Neutral Citation Number: [2020] EWCA Civ 1397

Case No: A4/2019/3139

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AN PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT**
**HIS HONOUR JUDGE PELLING QC**
**(SITTING AS A JUDGE OF THE HIGH COURT)**
**2019 EWHC 3241 (COMM)**
**CL-2019-000014**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2020

**Before:**

**LORD JUSTICE LEWISON**
**LORD JUSTICE PETER JACKSON**
and
**LADY JUSTICE CARR**

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**Between :**

| | |
|---|---|
| **Apache North Sea Limited** | **Appellant** |
| **- and –** | |
| **(1)Euroil Exploration Limited** | **First Respondent** |
| **(2)Edison S.P.A.** | **Second Respondent** |

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**Mr David Allen QC & Mr Henry Moore** (instructed by **Clyde & Co LLP**) for the **Appellant**
**Mr Alec Haydon QC** (instructed by **Herbert Smith Freehills LLP**) for the **First & Second Respondents**

Hearing date: 14 October 2020

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# Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00am 30 October 2020."

**Lady Justice Carr DBE:**

## Introduction

1. Farm-out agreements are used in the oil and gas industry across the world. They borrow their name from historical practices in the agricultural sector where undertaking work on farmland would entitle a person to a legal or beneficial interest in that land. A farm-out agreement operates as a type of sale and purchase agreement under which a seller agrees to transfer part (but not all) of its interest to the buyer in exchange for that buyer agreeing to undertake (or fund) work obligations such as acquiring seismic data or drilling wells in respect of that asset. In the context of the oil and gas industry, the upstream "asset" being transferred is usually an interest in a licence, production sharing contract, or other concession, granted by a government to a company to explore for and produce oil and gas.

2. Farm-out agreements do not typically exist in a vacuum. Where there is more than one owner, the parties will regulate their relationship in relation to that asset under a joint operating agreement. Farm-out agreements need to take account of and interact appropriately with those joint operating agreements to avoid inconsistencies and minimise the prospect of dispute. This appeal arises out of a dispute relating to the interaction between a farm-out agreement and a joint operating agreement.

3. The Appellant, Apache North Sea Limited ("ANSL"), entered into a Farm-Out Agreement dated 19 February 2015 (as amended and restated on 16 July 2015) with the First Respondent, Euroil Exploration Limited ("EEL"), for the sale and purchase of minority interests in respect of two UK Continental Shelf seaward production licences and participation in associated joint operating agreements ("the FOA"). The relevant licence for present purposes is Licence P. 1998 ("the Licence") and relates to an area described as "Val d'Isere" ("the Licence Area"). By way of consideration, under clause 2 of the FOA, EEL agreed to pay ANSL (subject to the terms of the FOA and in accordance with the provisions of clause 3.1 of the FOA) a price consisting of a proportion of ANSL's historic incurred survey and licence costs ("Back Costs") and 26.25% of ANSL's total costs (other than "Back Costs") including for drilling the well in the Licence Area.

4. The relevant associated (Val D'Isere) Joint Operating Agreement was deemed to be in full force and effect immediately for the purpose of the FOA even though, as was always anticipated, it was only executed subsequently (on 22 July 2015) ("the VJOA").

5. The Second Respondent, Edison SPA ("Edison"), is EEL's ultimate parent company and agreed to be guarantor of EEL's payment obligations under the FOA (as primary obligor and not merely as surety) under a Deed of Guarantee and Indemnity entered into with ANSL dated 19 February 2015 ("the Deed of Guarantee").

6. As set out in more detail below, ANSL drilled an exploration well in the Licence Area ("the Earn-In Well") with a drilling rig leased on a long-term basis at various fixed daily rates ("the rig"). Whilst these rates may have been favourable against the market at times, they were significantly in excess of the market rates prevailing at the time of drilling.

7. In a judgment dated 6 December 2019 ("the Judgment") HHJ Pelling QC (sitting as a judge in the High Court) ("the Judge") held that the total costs of drilling recoverable by ANSL and payable by EEL under the FOA were capped by reference to what they would have been if incurred at market rate (relying in particular on clause 3.1 of the FOA, clause 6.2.2 and the Accounting Procedure in Schedule 1 of the VJOA). The question for this court is whether he was right to do so.

8. On ANSL's construction of the FOA, ANSL is entitled to payment of £3,280,482.46 (based on the full costs actually incurred by it in hiring the rig to drill in the Licence Area); on EEL's construction of the FOA, favoured by the Judge, ANSL is entitled to no more than £1,114,480.68 (based on the costs of drilling based on the market (and not actual) rate of hiring the rig to drill in the Licence Area).

9. ANSL contends that the Judge failed to apply the express language of a contractual definition in the FOA negotiated by sophisticated commercial parties and drafted by the expert legal advisers. EEL contends that the Judge's construction was correct essentially for the reasons that the Judge gave. Edison adopted EEL's position on all issues, as it did before the Judge.

## The Facts

10. ANSL is a company incorporated in England and a subsidiary of Apache Corporation, a US oil and gas company. EEL is also an English company in the same group of companies as Edison, an Italian company, both being ultimately owned and controlled by Électricité de France.

11. The Licence was issued by the Secretary of State for Energy and Climate Change and dated 17 September 2013. It allowed ANSL either to drill one well or to elect to allow the Licence to cease. By letter dated 9 December 2014 ANSL elected to drill.

12. As set out above, ANSL and EEL then entered into the FOA on 19 February 2015 in respect of the Licence (and also another licence, Licence P. 2001, relating to an area described as "Les Arcs"). The VJOA was deemed to be in full force and effect immediately for the purposes of the FOA and was subsequently executed on 22 July 2015. The Deed of Guarantee was entered into on the same day as the FOA. Edison's liability for the Earn-In Costs under the Deed of Guarantee was "limited to an amount equal to fifty million Euro (€50,000,000)".

13. On 4 November 2016 ANSL entered into a Farm-In Agreement in relation to the Licence with a third-party company (ultimately named DNO Exploration UK Limited ("DNO")). DNO became a party to the VJOA by deed of novation dated 13 July 2017. Thereupon the percentage interests under the VJOA were held as follows: ANSL 60%; DNO 22.5%; EEL 17.5%.

14. The rig used by ANSL was the "WilPhoenix" semi-submersible rig which had been leased by ANSL from Awilco Drilling plc since 12 August 2013 under a hire contract for the provision for a mobile semi-submersible drill rig unit. Thunderclouds relating to the use of the rig gathered early on. Thus, having been notified in October 2016 that ANSL intended to use the rig, EEL emailed ANSL on 17 November 2016 setting out the basis for its objections to such use, maintaining that ANSL either had to

proceed with a tender process or limit the costs charged to the prevailing market rates. EEL maintained that position throughout the months that followed.

15. In the event an Authorisation for Expenditure Form was issued and approved (under clause 9.8 of the VJOA) by ANSL on various dates between 18 July and 15 September 2017 and by DNO on 4 October 2017, expressly authorising the use of the rig at the daily rate actually incurred by ANSL ("the AFE") and the rig was deployed. EEL accepts that the AFE was issued contractually but contends that it was invalid for the failure to follow the Accounting Procedure in the VJOA.

16. The drilling commenced on 19 December 2017 and continued until 3 February 2018. During that period the rate payable for the rig under the hire contract (of US$382,404 per day) exceeded the market rate for an equivalent rig (of US$130,000 per day) significantly.

17. The Earn-In Well was found to be dry, with hydrocarbons in economically producible quantities not being located. EEL did not exercise its option (under clause 3.1.8 of the FOA) to acquire a further 7.5% interest in the Licence. The operation was wound up.

18. ANSL sent EEL a Reconciliation Statement dated 13 June 2018 under clause 3.1.3 of the FOA, showing £3,280,482.46 as the balance due. EEL refused to pay, maintaining that ANSL was only entitled to payment for the cost of the rig by reference to the rate prevailing for similar equipment to the rig over the material period. EEL admitted liability for payment by reference to market rates (although it did not make any such payment (in whole or part) until after the commencement of the proceedings and three days prior to the case management conference on 16 May 2019).

## The terms of the FOA and the VJOA

19. Given the nature of the issues raised, it is necessary to set out the relevant clauses of the FOA and the VJOA in detail (as contained in the Appendix to this judgment). The key clauses of the FOA and the VJOA as referred to by the parties are, however, repeated here for ease of reference.

*The FOA*

20. Recitals B and C provided:

> "WHEREAS:
>
> …
>
> B. On and subject to the terms and conditions of this Agreement, [ANSL] is willing to transfer the Earned Interests to [EEL] in consideration of the payment by [EEL] of certain costs that would otherwise be borne by Apache.
>
> C. The costs to be borne by [EEL] described in Recital B are in respect of the drilling of up to two (2) separate wells at different times under the Licences"

21. Clause 1 contained the following key definitions:

""**Agreement**" means this deed including the recitals and the Schedules attached hereto;…

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

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

"**Operator**" means [ANSL] or whichever person is designated operator under the relevant JOA from time to time;…

"**Val D'Isere Earn-In Costs**" means (I) (a) in the event that the Val D'Isere Option is not exercised twenty six point twenty five percent (26.25%) of the total costs (other than the Back Costs) in relation to the Val D'Isere Earn-In Well, whensoever incurred, and in respect of all works undertaken pursuant to the Well Programme in connection with the Val D'Isere Earn-In Well, including: the planning, surveying, drilling (including side-tracking for mechanical reasons), coring, testing, logging, suspending and abandoning of the Val D'Isere Earn-In Well and the mobilisation and demobilisation of the rig (if relevant), provided that in the event that the costs in respect of Val D'Isere Earn-In Well (net to [EEL]) exceed ten million five hundred thousand pounds (£10,500,000), then with respect to any such costs in excess of such amount such percentage shall be reduced to seventeen point five percent (17.5%) of such costs; or (b) in the event that the Val D'Isere Option is exercised, thirty-seven point five percent (37.5%) of the total costs (other than the Back Costs) in relation to the Val D'Isere Earn-In Well, whensoever incurred, and in respect of all works undertaken pursuant to the Well Programme in connection with the Val D'Isere Earn-In Well, including: the planning, surveying, drilling (including sidetracking for mechanical reasons), coring, testing, logging, suspending and abandoning of the Val D'Isere Earn-In Well and the mobilisation and demobilisation of the rig (if relevant), provided that in the event that the costs in respect of Val D'Isere Earn-In Well (net to [EEL]) exceed eighteen million Pounds Sterling (£18,000,000), then with respect to any such costs in excess of such amount such percentage shall be reduced to twenty-five percent (25%) of such costs; plus (II) the Back Costs as further set out in Schedule 4 Part 2"…

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

22. Clauses 2 and 3 provided materially:

> "**2. Agreement to Transfer the Earned Interests**
>
> 2.1 Subject to the terms of this Agreement, in consideration of [EEL] paying the Earn-In Costs in accordance with the provisions of clause 3.1 below, [ANSL] hereby agrees to transfer the Earned Interests to [EEL] free from all Encumbrances (other than any Encumbrances set out in the Earned Interest Documents) and [EEL] hereby agrees to acquire from Apache, the Earned Interests and to pay the Earn-In Costs.
>
> **3. Well Programme and Earn-In Costs**
>
> 3.1 ***Determination and Payment of Earn-in Costs***
>
> 3.1.1 Subject to the terms of this Agreement, [EEL] shall pay the Earn-In Costs, in accordance with the provisions of this Clause 3.1. On and from Completion [EEL] shall, for the avoidance of doubt, also pay its Percentage Interest share of any other costs pursuant to or in connection with the relevant JOA and/or the Earned Interests.
>
> 3.1.2 [EEL] agrees to pay [ANSL] within three (3) Business Days of execution of this Agreement the sum of five million Pounds Sterling (£5,000,000) in respect of the anticipated Earn-In Costs (the "Upfront Payment"). The Upfront Payment shall be applied by [ANSL] towards payment of the Earn-In Costs following receipt of a corresponding AFE, cash call or invoice issued by [ANSL] in accordance with the relevant JOAs within the applicable time periods as set out in the relevant JOAs.
>
> 3.1.3 Upon Earn-In Well Completion, [ANSL] shall calculate the total amount remaining due pursuant to Clause 3.1.1, taking into account the Upfront Payment and payments made pursuant to Clause 3.1.4. [ANSL] shall issue a statement within ten (10) days of the Earn-In Well Completion having occurred, which shall confirm whether or not any payment is due under this Clause 3.1.3 by [EEL] to [ANSL], or by [ANSL] to [EEL] (as applicable) and the amount of such payment (the "Reconciliation Statement"). The Parties shall then discuss and agree the same (taking into account any items which may be the subject of dispute with the Operator under the JOA). If a payment is due under the Reconciliation Statement, such payment shall be made within thirty (30) days of the date of issue of the Reconciliation Statement and any dispute regarding the amounts set forth in the Reconciliation Statement shall be resolved between the Parties in accordance with the JOA.

> 3.1.4 [EEL] shall pay all sums payable by it with respect to the Earn-In Costs upon receipt of an invoice from [ANSL] (taking into account the Upfront Payment) in accordance with the relevant JOA within the applicable time periods as set out in the relevant JOA, provided that the payment of the Back Costs agreed with respect to Val D'Isere Earn-In Well shall be made within seven (7) Business Days of a demand being made for such payment, such demand to be made no earlier than 1 January 2016….
>
> 3.1.8 [EEL] may, by giving notice in writing to [ANSL] at any time prior to the date falling ninety (90) days after Earn-In Well Completion in respect of Earn-In Well Completion of the Les Arcs Earn-In Well (the "Option Expiry Date"), exercise the option to acquire a further 7.5% Percentage Interest under the Val D'Isere JOA. At such time, [EEL] shall pay the amount of any further Val D'Isere Earn-In Costs then due and not yet paid as a result of exercising such Val D'Isere Option…..
>
> **3.3 JOAs**
>
> 3.3.1 For the purpose of this Agreement, the parties agree that the Les Arc[s] JOA and Val D'Isere JOA shall, to the extent not otherwise in force and effect, be deemed to be in full force and effect both prior to and after Completion and [ANSL] shall, with respect to the Earn-in Costs, issue AFEs pursuant to and in accordance with the relevant JOAs from the date hereof…."

23. Clause 19 contained what has been described as an "inconsistency clause":

> **"19. General**
>
> 19.1 If there is any conflict between the provisions of this Agreement and the provisions of the Assignment Documents, the Reassignment Documents and/or the JOAs, the provisions of this Agreement shall prevail."

*The VJOA*

24. ANSL was the "Operator" under the VJOA. Key provisions of the VJOA are as follows:

> "**1 Definitions and Interpretation**
>
> **Invoice** any invoice presented for payment by the Operator to a Participant in accordance with the provisions of the Accounting Procedure in connection with Joint Operations
>
> **Joint Account** the account established and maintained by the Operator to record all Advances, Invoice payments, expenditures and Receipts in the conduct of the Joint Operations

**Joint Operations** all operations which are conducted by the Operator on behalf of all the Participants in accordance with this Agreement after the date of commencement of this Agreement as provided in clause 2

…

**3 Scope and Understanding**

3.1 Scope

3.1.1 The scope of this Agreement shall extend to:

(a) the exploration for….Petroleum under the Licence;

…

**4 Interests of the Participants**

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

[ANSL] 82.5%

[EEL] 17.5%

TOTAL 100.0%

…

**6 Authorities and Duties of the Operator**

…

6.2 Responsibilities

…

6.2.2 The Operator shall:

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

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

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

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

…

6.5 Commitments for Material and Services

…

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

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

…

**16 Costs and Accounting**

16.1 The Accounting Procedure

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

…

**Schedule 1**

Accounting Procedure

…

1 Purpose and Intent

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

1.2 It is intended that the Accounting Procedure is fair and equitable as regards the charges, income, losses and gains

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

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

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

…

**3 Accounting Basis**

3.1 The Operator shall open and maintain such separately identifiable accounting records as may be necessary to record in a full and proper manner all Invoice and Advance payments received by the Operator from each Participant and all expenditure incurred and all Receipts obtained by the Operator in connection with the Joint Operations.

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

## The Judgment

25. Having set out the facts, the parties' respective cases and the relevant applicable principles of construction, the Judge reasoned (in summary) as follows:

    i) Neither party maintained that there was any relevant factual or commercial context relevant to the construction outside the FOA and the VJOA. The FOA was a complex agreement drafted by skilled and specialist solicitors acting for sophisticated and experienced parties; it was bound to be interpreted principally by textual analysis unless a provision lacked clarity or was apparently illogical or incoherent;

    ii) In interpreting the FOA the VJOA could not be ignored (referring to clause 3.3.1 of the FOA);

    iii) Whilst a large number of words and phrases in the FOA were defined with great precision, the phrase "…the total costs….in relation to the Val D'Isere Earn-In Well" was not so defined. The Judge was unable to accept ANSL's submission that that was because it was intended that EEL would pay its proportion whensoever incurred as long as they were in respect of any parts of the works undertaken by ANSL in connection with the Earn-In Well. Nor did clause 19.1 of the FOA produce such a result;

    iv) The FOA did not define what came within the scope of the phrase "total costs" nor provide any machinery by which to determine them. It was the parties' intention that this would be determined using the machinery provided by the VJOA (see clauses 3.1.2, 3.1.3, 3.1.4 and 3.3.1 of the FOA read together). It would have been "entirely unnecessary" to have approached payment in that way if ANSL's position was correct. The FOA would have provided for a simple billing mechanism without any reference to the need for such invoices to be issued in accordance with the VJOA;

v) It was difficult to see how the work identified within the Earn-In Costs in the FOA could not be work to which the VJOA applied. Even if there was a distinction, there was no business sense in providing for the costs of the types of work within the Earn-in Costs to be treated differently from other work coming within the scope of "Joint Operations";

vi) Paragraph 3.1 of the FOA, when read as a whole, is consistent with the parties having intended that the amount of the sale consideration set out in clause 2.1 was to be calculated, claimed for and paid in accordance with the terms of the VJOA. That was why there was no definition of "total costs" in the FOA;

vii) This conclusion was not an unwarranted interference with the price that ANSL was entitled to receive. The profit for entering into the FOA from ANSL's perspective lay not in recovering by way of total costs a sum in excess of what was provided for under the Accounting Procedure in the VJOA; rather it lay in the proportion of the total costs being paid by EEL being in excess of what would be referable to the share that it was purchasing. Reliance was also placed on clause 6.2.2 of the VJOA;

viii) There was no relevant conflict between the VJOA and the FOA because the former did not contradict or conflict with any term in the latter. The two were plainly intended to work together as a cohesive whole;

ix) The fact that ANSL had freedom to drill as it saw fit was irrelevant. It was also not right for ANSL to suggest that EEL was requiring ANSL to lease a new rig: what was required was an adjustment as in the end the parties had undertaken. Finally, no reliance could be placed on the deed of novation introducing DNO to the VJOA since it was entered into after the FOA.

26. Accordingly, the Judge dismissed ANSL's claim.

## The challenge by ANSL

27. Mr Allen QC for ANSL submits the central thesis that the FOA and the VJOA are entirely different contracts with different mechanisms and purposes and separate parties, with the FOA having primacy in the event of any inconsistency. The FOA is a bilateral sale contract with a price agreed which the purchaser is liable to pay. The JOA on the other hand is a multilateral joint venture contract with a joint venturers' account. ANSL wears different hats at different times, depending on which contract is being considered. Under the FOA it is the seller, whilst under the VJOA it is the operator and a participant. The multiple references to the VJOA in the FOA do not mean that the accounting rules in the VJOA are imported into the FOA.

28. The effect of the Judgment is thus said to be impermissibly to incorporate a joint venture accounting convention in a multilateral joint operating agreement into a bilateral farm-out sale and purchase agreement so as to reduce the price there agreed. That is said to be a "unique proposition" unsupported by any previous authority and a significant development for the oil and gas industry, given that joint operating agreements are attached routinely to farm-out agreements by way of appendix.

29. ANSL submits that the Judge's decision to apply the Accounting Procedure in the VJOA was reached without proper regard to the express language of the FOA and was unsustainable on its own terms, in summary for the following reasons:

i) Under the FOA EEL agreed to pay 26.25% of the total costs (other than the Back Costs) in relation to the Val D'Isere Well "whensoever incurred", being "costs that would otherwise by borne by [ANSL]". It did not agree to pay 26.25% of the costs which could, in the absence of the FOA, have been charged to a joint venture account and recovered pursuant to the VJOA;

ii) The Judge failed to apply or even address the words "whensoever incurred" which appear in the key contractual definition of the price payable. Had he done so he would have found that the bilateral formula for the allocation of costs under the FOA simply and obviously required that EEL pay 26.25% of ANSL's total costs of drilling the well with due authorisation. The Judge was wrong to hold that any further definition was required. The words "total costs...whensoever incurred" are clear and unambiguous. There was no room for any gloss, particularly given that skilled solicitors drafting the definition would have been specifically focussing on the issued covered by the disputed clause. The FOA contained very clear machinery governing what had to be paid and when;

iii) The application of the bilateral formula did not require reference to rules for the making of entries into the accounting ledger of the VJOA's multilateral joint account;

iv) The multilateral formula for allocating joint account charges in the VJOA existed in parallel to the FOA's bilateral price payment regime and was inferior to it: it had no application due to the inconsistency clause in clause 19.1 of the FOA;

v) There is no explanation as to why, if a "market rates" cap was intended, the parties did not provide for one in the relevant contractual definition. If the parties had wanted such a cap, on what was a fundamental part of the agreement, they would have said so expressly. Instead they used the words "whensoever incurred". As a matter of construction it is to be inferred that the parties did not agree a cap;

vi) There is no textual basis for the words of paragraph 3.2.4 of the Accounting Procedure to be apt to limit the amount of the Val D'Isere Earn-In Costs. The words are concerned expressly with the charging of expenditure to the Joint Account, not the charging of expenditure to a particular participant or person;

vii) EEL's submissions on the commercial and contractual context of the FOA are misguided. The Judge was wrong to speculate as to the parties' commercial bargain as a whole. He was not entitled to place weight on clause 6.2.2 of the VJOA (which provided that no gain or loss should be enjoyed or suffered as a result of acting as Operator). That was irrelevant to ANSL's capacity as a seller under the FOA;

viii) Clause 3 of the FOA, upon which the Judge laid much weight, is a "red herring". By the time that clause 3 arises, there is already a "defined and unqualified obligation" on EEL to pay the Earn-In Costs by reason of clause 2.1. Clause 3 concerns only the timing and manner of payment, not determination of the extent of the obligation to pay. Clause 3.1.3 of the FOA refers to a Reconciliation Statement which is not contractually linked to the VJOA and is not a process possible under the VJOA. Equally, clause 3.1.2 of the FOA referred to the Upfront Payment, a concept only existing under the FOA.

## Relevant legal principles

30. The well-known principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173. No issue is taken with the Judge's summary of the law at [13] and [14] of the Judgment.

31. In *Arnold v Britton and others* (supra) Lord Neuberger identified the relevant legal principles as follows:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* [1971] I WLR 1381, 1384-1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] I WLR 989, 995-997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] I AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky* [2011] I WLR 2900, paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC."

32. Seven factors were then emphasised, of which five are relevant for present purposes:

> "17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook* [2009] AC 1101 , paras 16-26) should not be

invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191 , 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into

> arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.
>
> 21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties…"

33. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense, but disregarding the subjective evidence of the parties' intention. While commercial common sense is a very important factor to be taken into account, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed. The meaning of a clause is usually most obviously to be gleaned from the language of the provision. Where the parties have used unambiguous language, the court must apply it; if there are two possible constructions, the court is entitled to prefer the construction consistent with common sense and to reject the other (see *Rainy Sky (supra)* at [21] and [23]).

34. In *Wood v Capita Insurance Services Ltd (supra)* at [9] to [11]) Lord Hodge JSC described the court's task as being to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise focused solely on a "parsing of the wording of the particular clause"; the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated.

35. ANSL refers to two particular further authorities:

    i) *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* [2010] UKSC 47; [2011] 1 All ER 175 (at [11]). It is common ground that effect is to be given to every word used in the contract so far as possible and words should not be added which are not there unless sense cannot be made of the language used by the parties, or rearrangement is necessary to resolve an ambiguity;

ii) *Britoil plc v Hunt Overseas Oil* [1994] CLC 561 (at 567-568). Again, it is common ground that the court must put itself in the parties' position at the time of the making of the contract and then construe the contract in accordance with the language used by the parties. It is no part of the function of the courts to consider what a reasonable businessperson would have agreed to and then decide that that is what the agreement must be.

36. As for "inconsistency" clauses such as clause 19.1 of the FOA, the court must first decide whether, objectively, there is a conflict. It is not enough that one term qualifies or modifies the effect of another. To be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses, or the clauses cannot sensibly be read together (see *Pagnan SpA v Tradax Ocean Transportation SA* [1983] All ER 565 at 574 - 575). So consideration needs to be given not merely to whether or not there is a literal contradiction but whether there is such a contradiction having regard to issues of reasonableness and business common sense (see *Alexander v West Bromwich Mortgage Company Limited* [2016] EWCA Civ 496; [2017] 1 All ER 924 at [41]. There will be inconsistency where one clause in one document emasculates another clause in another document.

## Analysis

37. In circumstances where these sophisticated parties represented by experienced lawyers could undoubtedly have expressed their agreement on the question of recoverable Earn-In Costs as construed by the Judge more clearly, ANSL's submissions hold some initial attraction. The words "total costs" in the definition of the Val D'Isere Earn-In Costs in the FOA may point towards the absence of a cap by reference to market rates. But whether or not that is so depends upon the FOA as a whole.

38. As the Judge indicated, the proper construction of EEL's payment obligation falls to be determined on the basis of the documents themselves. No relevant factual or commercial context is relied on by the parties. The FOA and the VJOA are to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent.

39. I reject at the outset the central premise of ANSL's submissions, namely that the FOA and the VJOA are to be treated as entirely separate contracts, with ANSL wearing different hats in each. That presents as an ex post facto theoretical argument that does not reflect the true nature of the parties' dealings at the time.

40. By the time that the FOA was executed, the terms of the VJOA, including the Accounting Procedure, had been negotiated; by clause 3.3.1 of the FOA they were to be deemed to be in full force and effect before and after completion of the FOA. The two contracts were part of a package and fall to be read together. This is reflected not only in the definition of "the Agreement" in the FOA (which expressly included the Schedule containing the VJOA) and in the definition of the Earn-In Well (being the well to be drilled "pursuant to the [VJOA] by the Operator") but also in the plethora of references throughout the FOA to compliance with the provisions of the VJOA (see for example clauses 3.1.2, 3.1.3, 3.1.4. 3.3.1, 3.3.2, 4.1 and 4.2). The suggestion that the FOA is an entirely separate and self-contained agreement does not sit with the parties' express agreement for issuing AFEs, invoicing and payment under the FOA

"in accordance with the relevant JOA". Nor does it reflect the interaction between the percentage contributions selected by the parties as the price payable by EEL under the FOA and the percentage interest to be acquired by EEL under the VJOA. (The initial 26.25% payment by EEL under the FOA is 1.5 times the percentage interest of 17.5% acquired by EEL under the VJOA. If Earn-In Costs over £10.5million are incurred, then EEL's contribution under the FOA reduced to 17.5%, the same as its percentage interest under the VJOA.)

41. Nor did ANSL identify itself at the time as wearing two different hats, as seen in the fact that it is defined in the FOA as being "the Operator". It drilled the Val D'Isere Earn-In Well as Operator under both the FOA and the VJOA and it was in that capacity that it would be incurring drilling costs.

42. This is not to "merge" the two contracts, as ANSL suggested, but rather to construe them in their proper context as a cohesive whole.

43. Against the above, I turn to the proper construction of the precise clauses in question.

44. By clause 2.1 of the FOA EEL was to pay the Earn-In Costs "subject to the terms of this Agreement" and "in accordance with the provisions of clause 3.1…" The Earn-In Costs were defined as the Les Arcs Earn-In Costs and the Val D'Isere Earn-In Costs. The Val D'Isere Earn-In Costs were defined (in the event that the Val D'Isere Option was not exercised) as 26.25% of the total costs (other than the Back Costs) in relation to the Earn-In Well, whensoever incurred, and in respect of all works undertaken pursuant to the Well Programme in connection with the Earn-In Well including drilling. The definition is consistent with clause 4 of the VJOA which speaks, amongst other things of how "all costs…incurred" are to be apportioned between the participants.

45. As indicated, ANSL submits that clause 3 related only to the mechanics of payment. But that submission does not withstand the words of clauses 3.1.2 and 3.1.3 where in each case the invoice from ANSL was to be not only "within the applicable time periods as set out in the relevant JOA" but also "in accordance with the relevant JOA". Clause 3 was not just about when and how, but also what. It determined the amount to be paid in respect of the Val D'Isere Earn-In Costs. Further, whilst the heading to clause 3 of "Determination …of Earn-in Costs" must be ignored as an aid to construction (because of clause 1.3 of the FOA), EEL can legitimately point to clause 12.8 of the FOA which refers to "the reimbursement by [EEL] pursuant to Clause 3 of this Agreement".

46. Thus clause 2 (and the definition of Val D'Isere Earn-In Costs) did not, in my judgment, determine the amount to be paid without more. It identified what costs ANSL could recover but not necessarily in what sum. Payment was to be made "in accordance with the provisions of clause 3.1". Clause 3.1 would be the obvious place to look for any limitations on the payment obligation; the absence of reference to any limitation in the definition of Earn-In Costs would not be surprising (so, for example, a definition of costs payable can be unqualified with the obligation to pay nevertheless being limited to payment of a fair proportion (see for example *Ground Rents v Dowlen* [2014] UKUT 0144 (LC); [2014] 3 EGLR 7)).

47. I do not consider in this context that Recital B or the words "whensoever incurred" in the definition of Val D'Isere Earn-In Costs can bear the heavy weight attached to them by ANSL. Recital B is "on and subject to the terms and conditions of the Agreement". It correctly reflects the fact that EEL is to pay "certain costs" that would otherwise be borne by ANSL. What those "certain costs" are must be found elsewhere. The words "whensoever incurred" correctly reflect the fact that ANSL is entitled to recovery of costs (whenever) incurred. The word “whensoever” appears to be a timing point, although I accept that it is not clear what the timing issue was. (It perhaps reflected the fact that the Upfront Payment was in respect of anticipated costs.) As for the word “incurred”, there is of course no suggestion that ANSL is entitled to costs that it has not incurred. An entitlement to such recovery does not preclude the application of a cap on what can be recovered in respect of those costs (incurred).

48. Clause 3.1.1 repeated EEL's obligation to pay the Earn-In Costs. It also referred to EEL's ongoing obligation to pay under the relevant JOA and/or the Earned Interests. Clause 3.1.2 provided for payment by EEL of the Upfront Payment, which was a quantified lump sum of £5million. Whilst the Upfront Payment was not a concept contractually linked to the VJOA, it was nevertheless to be applied by ANSL towards payment of the Earn-In Costs following receipt of a corresponding AFE, cash call or invoice "issued by [ANSL] in accordance with the relevant JOAs within the applicable time periods as set out in the relevant JOAs". Further, by clause 3.3.1 AFEs in respect of Earn-In Costs were specifically to be issued "pursuant to and in accordance with the relevant JOAs…". The Upfront Payment was to be paid into the Joint Account (as defined) by virtue of paragraph 1.3 of the Accounting Procedure. As a matter of consistency, one would expect the remainder of expenditure to be paid by EEL also to be treated in accordance with the relevant JOAs.

49. Clause 3.1.3 addressed the issuing of a Reconciliation Statement by ANSL, for which there could be many reasons (for example, late or incomplete invoicing). The parties were then to discuss and agree the Reconciliation Statement "taking into account any items which may be the subject of dispute with the Operator under the JOA". In the event of such dispute, that dispute was to be resolved between the parties "in accordance with the JOA". Again, although the Reconciliation Statement was not a process within the VJOA, the point is that in the event of a dispute as to the amount to be paid under it, such dispute was to be resolved under the VJOA and the parties agreed to abide by the result.

50. Clause 3.1.4 is central for present purposes. It provides for EEL to pay the Earn-In Costs "upon receipt of "an invoice" from [ANSL] "in accordance with the relevant JOA within the applicable time periods as set out in the relevant JOA". The only invoice for the purpose of the VJOA is an "invoice presented for payment by the Operator to a Participant in accordance with the provisions of the Accounting Procedure in connection with Joint Operations". “Joint Operations” is defined widely as meaning all operations carried out by ANSL on behalf of all the participants in accordance with the VJOA after the date of its commencement. It covered the cost of drilling that also fell within the Earn-In Costs defined in the FOA (as works undertaken pursuant to the Well Programme (which was to be approved pursuant to the relevant JOA)). It follows that any invoice that was the trigger for payment of some or all of the Earn-In Costs had to be presented in accordance with the

Accounting Procedure in the VJOA. ANSL's case thus ignores the words in paragraph 3.1.4 which tie the relevant invoice to the VJOA (and so to the Accounting Procedure and its clause 3.2.4). The provisions of the Accounting Procedure provided the mechanism for calculating the sums due from EEL under an invoice from ANSL in respect of Earn-In Costs.

51. Before turning to paragraph 3.2.4 itself, it is helpful to consider the VJOA and the Accounting Procedure in a little more detail.

52. By paragraph 1.3 of the Accounting Procedure, the Operator was mandated to charge and credit the Joint Account for all costs and receipts "properly and necessarily incurred to conduct Joint Operations in accordance with the principles" set out in the Accounting Procedure. The FOA provided that the Earn-In Well was to be drilled by the Operator – a joint operation - under the VJOA. Thus ANSL as Operator was obliged to charge the costs of drilling the Earn-In Well, a joint operation, to the Joint Account.

53. It was intended under the VJOA that the Operator should neither gain nor suffer any loss as a result of acting as Operator (see clause 6.2.2(d) of the VJOA and clause 1.2 of the Accounting Procedure). The VJOA recognised that the Operator might wish to supply its own resources for the conduct of joint operations (at clause 6.5.2 of the VJOA) - but the Operator nevertheless had to charge the drilling costs to the Joint Account in accordance with the Accounting Procedure. Those costs (if incurred by the Operator) had to be costs incurred by the Operator when acting as Operator (not as a private supplier). The "no loss, no gain" principle only applied to the Operator's activities qua operator (although the very fact that the cost of equipment leased or hired by the Operator could be capped at all shows that in its capacity as supplier of equipment the Operator could make a loss); it did not prevent the Operator suffering a loss in a personal capacity.

54. Once the effect of paragraph 1.3 of the Accounting Procedure in particular is understood, it is easy to see how paragraph 3.2.4 of the Accounting Procedure is apt to apply to payment by EEL of Earn-In Costs under the FOA.

55. The purpose of the Accounting Procedure, which by clause 16 of the VJOA formed part of the VJOA, was to define the responsibilities and procedure for the financial transactions relating to the VJOA. It was intended to be "fair and equitable as regards the charges, income, losses and gains attributed to the Joint Account".

56. Paragraph 3.2 provided that, “subject to the necessary Budget and AFE being approved … the Operator shall” charge and credit the Joint Account on the basis of its accounting policies" "for all the costs and income properly and necessarily incurred and received in accordance with this Agreement, including:….

> "3.2.4 the cost of …equipment…leased or hired by the Operator and used on behalf of the Joint Account, which shall be charged commensurate with the costs of ownership. The rates shall not exceed rates currently prevailing for like…equipment…if provided by non-affiliated third parties;…"

57. Thus there was a market rates cap on what the Operator could charge for the supply of its own resources. It was permitted to charge for such supply but on a basis limited by reference to market rates. This can be seen to produce a "fair and equitable" result, ensuring that the Operator is compensated fairly for the value of what it has supplied, whilst also protecting the participants by ensuring that the chargeable costs are confined to those properly and necessarily incurred and by reference to market rate.

58. ANSL points to the fact that EEL's interest under the VJOA was only 17.5%, and not 26.25%, being the proportion of the total Val D'Isere Earn-In Costs that EEL agreed to pay under the FOA. I do not see that this difference undermines EEL's construction of the FOA, not least since EEL was also purchasing an interest in the Licence under the FOA. It was not entering only into the VJOA. It was agreeing under the FOA to pay up to £3.5million more towards the future costs of the Earn-In Well than it would have done simply under the VJOA. (Under the FOA EEL agreed (in addition to "Back Costs") to pay 26.25% (50% more than its 17.5% interest under the VJOA) of the Val D'Isere Earn-In Costs up to the first £40million incurred by the Operator, namely £10.5million; on the basis of a 17.5% contribution it would have been required to pay up to only £7million.)

59. EEL does not dispute that it is obliged to pay 26.25% of the Val D'Isere Earn-In Costs under the FOA (which has primacy over the VJOA by reason of the inconsistency clause (19.1) in the FOA). The real question is how the "total costs" of which EEL agreed to pay 26.25% are to be measured. The percentage difference in the allocation does not cause the "costs incurred" in the definition of Val D'Isere Earn-In Costs and to be paid in accordance with clause 3.1 of the FOA to be construed differently from costs "properly and necessarily incurred" and to be charged under the Accounting Procedure in the VJOA (including paragraph 3.2.4).

60. ANSL submits that paragraph 3.2.4 cannot apply because it is concerned with charges to a joint account, not payments to an individual entity. But it can be seen that there is nothing counter-intuitive in the Val D'Isere Earn-In Costs going through the Joint Account procedure in paragraph 3.2 of the Accounting Procedure. The simple point is that the Earn-In Costs to which ANSL was entitled under clause 2 of the FOA always had to be charged to the Joint Account under paragraph 1.3 of the Accounting Procedure. What is charged to the Joint Account affects, albeit indirectly, what is charged to each participant.

61. This construction also meets the problem of potential exposure on the part of EEL to double-payment under the FOA and the VJOA. If it were right to treat the Earn-In Costs payable under the FOA as entirely separate and distinct from the costs incurred for the purpose of clause 3 of the Accounting Procedure in the VJOA, then EEL would be potentially liable to pay the same costs twice: an item of expenditure necessarily and properly incurred in accordance with the Val D'Isere Well Programme and so falling to be charged to the Joint Account under the VJOA could also fall within the definition of Earn-In Costs in the FOA. DNO would receive a windfall. Mr Allen suggested that the solution then would be the inconsistency clause (19.1) in the FOA, but that is not an obvious solution to the problem.

62. ANSL asks rhetorically why the limit on the Deed of Guarantee (of €50million) would be so high if there was a cap on what could be recovered by way of Earn-In Costs under the FOA. It does not seem to me that the level of indemnity assists one

way or the other in identifying the proper construction of what EEL was liable to pay under clause 2 of the FOA.

63. My conclusions are reinforced (rather than driven) by the fact that EEL's construction is not in any way commercially implausible or unworkable. In return for a share of the Licence, EEL agreed to bear 8.75% of costs that would otherwise be borne by ANSL.[1] By contrast, ANSL's construction can be said to lead to the very uncommercial proposition whereby EEL would have agreed to take on an open-ended exposure under the FOA by reference to costs incurred by ANSL over which it had no meaningful control.

64. For these reasons, and despite the clear and skilful manner in which ANSL's position has been advanced, I would uphold the dismissal of the claim, broadly for the same (though not identical) reasons as the Judge.

## The Respondents' Notice

65. In these circumstances it is not necessary to consider the further matters raised in the Respondents' Notice dated 13 March 2020 as an alternative basis for upholding the Judgment. EEL wished to argue that the "total costs…incurred" were not ANSL's incurred payments under the lease for the rig, but rather costs at a level "no more than the loss of the use of the rig for other drilling operations which might have been scheduled for the same time" or at the level of "the price which a third party might have paid to sub-lease [the rig] from [ANSL]".

66. In any event, I would not have permitted EEL to advance such a contention: it was not put forward as a positive line of defence before the Judge (for which no good reason has been identified) and would have raised significant new factual issues, such as what other drilling operations might have been scheduled at the same time and the economic cost of the loss of use. It would not have been fair or appropriate to allow EEL to rely on it for the first time on appeal.

67. Further, EEL sought permission to appeal against the costs order made by the Judge. The Judge ordered the Respondents to pay ANSL's costs of the action up to 16 May 2019, to be assessed if not agreed, and the Claimant to pay the Respondents' costs of the action thereafter to the conclusion of the trial, again to be assessed if not agreed. It will be remembered that 16 May 2019 was the date of the case management conference and that a few days earlier, on 13 May 2019, EEL had paid over the sums which were on its case due to ANSL.

68. The Judge exercised his discretion in this manner on the basis that ANSL had been forced to commence proceedings in order to recover anything from EEL at all. ANSL was successful down to the date when EEL agreed to pay what it was liable to pay as

[1] This is reflected in an ANSL interoffice memo dated 22 August 2017 where Mr Vaughan and Mr Griffith of ANSL wrote as part of a submission recommending the drilling of the Licence Area the following:
"After the commitment well is drilled, the working interests in the licen[c]e will be [ANSL] 60%, DNO 22.5%, and [EEL] 17.5%. [ANSL] has a carry on the exploration well of 60% for 51.25% which reflected in the AFE."
This was an acknowledgment that the additional 8.75% payable by EEL under the FOA would directly subsidise ANSL's contribution under the VJOA by that amount.

opposed to insisting on a judgment. It was not obviously the case that the costs exclusively attributable to that part of the claim that was conceded by EEL were trivial or overwhelmed by the costs attributable to the issue on which ANSL ultimately failed. An issue-based costs order (limiting the costs in favour of ANSL to those attributable to the element of the claim on which EEL paid out) would be impracticable. In any event such an order would ignore a dispute between the parties as to when interest under clause 11.2 of the FOA ran. That dispute remained live throughout the trial and was resolved in ANSL's favour.

69. Permission to appeal the costs order was refused at the full appeal hearing. There was no real prospect of appellate interference with the Judge's exercise of discretion (and no other compelling reason for an appeal against the costs order to be heard). The Judge had presided over the trial, understood the merits of the parties' positions, been referred to interparty correspondence and appreciated the significance of the payment ultimately secured by ANSL. He had ruled in ANSL's favour on the question of interest (against which ruling there is no appeal), stating at [42] of the Judgment that it had been open to EEL to make a payment on account if necessary: the fact that EEL was not in a position to work out what sum was due until much later was immaterial. The costs decision was "pre-eminently a matter for the discretion of the trial judge " (see *Britoil plc v Hunt Overseas Oil Inc* [1994] CLC 561 at 575); it could not be said that it "exceeded the generous ambit within which reasonable disagreement is possible" (see *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311 at [32]).

## Conclusion

70. I would therefore dismiss the appeal. I emphasise that this conclusion is a contract-specific one. I reject ANSL's submission to the effect that it would have any industry-wide impact by setting a general precedent. Neither the FOA nor the VJOA was on a standard or model form; rather each was bespoke. The proper construction of a farm-out agreement and analysis of its interplay with an associated joint venture agreement will always turn on the precise terms of agreement between the parties.

**Lord Justice Peter Jackson:**

71. I agree.

**Lord Justice Lewison:**

72. I also agree.

## APPENDIX

## THE FOA

"WHEREAS:

…

B. On and subject to the terms and conditions of this Agreement, [ANSL] is willing to transfer the Earned Interests to [EEL] in consideration of the payment by [EEL] of certain costs that would otherwise be borne by Apache.

C. The costs to be borne by [EEL] described in Recital B are in respect of the drilling of up to two (2) separate wells at different times under the Licences

**NOW THEREFORE IT IS HEREBY AGREED as follows:**

**1. Definitions and interpretation**

**Definitions**

1.1 In this Agreement the following expressions shall, except where the context otherwise requires, have the following respective meanings:

…

"**AFE**" means an authorisation for expenditure pursuant to the relevant JOA relating to an Earned Interest (including those set out in Schedule 6);

…

"**Agreement**" means this deed including the recitals and the Schedules attached hereto;

…

"**Back Costs**" means such past costs and seismic costs relating to the Earn-in Wells as set out in Schedule 4

…

"**Completion**" means the completion of the transfer of the Earned Interests in accordance with the provisions of this Agreement

…

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

…

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

…

"**Earn-in Well**" means the Les Arcs Earn-in Well or the Val D'Isere Earn-in Well (or either of them as the case may be) and "**Earn-in Wells**" means both of them

…

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

…

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

…

"**Operator**" means Apache North Sea Limited or whichever person is designated operator under the relevant JOA from time to time;

…

"**Val D'Isere Earn-In Costs**" means (I) (a) in the event that the Val D'Isere Option is not exercised twenty six point twenty five percent (26.25%) of the total costs (other than the Back Costs) in relation to the Val D'Isere Earn-In Well, whensoever incurred, and in respect of all works undertaken pursuant to the Well Programme in connection with the Val D'Isere Earn-In Well, including: the planning, surveying, drilling (including side-tracking for mechanical reasons), coring, testing, logging, suspending and abandoning of the Val D'Isere Earn-In Well and the mobilisation and demobilisation of the rig (if relevant), provided that in the event that the costs in respect of Val D'Isere Earn-In Well (net to [EEL]) exceed ten million five hundred thousand pounds (£10,500,000), then with respect to any such costs in excess of such amount such percentage shall be reduced to seventeen point five percent (17.5%) of such costs; or (b) in the event that the Val D'Isere Option is exercised, thirty-seven point five percent (37.5%) of the total costs (other than the Back Costs) in relation to the Val D'Isere Earn-In Well, whensoever incurred, and in respect of all works undertaken pursuant to the Well Programme in connection with the Val D'Isere Earn-In Well, including: the planning, surveying, drilling (including sidetracking for mechanical reasons), coring, testing, logging, suspending and abandoning of the Val D'Isere Earn-In Well and the mobilisation and demobilisation of the rig (if relevant), provided that in the event that the costs in respect of Val D'Isere Earn-In Well (net to [EEL]) exceed eighteen million Pounds Sterling (£18,000,000), then with respect to any such costs in excess of such amount such percentage shall be reduced to twenty-five percent (25%) of such costs; plus (II) the Back Costs as further set out in Schedule 4 Part 2;

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

"**Val D'Isere Earned Interest**" means an undivided legal interest in the Licence P.1998 and a seventeen point five percent (17.5%) Percentage Interest under the Val D'Isere JOA in the event that the Val D'Isere Option is not exercised, or twenty five percent (25%) Percentage Interest under the Val D'Isere JOA in the event that the Val D'Isere Option is exercised, together with all rights and obligations attaching thereto and including but not limited to: (1) the right to take and receive a consequent share of all Petroleum produced under

Licence P.1998 on or after the Completion Date and to receive the gross proceeds from the sale or other disposition thereof; and (ii) all rights, liabilities and obligations associated with such an interest under the Earned Interest Documents and Earned Interest Data;

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

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

…

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

**Interpretation**

…

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

…

**2. Agreement to Transfer the Earned Interests**

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

2.2 Each Earned Interest shall be transferred in accordance with Clause 5 following satisfaction of the Condition Precent.

…

**3. Well Programme and Earn-In Costs**

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

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

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

3.1.3 Upon Earn-In Well Completion, [ANSL] shall calculate the total amount remaining due pursuant to Clause 3.1.1, taking into account the Upfront Payment and payments made pursuant to Clause 3.1.4. [ANSL] shall issue a statement within ten (10) days of the Earn-In Well Completion having occurred, which shall confirm whether or not any payment is due under this Clause 3.1.3 by [EEL] to [ANSL], or by [ANSL] to [EEL] (as applicable) and the amount of such payment (the "Reconciliation Statement"). The Parties shall then discuss and agree the same (taking into account any items which may be the subject of dispute with the Operator under the JOA). If a payment is due under the Reconciliation Statement, such payment shall be made within thirty (30) days of the date of issue of the Reconciliation Statement and any dispute regarding the amounts set forth in the Reconciliation Statement shall be resolved between the Parties in accordance with the JOA.

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

…

3.1.8 [EEL] may, by giving notice in writing to [ANSL] at any time prior to the date falling ninety (90) days after Earn-In Well Completion in respect of Earn-In Well Completion of the Les Arcs Earn-In Well (the "Option Expiry Date"), exercise the

option to acquire a further 7.5% Percentage Interest under the Val D'Isere JOA. At such time, [EEL] shall pay the amount of any further Val D'Isere Earn-In Costs then due and not yet paid as a result of exercising such Val D'Isere Option.

…

**3.3 JOAs**

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

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

…

**4. Interim Period**

4.1 In respect of each Earned Interest, from the date of this Agreement until Completion, [ANSL] shall (to the extent it is permitted to do so under the Licences and by the JOAs and subject to any confidentiality obligations by which it is bound):

…

4.1.6 maintain insurance in relation to the Earned Interests in accordance with the JOA;

…

**11. Costs and Expenses**

…

11.2 Without prejudice to any other rights hereunder, if any amount payable pursuant to this Agreement is not paid when due, the defaulting Party shall pay interest on such amount from the due date of payment (after as well as before judgment) at the Default Rate (on a compounded basis).

…

**12. Taxation**

…

12.8 …..For the avoidance of doubt, [ANSL]agrees that it will treat the reimbursement by [EEL] pursuant to clause 3 of this Agreement of Earn In Costs as disposal proceeds under Part 6, Part 5 or Part 2 of the Capital Allowances Act 2001 as applicable and [EEL] shall be entitled to treat the same as qualifying expenditure under Part 6, Part 5 or Part 2 of the Capital Allowance Act 2001 (as applicable).

…

**19. General**

19.1 If there is any conflict between the provisions of this Agreement and the provisions of the Assignment Documents, the Reassignment Documents and/or the JOAs, the provisions of this Agreement shall prevail."

**The VJOA**

"**BACKGROUND**

…

(B) This Agreement is entered into by the Participants for the purposes of regulating operations under the Licence and of defining their respective rights, interests, duties and obligations in connection with the Licence…

**1 Definitions and Interpretation**

1.1 In this Agreement the words below have the meaning next to them unless the context requires otherwise:

**Accounting Procedure** the procedure set out in Schedule 1.

…

**AFE** authority for expenditure.

…

**Agreement** this Agreement and includes its recitals and the Schedules.

…

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

**Joint Account** the account established and maintained by the Operator to record all Advances, Invoice Payments, expenditures and Receipts in the conduct of the Joint Operations.

**Joint Operations** all operations which are conducted by the Operator on behalf of all the Participants in accordance with this Agreement after the date of commencement of this Agreement as provided in clause 2.

…

3 **Scope and Understanding**

3.1 Scope

3.1.1 The scope of this Agreement shall extend to:

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

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

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

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

3.1.2 This Agreement shall not extend to:

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

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

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

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

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

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

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

3.2 Understanding

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

4 Interests of the Participants

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

[ANSL] 82.5%

[EEL] 17.5%

TOTAL 100.0%

5 The Operator

5.1 Designation

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

…

**6 Authorities and Duties of the Operator**

…

6.1 Rights

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

…

6.2 Responsibilities

…

6.2.2 The Operator shall:

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

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

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

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

…

6.5 Commitments for Material and Services

…

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

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

(b) in the event that the Operator, or any Affiliate of the Operator, proposes to supply Material and/or services from its own resources which it estimates will cost more than £500,000

(five hundred thousand Pounds) the Operator shall obtain the approval of the Joint Operating Committee prior to supplying such Material and/or services;

…

6.5.8 The Operator shall act as agent of the Participants in dealings with contractors and shall use reasonable endeavours to include in all contracts made pursuant to this Agreement, a provision which ensures that the Operator makes the contract on behalf of all the Participants…"

…

6.10 Expenditures and Actions

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

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

…

**10 Exploration and Appraisal Programmes and Budgets**

…

10.2 Authorisation for Expenditure

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

or appraisal well, on a dry-hole basis, Drill stem testing shall be a contingent item."

**11 Development Programmes and Budget**

…

11.2 Authorisation for Expenditure.

Except as provided in clause 6.10.2, the Operator shall, before entering into any commitment or incurring any capital expenditure in excess of £1,000,000 (one million Pounds) with respect to the preparation of a development Programme and Budget or under an approved development Programme and Budget submit to the Participants an AFE for it in accordance with the Accounting Procedure. To the extent that the Joint Operating Committee approves an AFE, the Operator shall be authorised and obliged, subject to clauses 6.5 and 11.3, to proceed with such commitment or expenditure. The Operator shall prepare and submit to the Participants a separate AFE for each development well.

…

**13 Decommissioning Programme and Budget**

…

13.2 Authorisation for Expenditure

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

…

**16 Costs and Accounting**

16.1 The Accounting Procedure

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

Accounting Procedure, the provision in the main body shall prevail.

…

## Schedule 1

Accounting Procedure

…

1 Purpose and Intent

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

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

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

1.4 Subject to the necessary Budget and AFE being approved in accordance with clauses 10 to 14 (as applicable), expenditures properly and necessarily incurred to conduct Joint Operations from and after the effective date of this Agreement as set out in

clause 2.1 shall be charged to and paid by the Participants in proportion to their respective Percentage Interests. The Operator may, in accordance with the Accounting Procedure, Invoice the Participants Monthly in respect of all expenditures to be borne by the Participants incurred pursuant to this Agreement provided, however, that other frequencies and procedures for invoicing may be approved by unanimous decision of the Participants from time to time.

…

**3 Accounting Basis**

3.1 The Operator shall open and maintain such separately identifiable accounting records as may be necessary to record in a full and proper manner all Invoice and Advance payments received by the Operator from each Participant and all expenditure incurred and all Receipts obtained by the Operator in connection with the Joint Operations.

3.2 Subject to the necessary Budget and AFE being approved in accordance with clauses 10 to 14 (as applicable), the Operator shall charge and credit the Joint Account on the basis of its accounting policies in effect on the date on which the transaction is charged or credited to the account for all the costs and income properly and necessarily incurred and received in accordance with this Agreement, including:

…

3.2.4 the cost of services, equipment, and/or facilities owned, partly owned, leased or hired by the Operator or its Affiliates and used on behalf of the Joint Account, which shall be charged at rates commensurate with the cost of ownership. The rates shall not exceed rates currently prevailing for like services, equipment and/or facilities if provided by non-affiliated third parties;

..."