill with drilling instructions. That is clear from the rig schedules. Delay or prevention was not at that time a realistic possibility. Delay or prevention became a realistic possibility in March 2016 (after the FPSO incident) and that is when notice was given. Seadrill's subsidiary point was that notice ought to have been given by fax. However, the contract particulars provided an email address for Seadrill's representative. I was told that a later part of the contract provided for notice by fax but the contract particulars were given precedence in the event of ambiguity or contradiction and so, as it seems to me, it was permissible to give notice by email. I would therefore hold that proper notice was given.

The reasonable endeavours issue

82. This issue does not strictly arise in circumstances where Tullow has failed on the force majeure issue. But I shall nevertheless consider it because it was the subject of evidence and detailed argument.
83. The first question to be determined is the nature of the obligation. The obligation arises when there has been a force majeure. In that event both parties are under an obligation to use reasonable endeavours to avoid or circumvent "the circumstances of force majeure". That obligation requires both parties to use reasonable endeavours to ensure that the force majeure does not prevent them from performing their obligations under the contract or, if it does, to ensure that the effect of the force majeure is mitigated. In the present case there is no suggestion that Seadrill failed to exercise its reasonable endeavours. The suggestion is that Tullow failed to exercise its reasonable endeavours to provide Seadrill with drilling instructions at wells in Jubilee or TEN which were not subject to the moratorium. That obligation arises under both clause 27.1 and clause 27.5.
84. There was a dispute between the parties as to whether Tullow, when seeking to say that it has exercised its reasonable endeavours, is entitled to say that there was no business case for working on any of the wells suggested by Seadrill or that it was not in its commercial interests to do so.
85. As a matter of language "reasonable endeavours" is a phrase which enables account to be taken of all matters which bear upon the question whether it is reasonable to expect a party to take certain steps to avoid or circumvent a force majeure. There is no

Approved Judgment

reason to exclude the absence of a business case or Tullow's commercial interests from those matters which may be taken into account. However, the extent to which such matters may be taken into account and whether they are determinative will depend upon the contractual context in which the phrase is used. A duty to exercise reasonable endeavours can be found in a variety of contexts.

86. Thus, where a contract for the sale of real property obliges a party to use reasonable endeavours to obtain planning permission the test has been described as "what would a reasonable and prudent person acting properly in their own commercial interests and applying their minds to their contractual obligation have done to try to obtain the planning permission" or to minimise the affordable housing; see *Minerva v Greenland Ram* [2017] EWHC 1457 (Ch) per Rose J. That is an objective test.
87. Where a long term contract for the sale and purchase of the output of a North Sea gas field provided that the buyer and seller were to use their reasonable endeavours to agree a Commissioning Date (and provided for what that date would be if the parties were unable to agree) it was held (against the background of a severe fall in the market price of gas) that the buyer was entitled, when exercising his reasonable endeavours to agree a commissioning date, to have regard to the financial effect on him; see *Phillips Petroleum v Enron Europe* [1997] CLC 329 at p.342 C per Kennedy LJ. In that context the buyer has much more freedom of movement than would be the case were a purely objective test applicable.
88. The present context is different from both of the above examples. The context is a force majeure clause in a contract for the hire of an oil rig which requires the party seeking to rely upon the force majeure clause to use its reasonable endeavours to avoid or circumvent the effect of the force majeure.
89. Tullow's obligation is to provide Seadrill with drilling instructions. The contract area included TEN and Jubilee. Let it be assumed that Tullow was "delayed or temporarily prevented" from providing Seadrill with drilling instructions in TEN by reason of the moratorium. In consequence Tullow's contractual duty was to exercise its reasonable endeavours to avoid or circumvent that prohibition by providing Seadrill with drilling instructions in Jubilee to the extent that was reasonable. If providing such instructions would be more expensive to Tullow than drilling in TEN or would be accompanied by a greater risk of a non-profitable outcome than drilling in TEN, such that it was not convenient to Tullow or in its interests to provide such instructions, Tullow would not be able to say (with regard to Jubilee) that fulfilment of a term or condition of the contract had been "delayed or temporarily prevented" by the moratorium. It would merely be more expensive or less attractive to Tullow. That suggests that in the present context greater expense or a greater risk of an unprofitable outcome is not a matter which enables Tullow to say that it has exercised its reasonable endeavours. Were it sufficient for Tullow to show that drilling in Jubilee was not in its commercial interest Tullow would be able to avoid its obligation to provide drilling instructions on the grounds of expense or expected lack of profit. That would be surprising in the present context. Tullow could not rely upon such matters to excuse non-performance before a force majeure and, in my judgment, it cannot do so after a force majeure.
90. This approach is consistent with the authorities concerning exceptions or force majeure clauses.

Approved Judgment

91. In *Ross T Smyth & Co. Ltd. v W N Lindsay Limited* [1953] 2 Lloyd's Reports 378 CIF sellers sought to rely upon a clause which cancelled the contract of sale where fulfilment of the contract was "rendered impossible by prohibition of export". The shipment period was October and November 1951 and export was prohibited on 20 October as from 31 October. Thus the sellers had only 10 days within which to ship the goods. Devlin J. held, at p.380 right hand column, that restricting the shipment period to 10 days rendered performance more difficult but not "impossible" as the contract required. There was no finding that the sellers were unable to ship within that period notwithstanding the exercise of utmost diligence, see pp.381-382.
92. It is well established that when a party seeks to rely upon a force majeure clause he must show that the situation and the consequences are beyond his reasonable control; see *B&S Contracts v VG Publications* [1984] ICR 419 at p.427 F per Kerr LJ. In the present case a comparable obligation is expressly provided in the terms of clause 27.1 (and by clause 27.5). In *B&S Contracts v VG Publications* reference was made to *Brauer & Co. v James Clark* [1952] 2 AER 497, a case involving an exceptions clause, to illustrate that that a "mere difficulty of additional expense" is not generally a sufficient ground for saying that an action requiring such expenditure is beyond a person's control. But it is also to be noted that in *Brauer & Co v James Clark* a distinction was drawn between having to make a payment which meant the contract was unprofitable and having to incur a cost equal to a hundred times the contract price which would be "prohibitive" or "entirely outside the contemplation of the parties"; see p.153 left hand column per Singleton LJ. Thus, in the context of a force majeure clause such as the present, the mere fact that a step to avoid or circumvent the moratorium would or may be unprofitable would not necessarily lead to it being regarded as unreasonable. By contrast, to take an example used by counsel for Tullow in his closing argument, were it known that a well was dry there would be no purpose in completing it and it would be outside the contemplation of the parties that it should be completed in those circumstances. Reasonable endeavours would not require completion.
93. The reason why in the present context, a force majeure clause, the mere fact that a step is contrary to a party's commercial interests is insufficient to show that it has exercised its reasonable endeavours is that in such context the party cannot ignore the commercial interests of the other party in the force majeure being avoided or circumvented. That is apparent from the speech of Lord Devlin in *Reardon Smith Line v Ministry of Agriculture, Fisheries and Food* [1963] AC 691 at pp.729-730. Lord Devlin explained that when a contract provides that a party's obligation may be performed in a number of ways and he seeks to rely upon a force majeure or exceptions clause which bars one method of performance that party has a duty to perform his obligation in one of the other permitted ways. With regard to the example of a contract which provides for the shipment of a cargo wheat, barley or flour Lord Devlin said:

"Where there is no option in the business sense, the consequence of damning one channel is simply that the flow of duty is diverted into the others and the freedom of choice is restricted. If then a shipper cannot ship wheat, he must ship either barley or flour. The width of the alternatives is in the

Approved Judgment

contract for the benefit of both parties and it can be a liability as well as a benefit for the shipper.”

94. This principle has been applied in cases concerning commodities. Counsel for Tullow correctly observed that oil wells are not fungible in the way many commodities are. Counsel said that each oil well is unique (and Seadrill’s expert Mr. Zambonini agreed that each well was “to a degree, unique”) and that one well cannot be substituted seamlessly for another. That is no doubt so. But the obligation in the present case is to exercise reasonable endeavours to avoid or circumvent the force majeure. Thus, to the extent that there are differences between one well and another well, which may make it unreasonable to provide the rig owner with drilling instructions to drill a certain well when another well cannot be drilled because of a moratorium, such differences may be taken into account when considering what is reasonable. But the general principle remains sound that where, by reason of a moratorium on drilling, wells in TEN cannot be drilled Tullow’s contractual duty is to exercise its reasonable endeavours to provide Seadrill with instructions to drill in Jubilee. That is because Tullow’s obligation to provide Seadrill with drilling instructions may be performed in a number of ways, by providing Seadrill with instructions to drill at the location of one or more of wells in or Jubilee (or in TEN to the extent that the work in question is not barred by the moratorium).
95. In his oral submissions counsel for Tullow submitted that Tullow had what was “akin to the business option” referred to by Lord Devlin. The business option referred to by Lord Devlin is “a right of choice specifically granted to the holder of the option and to be used solely for his own benefit” (see p.729). Where there is such an option “there is not then one contractual obligation to be performed in alternative ways, but one obligation to be performed in one way, unless the option holder chooses to substitute another way and does so by the effective exercise of his option” (see p.730). A most important difference between the two is that when a business option is exercised the holder of the option “is not bound to consider the convenience or the interest of the other party” (see p.730). Another important difference between the two is that when a business option is exercised and the method of performance chosen by the option holder becomes impossible to perform the holder of the option is not bound to perform in any other way (see p.730). I do not accept that Tullow had a true business option or something akin to a true business option. There is nothing in the contract (and counsel did not refer to any particular words which might have this effect) to suggest that Tullow had a right of choice in the sense explained by Lord Devlin. Further, there is nothing in the factual narrative of events (and counsel did not refer to any particular event which might have this effect) to suggest that any such right of choice had been exercised by Tullow in favour of, for example, wells in TEN alone. Tullow had one contractual obligation to provide drilling instructions which could be performed in a number of ways.
96. Thus, in my judgment, when drilling in TEN was prevented by the moratorium and Tullow was obliged to exercise its reasonable endeavours to avoid or circumvent the moratorium, Tullow was entitled to consider its own interests, and in particular, whether there was a business case for drilling at another well, but Tullow was also bound to consider the interests of Seadrill. It was not entitled to ignore the interest of Seadrill in receiving instructions for West Leo to drill at a well not affected by the moratorium.

Approved Judgment

97. Since Tullow is seeking to rely upon a force majeure to excuse it from non-performance of its obligations the burden lies upon Tullow to prove on the balance of probabilities that there was nothing that it could reasonably have done to avoid or circumvent the force majeure. Although the burden lies upon Tullow the parties have agreed to limit this part of the case to a consideration of three wells in Jubilee, two wells in TEN and the MTA wells.
98. Almost all of Tullow's factual witnesses and their expert were questioned on this subject and considerable reliance was placed upon their answers by Tullow's counsel in his closing submissions. However, they were often in conflict or tension with the contemporaneous documents and it did not appear that the witnesses took into account the interest of Seadrill.

Wells J13 and J15 in Jubilee

99. These were two water injector wells in Jubilee which required a "workover", namely, maintenance work to ensure that the necessary two "barriers" between the contents of the wells and the environment were in place. There is no dispute that this work was required to be done, was technically feasible and did not require government approval. The question for the court is whether Tullow's obligation to use its reasonable endeavours to avoid or circumvent the force majeure obliged it to do the work in October 2016 and to direct West Leo to be used in such work.
100. Before considering Tullow's submission that to require the workovers to be performed in October 2016 would be unreasonable it is necessary to note the factual context in which the question arises. Tullow had identified the need for the workovers since about 2013. Tullow's Well Life Cycle Barrier Standard provided at clause 2.2.5 that "in the event of the loss of one of the well barriers, well operations shall cease and immediate action taken to reinstate a two barrier system". There had been such a loss. However, provision was also made for a dispensation from the Barrier Standard. Dispensations were in fact granted on an annual basis from 2013 and the wells were "shut in", that is, they were not used but remained available for use in the future. The workovers were not done in October 2016. It is in fact proposed that the workover of J13 be done in 2018 and that the workover of J15 at a later date, I think 2020, though that may be brought forward.
101. Counsel for Tullow addressed the workovers of wells J13 and J15 between paragraphs 291 and 301 of his closing submissions. Paragraphs 291 to 300 concern criticisms of Seadrill's case. Paragraph 301 sets out Tullow's case, namely, that there was no "business case" for doing the workovers of J13 and J15 at any material time prior to the termination of the contract. Since the burden is on Tullow to show that it exercised its reasonable endeavours to avoid or circumvent the force majeure it is appropriate to consider Tullow's case.
102. Reliance was placed on the evidence of Mr. Lawrie and of Mr. Turnbull and on the expert evidence of Mr. Paver. Mr. Lawrie accepted that the work could be done technically but said there was no "case" for doing so. Mr. Turnbull said there was no "value in doing the work.....they were safe wells". He said it would be "unreasonable to work over a safe well". Mr. Paver said there was no "business imperative to spend the money.....there was no major risk associated with leaving it the way it was."

Approved Judgment

103. Counsel for Tullow informed me (at paragraph 286 of his closing submissions) that the workovers would have been “very expensive – between US\$50-60m. for each well.” However, I did not understand Tullow’s case to be that for that reason alone it was unreasonable to expect Tullow to have done the work in October 2016. Rather, Tullow’s case was that there was no business case for spending that money on a workover of a “safe” well in October 2016 and for that reason it was unreasonable to expect Tullow to have done the work in October 2016.
104. I was not persuaded by that case. The need for the workover in the case of each well arose because there had been a breach of the “two barrier” standard. In the case of J13 and J15 there had been a leak in the completion tubing, which tubing needed to be replaced. The importance of that breach is reflected in Tullow’s safety policy which stated that “immediate action” should be taken to restore the two barrier protection. It is also reflected in the September 2016 dispensation from that requirement in the case of J13 which stated that the work be done “at the earliest practical opportunity” and in the request for a dispensation in respect of J15 until November 2016 which proposed that the workover take place “at earliest convenience” and identified that time as “after delivery of all first oil wells for the TEN project (October 2016)”. When West Leo had completed the 10 wells in TEN required for First Oil in September 2016 there was an opportunity to do the necessary workovers of J13 and J15. Mr. Lawrie agreed that the workover on J13 was a useful thing to do “if there was gap in the rig schedule” (just as Mr. Williams, the Group Head of Well Engineering, had suggested in 2015 when there was a gap before the TEN completions) and there was such a gap in October 2016. Thus there was a case for doing the work in October 2016.
105. The case of Tullow (and the evidence of Mr. Lawrie, Mr. Turnbull and Mr. Paver which supported it) depended upon the proposition that the wells were “safe”. There was a debate between the experts on this issue. Reference was made to the importance of the “two barrier” standard, to the risk of the second barrier failing and to the nature of the consequences had that risk materialised. Tullow had, at the time, considered the risk low but the consequences catastrophic. There was a dispute as to the nature of the consequences Tullow had in mind when making that assessment. However, having noted the technical details included within the dispensations I accept that careful consideration was given by Tullow’s technical team to the question whether or not it was appropriate to grant a dispensation from the “two barrier” standard and that there were, as Mr. Turnbull stressed when cross-examined, risk and control measures in place with the result that it can be said that Tullow reasonably formed the view at the time that it was safe to postpone the necessary work until 2018. But the question is not whether Tullow acted reasonably in its own interests but whether it discharged its duty to Seadrill, in the context of the force majeure clause, to exercise its reasonable endeavours to avoid or circumvent the force majeure. The object of that obligation is to ensure, so far as is reasonable, that, notwithstanding the force majeure, there is work which Tullow can request the rig to perform. In circumstances where (i) there is no dispute that the workovers on J13 and J15 had to be done, (ii) there was an opportunity to do the work in October 2016 when the rig would otherwise be idle, and (iii) it was accepted by Mr. Lawrie that this was appropriate work to be done when there was a gap in the rig’s schedule, Tullow’s failure to instruct West Leo to do this work in October 2016 was, in my judgment, a breach of Tullow’s obligation to use its reasonable endeavours to avoid or circumvent the force majeure.

Approved Judgment

106. Mr. Turnbull was asked whether it would have been unreasonable to carry out the work in October 2016 and he replied that it would have been unreasonable. When asked why that was so he replied that “it would be like changing the engine on your car when your car engine works”. I do not consider that an apt analogy. J13 and J15 suffered from a breach in the two barrier policy which required to be remedied. But more importantly, as it seems to me, Mr. Turnbull looked at the matter without taking into account the fact that Tullow was under a contractual obligation owed to Seadrill to use its reasonable endeavours to avoid or circumvent the force majeure so that, notwithstanding the force majeure, Tullow was able to provide a drilling programme to Seadrill. To be fair to Mr. Turnbull it was not his province to take such matters into account. They were management issues which were not his concern. But they were also not taken into account by Mr. Lawrie or by Mr. Paver, Tullow’s expert witness. In circumstances where the workovers had to be done at some stage and where there was an opportunity to do them in October 2016 I consider that Tullow’s obligation which it owed to Seadrill to use its reasonable endeavours to avoid or circumvent the force majeure required it to fill the gap in West Leo’s schedule by doing the workovers on J13 and J15. Of course that would cost money and Tullow preferred not to spend the money in October 2016 but such considerations, in the context of a force majeure clause, do not make doing the workovers unreasonable, notwithstanding that Tullow may reasonably have formed the judgment that the workovers could safely have been left until a later date. The impression I gained from the evidence was that the decision taken by Tullow not to do the workovers of J13 and J15 was taken by it in its own interests without considering the interests of Seadrill. Mr. MacFarlane replied, when asked whether he personally gave any thought to Tullow’s obligation to exercise reasonable endeavours, that he did. However, I was not referred to any contemporaneous document which evidenced such thought and I consider it more likely than not that the decision not to do the workovers in October 2016 was taken by Tullow in its own interests without considering its obligation to Seadrill. Tullow was obliged to take into account the interest of Seadrill in being instructed to do the workovers of J13 and J15. It did not do so. Within the context of the force majeure clause it was reasonable to do so notwithstanding that to do so was burdensome and inconvenient to Tullow.
107. For these reasons Tullow is unable to show that it exercised its reasonable endeavours to avoid or circumvent the force majeure.
108. My conclusion with regard to J13 and J15 means that it is unnecessary to consider any of the other wells which were debated. However, since the other wells were addressed in some detail I shall state my conclusions with regard to each of them.

Well J36 in Jubilee

109. J36 was a water injector well which was designed to support production of oil from J37. Before the PMO the rig schedule indicated an intention to complete J36 in November 2016. After the PMO the rig schedule indicated an intention to complete J36 in January 2016. In the event it was not completed in 2016. Completion was technically feasible and required no government permission. Tullow’s case for saying that its duty of reasonable endeavours did not require J36 to be completed was that there was no rationale for completing the well “sufficient to justify the inherent risk” (see paragraph 302 of its closing submissions). Any completion work has risks. What was said was that there was no business case for taking those inherent risks given: (a)

Approved Judgment

as a result of the FPSO problem any extra production could not be brought to market and (b) there was uncertainty as to whether there was any connectivity between J36 and J37 at level MH5. It was said (see paragraph 305 of the closing submissions) that there was no business case for completing J36 “in view of its lack of connectivity with J37”.

110. That case must be placed in the context of what in fact happened. Tullow planned to complete J36 in 2016. However, it appears to have been thought at that time that there would be connectivity between well J36 and well J37 at levels MHI and MH4. But by June 2016 it was thought that connectivity would be at a different level, MH5. Mr. Paver thought that this was uncertain and that view appears to be supported by Tullow’s report of June 2016 which referred to connectivity at level MH5 between J36 and J37 as “tortuous” and “not yet proven”. Nevertheless it appears (from Mr. MacFarlane’s email dated 21 July 2016) that Tullow’s technical/business recommendation was in favour of completing J36. Further, Mr. Turnbull explained that table 1 in his first statement showed MH5 as having been approved in 2016 and in his first statement he described MH5 as the only layer that may be in communication with J37. Mr. Lawrie accepted, when cross-examined, that there was a business case for completing J36 which was put to the joint venture partners but was rejected by them.
111. Whilst connectivity at level MH5 could not be certain the evidence in June and July 2016 was sufficient to persuade Tullow that it was appropriate to complete J36. Similarly, although the problem with the FPSO was known about Tullow remained in favour of completing J36. Mr. MacFarlane said when cross-examined that in the light of the FPSO problem there was “no economic business case for executing this well”. However, that was not the view formed by Tullow at the time, as Mr. MacFarlane’s own email dated 21 July 2016 showed.
112. Although Mr. Paver disagreed that there was a business case for completing J36 Tullow thought at the time that there was.
113. There was a risk that there would prove to be no connectivity between J36 and J37. That is no doubt the type of risk an oil company takes from time to time. In 2016 Tullow considered that there was a business case for completing J36 and Tullow put that case to its partners. Had the risk of there being no connectivity been such that it was unreasonable to complete J36 Tullow would surely not have formed the view in 2016 that there was a business case for completing J36 and would not have put that case to its partners. Mr. MacFarlane said when cross-examined that what had been discovered about connectivity “fundamentally changed the economics”; but that is not a view which he put forward at the time. Similarly, Tullow cannot have thought at the time that the consequences of the FPSO problem were such as to make it unreasonable to complete J36. Mr. MacFarlane said when cross-examined that that there was no economic business case for completing J36 in the light of the FPSO problem; but again that is not a view which he put forward at the time. His explanation of the business case put to the joint venture partners was that “we were trying to create a strategic benefit in the minds of the joint venture to complete this well which would ultimately help us with our future well location targeting on Jubilee”. I consider that to be an unconvincing attempt to explain away the contemporaneous documents. I find the contemporaneous evidence that there was a

Approved Judgment

business case for completing J36 more reliable evidence than either the current views of their witnesses or the expert evidence of Mr. Paver.

114. If it had been unreasonable to complete J36 in 2016 I do not consider that Tullow would have proposed to its joint venture partners that it be completed in 2016. I therefore find that Tullow failed to exercise its reasonable endeavours to avoid or circumvent the force majeure by failing to complete J36. The work could have been done and there was a business case for doing it.
115. The reason why that work was not done was because the joint venture partners did not agree. But in circumstances where Tullow entered the contract on behalf of its partners that is not a matter on which it can rely to say that it exercised its reasonable endeavours to fulfil its contractual obligations. Tullow mentioned the partners' lack of support but did not explain why, given that Tullow entered the contract on behalf of its partners, it could rely on the partners' lack of support; see paragraph 306 of Tullow's closing submissions.
116. It follows that for this reason also Tullow is unable to show that it exercised its reasonable endeavours to avoid or circumvent the force majeure.

Well TW01 in TEN

117. This well was intended for the production of gas (not associated with oil production). Tullow was committed to complete it under the TEN POD within 24 months of first oil in TEN. First Oil was achieved in August 2016 and so TW01 had to be completed by August 2018. There was no dispute that the well was technically available for completion in October 2016 or that it was not barred by the PMO. However, it was not included on the rig schedule for 2016.
118. In April 2016, following the problem with the FPSO in Jubilee, Tullow intended to complete TW01 in 2016 in order to accelerate gas production from TEN and so offset lost production resulting from the FPSO problem. A presentation was prepared which listed 10 reasons for completing TW01 and 3 for not doing so. Notwithstanding those 3 reasons for not doing the work the recommendation was to accelerate production from TW01. This was opposed by two of the joint venture partners. Mr. MacFarlane reported in April 2016 that so far as Kosmos was concerned "the rig is the real issue". By July 2016 Mr. MacFarlane reported that the views of Kosmos and GNPC were against Tullow's "technical/business recommendation" to complete TW01. Mr. Lawrie recalled when cross-examined that the proposal was put to the joint venture partners "in around summer of 2016". Mr. Turnbull was involved in making sure that Tullow was ready to do the work which Tullow had proposed to the joint venture partners.
119. As with well J36 Mr. Paver took a different view from the contemporaneous view formed by Tullow. He considered that there was no business case for accelerating completion of TW01. His reasons included the following: (i) there was insufficient infrastructure to transfer gas from the well; (ii) there was no agreement in place with the Government of Ghana to "take or pay for" gas and so no benefit would be derived from the completion; (iii) in the event the gas pipeline between TEN and Jubilee was used to return gas to TEN for re-injection. The evidence of Mr. Lawrie was to the same effect (a gas sales agreement was required, without which there was "a legal

Approved Judgment

commercial impasse”) as was that of Mr. Turnbull (“not worthwhile or even futile”) and Mr. MacFarlane (“economic stupidity”).

120. As to these points Seadrill said: (i) the infrastructure could be ready in the first quarter of 2017 and so there was no reason not to complete the well in October 2016 and (ii) there had been no “take or pay for” agreement in place when the TEN POD was agreed and yet it was agreed, and it was in the Government’s interests to negotiate a sensible agreement (the main terms of which had been agreed in principle in the TEN POD). It is also to be noted that when the advantages and disadvantages of completing TW01 had been considered by Tullow in May 2016, when Tullow decided to recommend accelerating the completion of TW01, one of the disadvantages was the need to agree a gas sales agreement. But that was not regarded at the time as being a reason of such force that the recommendation to accelerate production from TW01 should not be made. If it had been of the required force the recommendation would surely not have been made to do the work. Mr. MacFarlane’s evidence that there was “a solid case for doing [TW01] if the Government of Ghana agreed to take or pay for that gas” was not the view put forward at the time.
121. Seadrill did not advance any particular response to the argument that gas could not be pumped ashore because gas was being pumped the other way. Mr. Zambonini’s response to this was that the relevant pipeline was not constructed until January or February 2017 and that in any event the fact that gas was being pumped back to TEN did not stop TW01 being completed.
122. It was also submitted on behalf of Tullow that production of gas from TW01 would trigger an undertaking given in May 2013 which would breach the moratorium. But this was one of the 3 disadvantages noted at the time and it did not dissuade Tullow from recommending the production of gas.
123. In circumstances where Tullow decided to recommend completion of TW01 in 2016 it is very difficult for Tullow now to say that that view was mistaken and that in fact it was “futile” or “economically stupid” to complete the well. Of course there were risks involved (in particular the risk that a “take or pay” agreement might not be reached); and Mr. Clark described the work as “riven with risk”. But the risks did not prevent Tullow from recommending the work to its partners. If there had been no business case for doing that work Tullow would surely not have recommended it to its partners.
124. As with J36 the reason the work was not done in 2016 was because the partners, or at least two of them, did not agree to the work being done. As with J36 that does not enable Tullow to say that it had exercised its reasonable endeavours, especially in circumstances where it appears that Kosmos’ objection concerned the rig and, no doubt, the rate of hire which exceeded the market rate.
125. I therefore conclude that with regard to TW01 Tullow also failed to exercise its reasonable endeavours.

Well EN13 in TEN

Approved Judgment

126. This was another water injector well. It was linked with EN12 drilling of which was prevented by the PMO. For that reason Tullow's case was that completing EN13 in October 2016 at a cost of US\$60m lacked any business case.
127. Against that Seadrill rely upon the following: (i) the well was part of the TEN POD which Tullow was obliged to complete; (ii) in fact EN13 was to be completed before EN12; (iii) Tullow and its joint venture partners had invested billions of dollars in TEN and completion equipment had a life span of 25 years on the sea bed; (iv) Tullow expected Ghana to prevail in the border dispute (as they in fact did). In those circumstances there was a business case for completing EN13 notwithstanding that there would be some delay in the drilling and completion of EN12.
128. Given that EN12 could not be drilled and completed by reason of the moratorium I accept that in 2016 it was not reasonable to complete EN13, notwithstanding the interest of Seadrill in receiving instructions for West Leo to drill. Unless Ghana won the border dispute EN12 might never be drilled. There was thus a clear risk that completion of EN13 would be a futile, but expensive, step to take. Thus, notwithstanding that Tullow may have expected Ghana to win the dispute thereby enabling EN12 to be drilled, I accept that reasonable endeavours did not require Tullow to complete EN13.

The MTA wells

129. There were wells in MTA which had been suspended in a manner which did not comply with Tullow's policy; they did not have two tested barriers. However, that was not Tullow's responsibility because the operator of MTA was Kosmos. Nevertheless in June 2015 Mr. Turnbull commented that Tullow was "coming close to having to do something" in circumstances where Tullow had rig time, may be taking over operatorship and the wells had been suspended in a "sub-industry standard" way. Despite concerns of this nature it does not appear that Tullow made any effort to do the necessary work or to offer Kosmos the use of West Leo to do the necessary work. It was Seadrill's case that Tullow's duty of reasonable endeavours required it do so.
130. There was evidence (noted by Mr. Zambonini) that West Leo had worked in MTA before but there was no evidence of the circumstances in which that was done. I have no doubt that reasonable endeavours did not require Tullow to do the work itself in circumstances where it was not the operator of MTA. That would, it appears to me, be contrary to the established scheme of "operatorship". Kosmos, who was the operator of MTA, had its own rig, which it had stacked. Further, it would, it seems to me, be a novel step for Tullow to offer Kosmos the use of West Leo. I do not consider that reasonable endeavours required Tullow to take either of these steps, notwithstanding the interest of Seadrill in receiving instructions for West Leo to drill.

Conclusion on reasonable endeavours

131. Tullow failed to exercise its reasonable endeavours to avoid or circumvent the force majeure. Tullow ought, but failed, to have provided Seadrill with drilling instructions for West Leo to do workovers of wells J13 and J15 in Jubilee, to complete well J36 in Jubilee and to complete well TW01 in TEN.

Approved Judgment

132. That therefore is a further reason why Tullow is unable to rely upon the force majeure clause.

VAT and Withholding tax

133. This is the only point taken on the quantum of Seadrill's claim. Under the contract Tullow's liability to pay Seadrill is said to be contingent upon the submission of "true and correct" invoices; see section 2A clause 10.2.2 of the contract. Tullow submitted that "to the extent that the invoices were not true and correct, no liability to pay arose and no entitlement to interest under the contract could arise." The invoices submitted by Seadrill are said to be not "true and correct" because (i) they charged VAT when it was not due and (ii) they failed to deduct withholding tax when it ought to have been deducted.
134. I shall deal with the incidence of VAT and withholding tax but I should first deal with Tullow's submission upon the assumption that the invoices wrongly charged VAT and failed to deduct withholding tax. As to invoices which wrongly charged VAT the effect of Tullow's submission that "to the extent that the invoices were not true and correct" is simply that Tullow is not liable to pay VAT where it is not due. There is no suggestion that in any other respect the invoice was neither true nor correct. It would be absurd to conclude that because VAT had been wrongly charged nothing at all was due in respect of the invoice. Indeed I am not sure that Tullow actually advanced such a proposition. As to invoices which failed to deduct withholding tax I do not accept that they were not true and correct. Section 27 of the Petroleum Act 1987 obliges Tullow to withhold tax from the amount due to Seadrill. Seadrill is entitled to issue an invoice for the full amount due. There is nothing which is not true or correct about such an invoice. It is up to Tullow to comply with the law of Ghana and withhold the relevant tax and pay it to the Government of Ghana.

VAT

135. There is a dispute as to whether VAT was chargeable by Seadrill on its invoices for the period after West Leo left Ghana waters on 10 November 2016. This depends upon whether a service was provided in Ghana in respect of the period after 10 November 2016.
136. I first deal with this question in relation to the standby invoice. Seadrill says that VAT is chargeable because under section 42(3) of the Ghana Value Added Tax Act 2013 a supply of services takes place at the location of the place of business of the supplier from which the services are supplied. That place was Ghana and so VAT is due. However, that section was subject to, inter alia, section 42(5), which provides that the supply of services connected with tangible personal property takes place where the service is physically carried out, which Tullow says was outside Ghana. Both experts on the law of Ghana considered that this was arguable. Seadrill submitted that section 42(5) was inapplicable because no service was carried out after 10 November 2016. After that date West Leo proceeded to a stacking station outside Ghana pursuant to a proposal by Seadrill that she be "down-manned". That proposal was accepted by Tullow. Tullow's expert, when cross-examined, appeared to accept that Tullow was not receiving any services under the contract after the rig left Ghana. It is not clear from the transcript that this answer was given in relation to section 42(5). The most that can be said is that the West Leo was on standby after 10 November 2015. Is that

Approved Judgment

the supply of a service? It is arguable that it is not in circumstances where the rig has left Ghana to be stacked. But it seems to me difficult for Seadrill to maintain this in circumstances where Seadrill is seeking to charge VAT for the supply of services in respect of the period after the rig left Ghana. It seems to me that Seadrill cannot both make such a charge and say no service was provided. I have therefore concluded that a service was provided. If so, then pursuant to section 42(5) the service was supplied where the service is physically carried out, namely out of Ghana. It therefore follows that VAT is not chargeable in respect of that service.

137. With regard to the “termination for convenience” invoice there is also a dispute as to whether a service was provided. Seadrill says a service was provided because, pursuant to section 20 of the VAT Act, a supply of services means a supply in the nature of “the making available of a facility or advantage”. It was submitted that Seadrill made available to Tullow the facility or advantage of terminating the contract for convenience. Both experts on the law of Ghana accepted that in the absence of any authority from Ghana the courts of Ghana would have regard to English authorities. Particular reliance was placed by Seadrill on *Croydon Hotel & Leisure v Commissioners of Customs and Excise* 1997 Decision Number 14920 (a decision of a VAT tribunal) and *Lubbock Fine & Co. v Commissioners of Customs and Excise* 1993 Case C-63/92 (a decision of the European Court of Justice). Those cases supported the proposition that where a party conferred upon another party the right to terminate an existing agreement a service was supplied. However, Tullow said that such analysis was only correct when the right to terminate was conferred by a later and separate agreement. The analysis did not apply where, as here, the right to terminate was contained in the original agreement. In this regard reliance was placed on *Finance and General Print* 1995 Decision Number 13795 and on *Lloyds Bank PLC* 1996 Decision Number 14181 (two decisions of VAT tribunals). This distinction was also drawn in an advice published by HM Revenue and Customs. Seadrill said there was no reason to draw such a distinction.
138. I need not resolve that particular dispute. For the particular terms of the Ghana VAT Act on which reliance is placed (a supply of services means a supply in the nature of “the making available of a facility or advantage”) do not appear in the legislation considered in the English and European cases; see for example *Croydon Hotel & Leisure* at paragraphs 4-8. Thus the question which the Ghana courts would have to determine is one that is not covered by the English and European case law. That case law concerned comparable factual contexts but the legislative definition of a service was different. In particular the Ghana statute provided in terms that “the making available of a facility or advantage” was the supply of a service.
139. The question therefore is whether the provision in the contract for the services of West Leo that Tullow may terminate the contract for convenience on the payment of certain sums was the making available by Seadrill of a facility or an advantage. In my judgment it was. Tullow was provided with the contractual right to terminate the contract for its own convenience. There can be no doubt that such a right was a facility or an advantage. I therefore conclude that Seadrill provided a relevant service.
140. The next question is where that service was provided. The service, the making available of the right to terminate, was provided in the contract. It seems to me that, in accordance with section 42(3) of the VAT Act, that supply took place at the location of the place of business of the supplier from which the services are supplied, namely,

Approved Judgment

the place of business of Seadrill in Ghana. Of course, Tullow exercised the facility or advantage which had been granted to it when West Leo was out of the jurisdiction. But Seadrill's services had been supplied much earlier than that when the contract was made.

141. It follows that VAT is chargeable on the termination invoice.
142. Tullow's submissions suggested that the applicable rate of VAT was zero. Counsel for Seadrill objected to this on the basis that the point had not been pleaded, was not in the expert's reports and that the relevant section of the Act had not been put to Seadrill's expert. Counsel for Tullow had in fact put to Seadrill's expert a question which used the language of Schedule 2 paragraph 3(3) which is the section relied upon. He asked him if it was his opinion that, if the place of supply was Ghana, the VAT rating would be zero because Tullow was consuming the services outside of Ghana. Seadrill's expert did not agree. Tullow's own expert volunteered evidence on the issue of the rate when being cross-examined about a different matter but did not appear to rely upon paragraph 3(3) of the Second Schedule. The question of rate appears to be a new point not addressed in the expert's reports. In those circumstances I accept that it is not a point open to Tullow. I can envisage an argument that the services supplied by Seadrill in making available a facility or advantage, namely, the opportunity to terminate the contract for convenience, were "consumed" by Tullow at its premises in Ghana when it decided to exercise that facility or advantage, notwithstanding that West Leo was at the time out of Ghana. I do not say that that argument is correct; but in circumstances where the opposing arguments have not featured in the experts' reports it is not fair to Seadrill to permit this point to be advanced.

Withholding tax

143. The question is whether withholding tax was payable in respect of the standby invoices and termination for convenience services. Withholding tax is payable pursuant to the terms of section 27 of the Ghana Petroleum Income Tax Act 1987. That provides as follows:

"Where under the terms of a contract an amount due to a subcontractor in respect of work or services for or in connection with a petroleum agreement the person liable under that contract to make payment to the subcontractor shall withhold from the aggregate amount due to the subcontractor the percentage of the aggregate amount that may be specified in the petroleum agreement"

144. There does not appear to be any dispute that the amounts due to Seadrill from Tullow were in connection with a petroleum agreement. However, Tullow maintains that the services of the subcontractor, Seadrill, must be performed in Ghana. That is not stated in section 27 but is said to be the effect of the definition of subcontractor in the Act which is:

"A person who enters into a contract with a contractor for the provision of work or services, in the Republic for or in

Approved Judgment

connection with the petroleum agreement to which the contractor is a party.....”

145. The question is whether the phrase “in the Republic” governs the opening phrase “a person who enters into a contract” or whether it governs the phrase “the provision of work or services”. On balance I consider that it governs the latter. I therefore accept that the withholding tax in section 27 applies in respect of work or services in Ghana. This conclusion is consistent with the ruling by Internal Revenue Service of Ghana dated 25 August 2010 (although no details of what was in issue in that case were available).
146. The standby invoices in respect of the period before 10 November 2016 when the rig was in Ghana were supplied in Ghana. The standby services in respect of the period after 10 November 2016 when the rig was outside Ghana were not supplied in Ghana, essentially for the reasons already given. Thus withholding tax was payable in respect of the former but not in respect of the latter.
147. The termination for convenience invoice was in respect of a service supplied in Ghana, essentially for the reasons already given. So withholding tax was due in respect of it.

Conclusion

148. Seadrill is entitled to judgment in respect of the sums claimed save where VAT is not due, namely, on the standby invoices for the period after 10 November 2016. I invite the parties to agree an order which gives effect to this judgment.
149. Tullow requested that there be no order for payment of VAT on the grounds that it can discharge any VAT liability by the issue of a VAT Relief Purchase Order. I consider that the order should include VAT where it is due. It is then up to Tullow how it discharges its liability.