Neutral Citation Number: [2020] EWHC 2081 (Comm)

Case No: CL-2019-000763

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2020

Before :

MR JUSTICE FOXTON

- -

Between :

APACHE NORTH SEA LIMITED

Claimant

- and -

INEOS FPS LIMITED

Defendant

- -
- -

David Allen QC and **Michael Ryan** (instructed by **Clyde & Co LLP**) for the **Claimant**
Sonia Tolaney QC and **James Willan** (instructed by **Addleshaw Goddard LLP**) for the **Defendant**

Hearing dates: **15 and 16 July 2020**
Further Submissions: **20 July 2020**
circulated to the parties: **27 July 2020**

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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 28 July 2020 at 0930

Mr Justice Foxton :

INTRODUCTION

1. This is the trial of two preliminary issues ordered by Henshaw J on 8 April 2020 and Butcher J on 22 May 2020. Those issues arise in a dispute between the parties as to the proper construction of an agreement for the transportation and processing of hydrocarbons ("the TPA"). The hydrocarbons in question are those produced from the Claimant's ("Apache's") interests in the Forties Field in the North Sea, and they are to be transported through the Forties Pipeline System ("the FPS") owned and operated by the Defendant ("INEOS").

2. Apache's estimated production profile from the relevant fields is set out in Attachment F to the TPA, which in its present form sets out an estimated production profile on a quarterly basis up to the end of 2020. Apache wishes to revise Attachment F, to set out its estimated production profile for the period from January 2021 to December 2040. Clause 5.05(a) of the TPA provides that if Apache "requires to … amend Attachment F" then subject to there being Uncommitted Capacity, INEOS "shall not unreasonably withhold its consent to such increase". INEOS has stated that it is only willing to consent to the amendment sought if Apache agrees to revise the tariff payable under the TPAs for the transportation and processing of hydrocarbons.

3. The first preliminary issue which the Court has been asked to determine ("the First Preliminary Issue") is:

> "On the basis of:
>
> a. the agreed facts set out in Appendix 1; and
>
> b. the assumption that the facts alleged by the Defendant which are set out in Appendix 2 are proven at trial,
>
> is INEOS acting unreasonably and/or non-contractually by withholding consent under clause 5.05(a) of the Apache Forties TPA to an amendment to Attachment F unless Apache agrees to increase the base tariff payable?"

4. The underlined words are an addition I have made which is intended better to capture the issues as presented to the Court. The Appendices in question are appendices to Henshaw J's order of 8 April 2020, the terms of which I set out below.

5. If that issue is answered in the negative, the second preliminary issue which the Court is asked to determine ("the Second Preliminary Issue") is:

> "Are (a) the terms (including as to price) on which INEOS FPS acquired the FPS from BPEOC, and/or (b) INEOS' knowledge at the time it agreed to purchase the FPS from BPEOC, relevant to the assessment of whether INEOS FPS has unreasonably refused consent under clause 5.05(a)?"

6. If this hearing does not finally dispose of the action, a trial has been fixed for 6 days commencing on 2 November 2020.

7. This judgment adopts the following structure:

i) The background, including the facts which are either agreed or to be assumed for the purposes of this hearing.

ii) The parties' arguments.

iii) The applicable legal principles.

iv) The relevant provisions of the TPA.

v) The First Preliminary Issue.

vi) The Second Preliminary Issue.

THE BACKGROUND

8. The FPS is a network of pipelines and associated equipment which was originally constructed in the 1970s, to service the interests of BP Plc ("BP") in the Forties Field in the North Sea. Over time, the output of various other offshore fields have been added to the FPS, which currently transports about 30% of the United Kingdom's offshore oil to shore.

9. In 2003, BP sold its interests in the Forties Field to Apache. The fact that, going forward, these interests and the FPS would be in different ownership necessitated the conclusion of the TPA between Apache and a BP entity (BP Exploration Operating Company Limited or "BPEOC") to regulate the terms on which hydrocarbons produced by Apache from the transferred interests (referred to as "the Shipper's Fields") would be brought ashore through BPEOC's pipeline.

10. Attachment F was blank when the TPA was signed, but a completed Attachment F was agreed around the date of completion in order, in the parties' words, "to clarify the intent of the Agreement".

11. Apache subsequently acquired interests in two further fields from BP – the Maule Field and the Tonto Field. It entered into TPAs for those fields on 16 June 2012 and 23 April 2013 respectively, and on 23 April 2013, Apache and BPEOC entered into an Umbrella Agreement for all three fields by which they were all made subject to the same terms as the TPA applicable to the Forties Field. In this judgment, I use the abbreviation "the TPA" to refer to the unified terms applicable to all three fields.

12. On 1 October 2012, Apache and BPEOC agreed a revised Attachment F which sets out estimated production estimates to the end of 2020 ("the 2012 Amendment"), and provided for a revised tariff of £1.20 per barrel for hydrocarbons delivered to the FPS in excess of the values previously notified by Apache in 2008. There is a dispute between the parties as to the reason for the increased tariff:

i) Apache contends that it agreed to an increased base tariff under the 2012 Amendment in circumstances in which it was unclear whether there was Uncommitted Capacity, and Apache was seeking to transport significant additional quantities of liquids beyond those originally contemplated by the TPAs.

ii) INEOS contends that the parties agreed to an increased base tariff under the 2012 Amendment because Apache was seeking to transport significant additional quantities of liquids beyond those originally contemplated by the Apache Forties TPAs.

13. For the purpose of resolving the preliminary issues, I have proceeded on the basis that INEOS' formulation is correct, although I would note that in a letter to Apache of 2 April 2012, BPEOC took the position *both* that there was no Uncommitted Capacity in the system and, in any event, that it was entitled to refuse consent under the TPA even if there was Uncommitted Capacity. It was BPEOC's position that it was incurring substantial expenditure for which the contractual tariff offered inadequate recompense, such that it was entitled to offer Apache additional firm capacity only at a higher tariff. At that stage, Apache and BPEOC chose to compromise, rather than test, the issues of whether there was Uncommitted Capacity and, if so, what BPEOC's rights under clause 5.05(a) were, but only for a limited period. The 2012 Amendment provided that:

> "For periods after 1 January 2021, Apache shall be entitled to request (a) extensions to Attachment F, (b) FMQs and (c) Additional Quantities and Spot Quantities pursuant to Clauses 5.05 and 5.06 of the TPA".

14. Accordingly, I derive no assistance from the 2012 Amendment in determining the parties' rights and obligations under clauses 5.05(a) of the TPA now that the issue has been put to the test.

15. In 2017, BPEOC sold the FPS to INEOS. INEOS is part of the INEOS chemicals group which has an interest in the Grangemouth refinery. The TPAs were novated to INEOS, such that the references in them to BPEOC were thereafter to be read as references to INEOS.

16. On 14 June 2019, Apache wrote to INEOS seeking its agreement to amend Attachment F to provide for estimates of production until 2040. On 1 July, INEOS refused its consent to that request unless Apache agreed to a revision of the contractual tariff. It is INEOS' case, and for the purposes of deciding the preliminary issues I am required to assume:

i) that Apache's proposed amendment to Attachment F will have the effect of significantly increasing (by c. 120 million barrels) the quantity of liquids which are to be transported beyond those contemplated when the TPAs were executed, and of significantly extending (by 20 years, to 2040) the period over which Apache is entitled to transport hydrocarbons through the FPS beyond the 18 year period to the end of 2020 contemplated when the TPAs were executed.

ii) INEOS expects to invest around £500 million between 2019 and 2023 for the purpose of extending the life of the FPS, to maintain high levels of reliability of the system through to 2040, and to modernise environmental plants and improve safety systems in line with evolving legislation.

iii) The original base tariff of 60p per barrel was calculated so as to enable BPEOC to recover its initial investment in the FPS on the assumption that production would continue until around the end of 2020, and did not price in the investment and costs required to extend the life of, and upgrade, the FPS so as to enable it to continue operating for the period from 2020 to 2041.

iv) The standard published base tariff which INEOS charges for use of the FPS is currently £1 per barrel, subject to escalation, and all new agreements entered into by INEOS with customers since 2015 in respect of the provision of services in the FPS have used that base tariff.

v) It is common ground that there is and was at the material time Uncommitted Capacity in the Forties System within the meaning of clause 5.05(a) of the TPAs for the period 2021 to 2040.

vi) INEOS does not contend that, but for Apache's request to amend Attachment F, there would be no contractual commitment to any other party to operate the Forties System between 2021 and 2040 or that its investment cannot or will not proceed if INEOS is obliged to provide Apache with services between 2021 and 2040 on the base tariff agreed at clause 7 of the TPA.

17. There was a dispute between the parties, which was not addressed by the agreed or assumed facts, as to whether the FPS represented the only means of transporting hydrocarbons from the Shipper's Fields to shore (as Apache contended), or whether it was practicable for production to be shipped afloat to another pipeline system to be brought ashore (as INEOS contended). I am not in a position to resolve this dispute and in any event do not need to do so, as the issues of construction raised before me (in contrast to potential arguments as to the reasonableness of INEOS' decision on the facts) cannot turn on whether or not there are other acceptable means of bringing Apache's production ashore if it is unwilling to pay the increased tariff sought by INEOS.

THE PARTIES' ARGUMENTS IN SUMMARY

18. Apache's argument is essentially as follows:

i) It is an established principle when construing contractual provisions which provide that one party's consent is required before a particular step can be taken, such consent not to be unreasonably withheld (hereafter a "consent provision"), that consent cannot be withheld in order to secure a re-writing of fundamental terms of the parties' contract.

ii) Under the TPA, Apache is obliged (with very limited exceptions) to ship all of the production from the Shipper's Fields through the FPS until such time as the TPA is terminated, but the price for transporting and processing that production is fixed by clause 7.01 of the TPA, a provision which provides for the calculation of a contractual tariff by taking an agreed base point, and escalating it by reference to a series of indices over time.

iii) When the TPA was concluded in 2003, Apache's then expected production profile ran only to the end of 2020, and that was reflected in the terms of Attachment F. However, the TPA contemplated that production might continue beyond the end of 2020, in which case Apache's obligation to transport that production through the FPS would continue, as would the right (and obligation) to pay for such transportation at the contractual tariff.

iv) In those circumstances, INEOS' demand for a revised tariff as a condition of agreeing to the amendment of Attachment F is contractually impermissible, because it seeks as the price of consent to require Apache to give up its contractual entitlement to transport hydrocarbons at the agreed tariff.

v) If, contrary to Apache's case, INEOS might be entitled in some cases to condition consent to the amendment of Attachment F on the re-visiting of the tariff, then it is relevant (or potentially relevant) to the issue of whether it is entitled to adopt that course in this case to consider the terms on which INEOS acquired the FPS from BPEOC, and its knowledge at the time of that acquisition.

19. INEOS' case in summary is as follows:

i) The Court should not seek to limit the operation of clause 5.05(c) as a matter of construction. The issue of whether INEOS is entitled to require a change to the contractual tariff as a condition of amending Attachment F is a question of fact, to be judged in the light of all of the available evidence and by reference to the test of whether INEOS has acted rationally, or at least in way in which a reasonable person might act in the circumstances.

ii) Apache has no contractual right to transport its hydrocarbons through the TPA after the end of 2020, still less to do so at the contractual tariff. In those circumstances, the amendment to Attachment F which Apache asks INEOS to consent to would involve a very substantial increase in Apache's contractual rights.

iii) The only contractual limitation on INEOS' right to refuse or condition its consent is that the reasons for refusing or conditioning consent are relevant to INEOS' contractual relationship with Apache and to the change for which INEOS' consent is sought.

iv) In circumstances in which the use of the TPA to transport Apache's hydrocarbons in the period after 2020 is only possible because of the very substantial investment which INEOS intends to make in the FPS, the condition which INEOS seeks to impose is clearly referable to INEOS' contractual relationship with Apache and to Apache's request to amend Attachment F so that its estimated production profile will now run to 2040.

v) Any other issues which Apache seeks to raise concerning the basis on which INEOS is willing to grant consent are issues of fact, and the reasonableness (in the relevant sense) of INEOS' decision cannot be determined at this preliminary issues hearing.

vi) However, the Court can and should decide now that the terms on which INEOS acquired the FPS from BPEOC, and its knowledge at the time of that acquisition, are clearly irrelevant to that factual enquiry, because the terms on which INEOS acquired the FPS simply require it to stand in BPEOC's shoes.

THE APPLICABLE LEGAL PRINCIPLES

The principles applicable to the construction of contracts generally

20. As is to be expected, there was no real dispute between the parties as to the principles applicable to the construction of contracts. In particular, the following matters were common ground:

i) A contractual provision must be read in the context of the contract as a whole: see Wood v Capita [2017] AC 1173 (SC) at [10] per Lord Hodge JSC and Arnold v Britton [2015] AC 1619 (SC) per Lord Neuberger PSC at [15].

ii) As Leggatt J explained in Zhoushan Jinhaiwan Shipyard Co Ltd v Golden Exquisite Inc [2015] 1 Lloyd's Rep 283 (Comm) at [25]:

> "Identifying the meaning of the words used, however, and the shared purposes and values which the parties may be taken to have had are not two separate inquiries. The meaning of all language depends on its context. To paraphrase a philosopher of language, a sentence is never not in a context. Contracting parties are never not in a situation. A contract is never not read in the light of some purpose. Interpretive assumptions are always in force. A sentence that seems to need no interpretation is already the product of one. At the same time the main source from which the shared purposes and values of the parties can be ascertained is the contract they have made. It is for these reasons that it is a fundamental principle of the interpretation of contracts that the contractual document must be read as a whole."

21. I would add to these observations that the process of construing a clause in a contact in context may involve interpreting wording which, viewed in isolation, might be regarded as wide, in a way which is consistent with, and does not undermine, other, more-focussed, provisions of the contract. As Hoffmann LJ observed in William Sindall Plc v Cambridge County Council [1984] 1 WLR 1016, 1024:

> "It is, of course, a principle of construction that words capable of a very wide meaning may have to be given a narrower construction to reconcile them with other parts of the document. This rule is particularly apposite if the effect of general words would otherwise be to nullify what the parties appear to have contemplated as an important element in the transaction".

22. A particular application of this principle is invoked when, on one reading, a general or subsidiary clause in a contract would significantly detract from a benefit apparently conferred by one of the principal clauses. In this context, it is sometimes said that the secondary clause will be construed by reference to the principle of non-derogation from grant: Esso Petroleum Co Ltd v Addison [2003] EWHC 1730 (Comm), [47]-[49] and Johnston & Sons Ltd v Holland [1988] 1 EGLR 264 (CA).

23. The need to construe a particular clause in the context of the agreement as a whole is not excluded merely because of some or all of the principal provisions include the drafting reflex "subject to the terms of this agreement". While the parties will sometimes use language to make it clear that one term is to be qualified by another (e.g. by using language such as "subject to clause 2 below"), these more general words are unlikely to have any appreciable impact on the application of the conventional principles of construction. In a real sense, any contractual provision takes effect subject to the terms of the contract in which it appears.

24. Finally both parties referred, with contrasting degrees of enthusiasm, to the statement of Jackson LJ in Amey Birmingham Highways Ltd v Birmingham CC [2018] EWCA Civ 264, [93], as to the proper approach to the construction of long-term relational contracts:

> "Any relational contract of this character is likely to be of massive length, containing many infelicities and oddities. Both parties should adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract. They should not be latching onto the infelicities and oddities, in order to disrupt the project and maximise their own gain".

25. Even long-term contracts which are properly to be classified as "relational", are likely nonetheless to be "risk-allocational". I was not assisted by either party's attempts to pray-in-aid a particular interpretative approach said to be appropriate to long-term relational contracts. Rather, it is necessary to consider the terms of the TPA, and whether the risks of continuing to operate the FPS after 2020 in return for the contractual tariff was assumed by INEOS at the outset, or whether the TPA allowed this aspect of their original bargain to be re-visited by the parties if Apache continued production after 2020, and required INEOS' consent to the amendment of Attachment F to do so.

The construction of consent provisions in contracts

26. There was a rather greater difference of emphasis in the parties' submissions on the principles applicable to the construction of contractual consent provisions.

27. There are a number of decisions addressing consent provisions, many of them landlord and tenant disputes where the landlord's consent is required to an assignment or sub-letting of the lease or an application by the tenant to apply to change the permitted use of the demised premises. The principles set out in these decisions have been applied to consent provisions in other types of contract (Portson Capital Technology Funds v 3M UK Holdings Ltd [2011] EWHC 2895 (Comm), [228] and Crowther v Arbuthnot Latham & Co Ltd [2018] EWHC 504 (Com), [21]).

28. In Ashworth Frazer Ltd v Gloucester City Council [2001] 1 WLR 1280 at [3]-[5], Lord Bingham summarised the applicable principles as follows:

> "[3] When a difference is to be resolved between landlord and tenant following the imposition of a condition (an event which need not be separately considered) or a withholding of consent, effect must be given to three overriding principles. The first, as expressed by Balcombe LJ in International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd [1986] Ch 513, 520 is that

> ‘a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease…;

The same principle was earlier expressed by Sargant LJ in Houlder Bros & Co Ltd v Gibbs [1925] Ch 575, 587:

> ‘in a case of this kind the reason must be something affecting the subject matter of the contract which forms the relationship between the landlord and the tenant, and… it must not be something wholly extraneous and completely dissociated from the subject matter of the contract.’

While difficult borderline questions are bound to arise, the principle to be applied is clear.

[4] Secondly, in any case where the requirements of the first principle are met, the question whether the landlord's conduct was reasonable or unreasonable will be one of fact to be decided by the tribunal of fact. There are many reported cases. In some the landlord's withholding of consent has been held to be reasonable …, in others unreasonable … These cases are of illustrative value. But in each the decision rested on the facts of the particular case and care must be taken not to elevate a decision made on the facts of a particular case into a principle of law. The correct approach was very clearly laid down by Lord Denning MR in Bickel v Duke of Westminster [1977] QB 517, 524.

[5] Thirdly, the landlord's obligation is to show that his conduct was reasonable, not that it was right or justifiable. As Danckwerts LJ held in Pimms Ltd v Tallow Chandlers Company [1964] 2 QB 547, 564: ‘it is not necessary for the landlords to prove that the conclusions which led them to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances…’ Subject always to the first principle outlined above, I would respectfully endorse the observation of Viscount Dunedin in Viscount Tredegar v Harwood [1929] AC 72, 78 that one ‘should read reasonableness in the general sense’. There are few expressions more routinely used by British lawyers than ‘reasonable’, and the expression should be given a broad, common sense meaning in this context as in others.”

29. Two of the authorities referred to by Lord Bingham are worth picking up at this point. The first is the judgment of Lord Denning MR in Bickel, p.524 where he stated:

> “The words of the contract are perfectly clear English words: ‘such licence shall not be unreasonably withheld’. When those words come to be applied in any particular case, I do not think the court can, or should, determine by strict rules the grounds on which a landlord may, or may not, reasonably refuse his consent. He is not limited by the contract to any particular grounds. Nor should the courts limit him. *Not even under the guise of construing the words* .”

(emphasis added).

30. The second is the oft-quoted judgment of Balcombe LJ in International Drilling Fluids Ltd where at p.519, the applicable principles were summarised as follows:

> "(1) The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee …
>
> (2) As a corollary to the first proposition, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease … A recent example of a case where the landlord's consent was unreasonably withheld because the refusal was designed to achieve a collateral purpose unconnected with the terms of the lease is Bromley Park Garden Estates Ltd v Moss [1982] 1 WLR 1019.
>
> (3) The onus of proving that consent has been unreasonably withheld is on the tenant …
>
> (4) It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances …
>
> (5) It may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease …
>
> (6) There is a divergence of authority on the question, in considering whether the landlord's refusal of consent is reasonable, whether it is permissible to have regard to the consequences to the tenant if consent to the proposed assignment is withheld …. . But in my judgment a proper reconciliation of those two streams of authority can be achieved by saying that while a landlord need usually only consider his own relevant interests, there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment that it is unreasonable for the landlord to refuse consent.
>
> (7) Subject to the propositions set out above, it is in each case a question of fact, depending upon all the circumstances, whether the landlord's consent to an assignment is being unreasonably withheld".

31. In his first numbered proposition, Balcombe LJ identified the purpose of the covenant under review, from which he derived as a corollary the second numbered proposition: that the landlord cannot refuse consent for reasons which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease. While the second proposition has proved uncontroversial, a number of cases have cautioned against approaching consent provisions by seeking to identify their original purpose, and then determining as a matter of construction that consent can never be withheld save to give effect to that original purpose.

32. In particular, in Sequent Nominees Ltd v Hautford Ltd [2020] AC 28, the Supreme Court considered a tenant's challenge to its landlord's refusal to consent to the tenant's application to change the permissible use of parts of the demised premises from commercial to residential (the lease requiring the landlord's consent before such

an application could be made). The landlord refused to consent because, if such permission was obtained, the risk of a tenant becoming entitled to acquire the freehold from the landlord (so-called "statutory enfranchisement") was significantly enhanced.

33. Lord Briggs JSC's decision in Sequent Nominees featured prominently in INEOS' submissions as to the approach which I should adopt on this application, and for that reason it is worth considering the underlying facts of the case in some detail before turning to the judgment. The user covenant in the lease (clause 3(11)) permitted the use of the demised premises for residential, retail and commercial purposes. However, clause 3(19) required the tenant to comply with the provisions and requirements for planning permission (which, for so long as the permitted use of some parts of the demised premises was limited to non-residential use, prohibited the tenant from making residential use of those parts), as well as requiring the landlord's consent for any application by the tenant to change the permitted use, such consent not to be unreasonably withheld.

34. The Court of Appeal ([2018] Ch 603]) construed clause 3(11) as granting the tenant the right to use all of the floors of the building for residential purposes ([46]-[48]), and approached the construction of the consent provision accordingly ([51]). Against the background of its construction of clause 3(11), and because it was open to a third party to the lease to apply for planning permission to change the permitted user, the Court of Appeal concluded that the purpose of the consent provision in clause 3(11) could not be to prevent a change in use in order to avoid an increased risk of statutory enfranchisement.

35. Lord Briggs JSC, who delivered the majority judgment in the Supreme Court (with Lord Carnwath and Lord Hodge JJSC), disagreed. He held at [36] that:

> "Looking at the question as a matter of substance, it cannot be said that the Lease, read as a whole, conferred an unqualified right on the tenant to use the whole, or any particular part, of No 51 for residential purposes. Clause 3(11) must be read with clause 3(19), which required the tenant to perform and observe all the provisions and requirements of the planning legislation. Read together, the effect of those two clauses was to permit the tenant to use for residential purposes only such parts of No 51 as were from time to time permitted by the planning regime to be used for residential purposes".

36. He also criticised the approach to the clause which had been adopted by the first instance judge and the Court of Appeal, which he described at [35] as seeking:

> "to address the question whether the landlord's consent was unreasonably withheld by reference to an over-refined attempt to identify a limited original purpose behind clause 3(19), contrary to Lord Denning MR's dictum in the Bickel case, approved in the Ashworth Frazer case, that it is wrong in principle to address the question 'under the guise of construing the words'".

37. At [33], he stated that the issue of whether the landlord could reasonably refuse consent was not to be approached:

> "in any rigid or doctrinaire way, still less solely by reference to the original purposes of the [relevant covenant] which may have been within the

> contemplation of the parties when the lease was granted. It will in every case be a question of fact and degree measured as at the date upon which the relevant consent is sought …".

38. Lady Arden and Lord Wilson JJSC disagreed with the majority on the construction of clause 3(11) of the lease, and consequently on the conclusion on the consent issue. Lady Arden JSC observed at [44]:

> "The most relevant circumstances to take into account are the other provisions of the lease, including the lessee's unrestricted right to use the whole of the premises if he wishes to do so for residential purposes. I do not agree that this sub-clause must be read subject to the lessee first obtaining the lessor's consent to a planning application for a change of use (where that is required) or that, as Lord Briggs JSC has concluded, the right to use the premises for residential purposes was limited to those parts for which planning consent had already been obtained. That would involve writing words into the user clause as opposed to treating the lessor's power reasonably to refuse its consent in clause 3(19) as impliedly limited to other aspects of a planning application".

At [47], she observed:

> "On my interpretation of the lease, the power to refuse consent to a planning application was not granted to enable the landlord to cut down the user clause".

39. Lord Wilson JSC held that if the landlord was entitled to withhold consent to an application to change the permitted use to residential use, "the provisions of clause 3(11) would be deprived of substantial effect" and that "any permissible withholding of consent in such circumstances would in effect rewrite clause 3(11)" ([61]). He concluded at [62]:

> "Like the courts below, I cannot accept that an express grant of permission for residential use can – reasonably – be overridden by the freeholders deployment of an entirely unfocussed provision in relation to applications for planning permission".

40. As will be apparent from the paragraph just quoted, Lord Wilson JSC analysed the effect of the condition on the rights he held were afforded by clause 3(11) through the prism of reasonableness, albeit I understand the effect of his conclusion to be that such a condition could never be reasonable for the purposes of clause 3(19), rather than that the condition was not reasonable on the facts of the particular case.

41. I accept that Lord Briggs JSC's judgment provides a salutary warning that a court cannot substitute its own judgment for that of the contractual decision-maker, and turn what is essentially an evaluation of fact into an issue of law for the court by concluding that a consent provision was originally included in a contract to serve a particular purpose, and then holding that refusing consent for any other purpose falls outside the consent provision as a matter of construction. It may be that the boundary between law and fact as it was drawn in some of the consent provision authorities may now fall to be re-evaluated. However, Sequent Nominees clearly did not decide that it is no longer necessary to construe a consent provision in the context of the contract as a whole, nor render illegitimate the approach of construing such clauses on

the basis that they are not ordinarily intended to allow the consent-provider to override or nullify a contractual right conferred elsewhere, and in more specific terms, in the contract. Lord Briggs JSC at [37] noted that "the correct approach is to construe [the consent provision] so as to discover what, upon its express terms, it permits the landlord to do", an exercise not limited to looking at the terms of the consent provision in isolation (as INEOS' submissions appeared to assume at times), but also at the other terms of the contract of which it forms part. And just as it is important for the court not to trespass on issues which are properly part of the evaluative exercise for the consent-provider under the guise of construing the contract, it is legitimate for the court to consider to what extent the parties can have intended that one party would be subject to the risk of an adverse decision by its counterparty on a particular matter "with the protection only of a requirement of good faith and rationality" (as Hildyard J put it in Lehman's Waterfall. Re Lehman Brothers International (Europe) (In Administration) [2017] Bus LR 1475, [130]).

42. There is one further issue addressed in the authorities which consider consent provisions on which the parties made submissions, and with which I should deal (although it is not determinative of the dispute in this case): how far it is permissible for the consent-provider to impose a condition on its consent which would increase its contractual entitlements. In the landlord and tenant context, it has been held that "it will not normally be reasonable for a landlord to seek to impose a condition which is designed to increase or enhance the rights that he enjoys under the lease": Phillips LJ in Mount Eden Land Limited v Straudley Investments Limited (1996) 74 P&CR 306, 310-311.

43. I accept INEOS' submission that the mere fact that through the imposition of a condition, the consent-provider may acquire an entitlement to something it did not previously have does not automatically render the condition illegitimate. In particular, a condition may have this effect but otherwise be legitimate where it provides a mechanism for addressing a legitimate concern on the part of the consent-provider in relation to the consequences of providing consent, with the result that the benefit obtained is compensatory or mitigatory in nature. In Sargeant v Macepark (Whittlebury) Limited [2004] EWHC 1333 (Ch), Lewison J observed at [48]:

> "When considering the reasonableness of conditions, it seems to me that if the landlord would have been entitled to refuse consent on some particular ground, a condition neutralising the landlord's concern will ordinarily be reasonable. The most common example would be a case in which the landlord would be entitled to refuse consent to an assignment to a financially weak assignee, but in fact grants consent on condition that the assignee's obligations are guaranteed or that the assignee puts up a rent."

44. Another authority on which INEOS placed significant reliance was Barclays Bank Plc v UniCredit Bank AG [2014] 2 All ER (Comm) 115. This was also a case in which the condition imposed was essentially compensatory in nature. The counterparty sought the bank's consent to the early termination of a swap agreement, the contract providing "such consent to be determined … in a commercially reasonable manner". The bank was only willing to grant its consent on condition that it receive a payment representing the net value of the swap to it had it run its full term. Longmore LJ held that the amount demanded – which seemed "to be a rough and ready assessment of its loss of profit" – was not commercially unreasonable ([23]).

45. These cases demonstrate that it may well be legitimate for the consent-provider to impose a condition intended to protect or compensate for a benefit it enjoyed under the contract which the course for which consent is sought would impair. However, that is obviously very different from imposing a condition which would impair a right which the party seeking consent enjoys under the contract.

THE TPA

46. The terms of the TPA which featured in argument are set out in the attached schedule. The parties' rival submissions raised a number of overlapping issues as to the proper meaning and effect of the TPA, which I address below.

Was the TPA a "life of field" agreement?

47. It was a significant feature of Mr Allen QC's (counsel for Apache) argument that the TPA was a "life of field" agreement, by which he meant that the TPAs had no fixed duration, but continued for so long as hydrocarbons are produced from the Shipper's Fields unless one of the express termination provisions was exercised.

48. There were a number of provisions of the TPA which supported Mr Allen QC's argument that it was an agreement of indefinite duration, rather than one in which the principal provisions only extended to production up until the end of 2020, absent further agreement. In particular:

    i) Clause 3 of the TPA, which was concerned with the duration of the TPA, had a start date ("the Commencement Date"), but no fixed termination date. Instead clause 3.03(a) provided that the TPA would "continue in full force and effect until termination upon the earlier of the following occurrences …". *Ex facie*, the provisions which would continue "in full force and effect" would include the contractual tariff in clause 7.01.

    ii) There followed six termination events:

        a) Reasonable notice of the cessation of production from the Shipper's Fields.

        b) The expiry of 150 days after a notice served by INEOS following Apache's breach of contract in failing to make payments when due (i.e. termination for breach).

        c) The service by Apache of a notice of termination after INEOS had given notice of the exercise of its option (which I address further below) to move from the contractual tariff payable under clause 7.01 to a "costs share" scheme of charging under clause 7.05(a).

        d) Notice of termination by INEOS under clause 18.01 or Apache under clause 18.03 (both of which depend on INEOS giving notice of its intention to abandon or remove all or part of the FPS necessary for INEOS to fulfil its obligations under the TPA).

        e) By either party on 90 days' notice if, following an INEOS Force Majeure event, it is reasonably anticipated by INEOS that it will be

unable to transport and process Shipper's Pipeline Liquids for a continuous period of more than twenty four months.

f) By either party on 90 days' notice if, following an Apache Force Majeure event, Apache reasonably anticipates that it will be unable to tender Shipper's Pipeline Liquids for a period of more than twenty-four months.

iii) Reflecting its indeterminate nature, a number of key definitions in the TPA are open-ended, or are "living definitions" which are intended to reflect the position from time-to-time, without express limitation as to time. For example the definition of Contract Year is indeterminate ("a period beginning at 06.00 hours on 1 October *in any Year* and ending at 06.00 hours on 1 October in the next succeeding Year") (emphasis added), and the definitions of "Forties System" and "Shipper's System" are to facilities "existing from time to time".

iv) Clause 4.02 of the TPA imposes a maintenance obligation on INEOS "throughout the continuation of this Agreement". However, reflecting the fact that there may come a time when the age of the FPS is such that the maintenance costs become disproportionate, clause 4.02 qualifies INEOS' obligation to "provide, repair and operate" the FPS, by providing that "if at any time and for any reason" INEOS is unable to fulfil its obligations under the TPA, and in order to resume doing so it would have to "rebuild, repair, reconfigure, rectify or reinstate" some part of the FPS, it is not obliged to do so if it "would, in the reasonable opinion of [INEOS] be uneconomic to [INEOS]".

49. In support of its argument that the TPA was not a "life-of-field" agreement, at least in the sense that Apache's rights and obligations did not automatically continue for the life of the field, INEOS points to the language of clause 5.01 and the terms of Attachment F, the effect of which it says was to limit certain of Apache's rights and obligations to the period to the end of 2020. I now consider these provisions.

The role of FMQs and Attachment F

50. Clause 5 of the TPA is concerned with "Quantities", and in particular, the quantities which Apache can tender for delivery to the FPS on any one day "during the Contract Year in question". Clause 5.01 imposes two daily limits:

i) First, an absolute numerical limit of 75,000 barrels per Day (referred to as the "Peak Entitlement").

ii) Second, the "Firm Maximum Quantity" or FMQ.

51. It is through the mechanism of the FMQ that INEOS submits the TPA imposes a time limit on certain of Apache's rights and obligations, such that they do not continue after 2020 absent INEOS' consent to an appropriate amendment to Attachment F. INEOS' argument, as further developed in supplemental submissions filed at the Court's request after the hearing, was as follows:

i) Apache's obligations and entitlements in relation to the daily FMQ comes to an end at the end of 2020, unless a revised Attachment F is agreed.

ii) Even if no revised FMQ is agreed in respect of the period after 2020, Apache remains entitled to tender Additional and Spot Quantities to the FPS on the existing terms of the FPS.

iii) However, INEOS is not obliged to reserve capacity for such tenders, with the result that Apache is under no "send or pay" obligation in relation to them, and if INEOS legitimately declines to carry these quantities, it does not come under the compensatory "free barrel" obligation which applies to a failure to transport the FMQ.

52. The suggestion that this elaborate regime is given contractual effect through the use of the term FMQ and Attachment F is surprising:

i) FMQ is defined as "the Shipper's specification of the maximum quantity of Shipper's Pipeline Liquids which it wishes to deliver to the Transfer Point on any given Day during the relevant period (Contract Year)". The FMQ is, therefore, a figure unilaterally specified *by the shipper*, rather than one which is agreed. It is a term whose principal function appears to create a *daily* limit on the quantities of hydrocarbons which Apache can tender, rather than a term limit. Further, it is defined in terms which are not limited to any particular period, through the use of the chronologically open-ended phrase Contract Year, with clause 5.01 providing that the FMQ applies "during the Contract Year in question". All of these matters tell against the suggestion that the FMQ is intended to create the important and highly nuanced time limit on Apache's obligations and entitlements for which INEOS argued in its supplemental submissions.

ii) INEOS points to the fact that clause 5.01 provides that at the start of the TPA's operation – "on the Completion Date" – Apache is to notify INEOS "of its estimated maximum quantity for each Quarter for all subsequent Contract Years", and that the clause also provides that "the expected Production Profile for the Shipper's Pipeline Liquids is set out in Attachment F". It is common ground that the estimate which was originally notified for the purposes of this provision was that set out in Attachment F, which in its original form only included Contract Years out to 2020. However the suggestion that this notification defined the duration of key rights and obligations is difficult to reconcile with (a) the unilateral nature of the communication (which would involve Apache's unilateral estimate defining the duration of the key obligations under the TPA); (b) the fact that it is an estimate of something inherently uncertain which is said to have this effect; and (c) the fact that clause 5.01 appears to contemplate that this original estimate will be superseded by later estimates during the life of the TPA.

iii) This last aspect is particularly noteworthy. Just as at the very start of the TPA's operation, Apache is to notify FMQs for each quarter of the first Contract Year, and its estimate "for each Quarter of all subsequent Contract Years", so at the end of each Contract Year thereafter Apache is to notify its FMQ for each Quarter of the next Contract Year, and an "estimated maximum

quantity … for each Quarter of all subsequent Contract Years *during the anticipated duration of this Agreement*" (emphasis added). This provision suggests not only that a new estimate for "all subsequent Contract Years" will be provided at the start of each new Contract Year, but that the duration of Apache's rights and obligations is not fixed by the very first estimate it gives (which is what INEOS' argument assumes). The transient status of Attachment F is reinforced by the reference in clause 5.01(b)(i) to "Attachment F in force at that time".

53. INEOS submits that the time limit for which it contends arises from the provision in clause 5.01 that "the FMQ for each Quarter …. shall not exceed the maximum specified in respect of that Quarter in Attachment F in force at that time", which is said to have the effect that if Attachment F does not address the Contract Year in question, the FMQ is zero. However:

    i) That might be thought a rather oblique method of imposing a very significant time limit on important rights and obligations.

    ii) The argument assumes in INEOS' favour that the effect of Attachment F not extending to the Contract Year in question is to create an FMQ of zero, rather than meaning that there is no "maximum specified in respect of that Quarter in Attachment F in force at that time" which might be thought to be the more natural consequence of failing to agree a figure intended to act as a maximum.

    iii) INEOS' argument appears to prove too much. Attachment F, as originally notified, provided for FMQs only for 2003 and the first three quarters of 2004, and EMQs (Estimated Maximum Quantities) thereafter. EMQ is defined as "the Shipper's Estimated Maximum Quantity of Shipper's Pipeline Liquids which it wishes to deliver to the Transfer Point on any given Day". The fact that only EMQs were originally given from the end of 2004 to 2020 appears more consistent with the parties' recognising the difficulty of giving estimates of the end-of-life of the Shipper's Fields longer than that into the future, rather than an attempt to impose a time-limit on Apache's rights and obligations under the TPA. But in any event, if INEOS is right that the absence of an FMQ in Attachment F from time-to-time means that the FMQ is zero, that would have been the position from October 2004 (absent further agreement between the parties to amend Attachment F, which would have required INEOS' consent under clause 5.05(a) on whatever conditions it might rationally have decided to impose).

54. INEOS recognised in its supplemental submissions that its argument that Apache's entitlement to tender hydrocarbons under clause 5.01 of the TPA ended at the end of 2020 absent agreement to a revised Attachment F would be seriously undermined if Apache's obligation to ship hydrocarbons through the FPS continued after that point. For that reason, it argued that Apache was under no obligation to tender hydrocarbons in excess of the FMQ, or at all in a Quarter for which no FMQ was set out in Attachment F.

55. Clause 2.01(a) of the TPA, which defines Apache's obligation to tender Shipper's Pipeline Liquids for transportation through the FPS, provides as follows:

> "Subject to the terms and conditions herein contained, the Shipper undertakes to tender for delivery at the Transfer Point *its total production of Shipper's Pipeline Liquids*".

(emphasis added). The definition of Shipper's Pipeline Liquids includes a requirement that they are liquids which "subject to the terms of this Agreement, the Shipper *is entitled* to have transported and processed under the terms of this Agreement".

56. INEOS argued that Apache has no contractual entitlement to transport hydrocarbons in excess of the FMQ on the FPS, and that it was therefore free to transport any such hydrocarbons by any means open to it. It must follow on INEOS' argument that this is the case in the period up to 2020, in respect of amounts in excess of the FMQ on any particular Day, as well as for the period after 2020 if no revision to Attachment F is agreed.

57. However, this argument faces the immediate difficulty that clause 5.06 of the TPA treats Additional and Spot Quantities, which are not subject to an FMQ or Attachment F, as falling within the definition of Shipper's Pipeline Liquids (because the clause addresses the position where "the Shipper wishes to deliver … quantities of Shipper's Pipeline Liquids in excess of the FMQ"). This is also true of clauses 6.01 and 9.04(a). INEOS' argument also gives very little weight to the words "*its total production* of Shipper's Pipeline Liquids" in clause 2..01(a), which, on their face are suggestive of a life-of-field obligation on Apache's part to use the FPS. Given those words, and the contractual obligation that the FMQ be Apache's "bona fide best estimate of maximum daily production", it would be surprising if Apache was entitled to transport Shipper's Pipeline Liquids in excess of the FMQ by other means absent an express provision to that effect.

58. That suggestion becomes all the more surprising when regard is had to the fact that the TPA does make express provision for Apache to be able to make alternative transportation arrangements for Shipper's Pipeline Liquids, but in very limited circumstances.

59. Clause 5.05(d) addresses "Shipper's Pipeline Liquids" from "a previously undeveloped hydrocarbon accumulation". For that specific class of hydrocarbons, the TPA provides as follows:

> "If … the daily quantity of such Shipper's Pipeline Liquids for such an accumulation together with the existing Shipper's Pipeline Liquids for any Quarter would exceed the Production Profile for that Quarter given in Attachment F, then the following arrangements shall apply:
>
> (i) Shipper shall seek a change to the Production Profile in Attachment F for such increased quantities in accordance with clause 5.05(a).
>
> (ii) And if there is insufficient Uncommitted Capacity in the Forties System for the whole of such Shipper's Pipeline Liquids from that accumulation and/or the specification by reference to Attachment C for such Shipper's Pipeline Liquids for that accumulation is not accepted by [INEOS];

(iii) the Shipper shall be entitled to make alternative transportation arrangements for the Shipper's Pipeline Liquids for that accumulation or part thereof".

60. There are a number of features of this provision which are noteworthy in the context of the present debate:

i) First, it creates a special regime for "a previously undeveloped hydrocarbon accumulation".

ii) Second, clause 5.05(d) assumes that Apache is required to tender production of such hydrocarbons under the TPA, and, where the total production would exceed the FMQs in Attachment F, to seek a change to the estimated Production Profile.

iii) Third, it provides that INEOS can only refuse to agree to uplift Attachment F to account for such production if either (a) there is insufficient Uncommitted Capacity; or (b) the specification of product from the previously undeveloped hydrocarbon accumulation is such that it cannot be mixed with the other hydrocarbons being transported through the FPS. If INEOS' right to refuse to increase the Production Profile in Attachment F is thus constrained in respect of newly developed hydrocarbons, it is not clear why there should be a much wider right of refusal for hydrocarbons within accumulations which were already developed when the TPA was concluded.

iv) Fourth, the limited right to transport the production of previously undeveloped hydrocarbons using alternative arrangements, which only arises if INEOS has refused a request to increase the Production Profile for one of two reasons, strongly tells against Apache having any right to transport hydrocarbons from known accumulations by another system where INEOS is willing to allow them to be transported on the FPS (but, on INEOS' case, only at a higher tariff). That omission is particularly noteworthy because the TPA specifically addresses quantities from known hydrocarbon accumulations which exceed the FMQ for any Day - in the form of Additional and Spot Quantities addressed in clause 5.06 – but makes no provision entitling Apache to use other transportation arrangements if INEOS refuses to carry them.

v) Finally, the clause is drafted on the basis that hydrocarbons from previously undeveloped accumulations, even to the extent that they lead to total daily production exceeding the FMQs in Attachment F, are nonetheless Shipper's Pipeline Liquids. That tells against INEOS' contention that the definition of Shipper's Pipeline Liquids (particularly when used in clause 2.01(a) of the TPA), is limited to quantities falling within the FMQ as set out in Attachment F from time to time.

61. The other provision which expressly entitles Apache to transport Shipper's Pipeline Liquids other than through the TPA is the express qualification of the clause 2 obligation in clause 4.05 of the TPA. That is limited to circumstances in which and "to the extent that" INEOS fails to accept Shipper's Pipeline Liquids into the FPS for reasons of Force Majeure … for any reason not caused by the Shipper".

62. In the face of the apparently clear terms of clause 2.01(a), and given that the TPA makes express provision for two limited circumstances in which Apache is entitled to use other means of transporting Shipper's Pipeline Liquids, I am unable to accept INEOS' argument that it is implicit in the TPA that Apache is entitled to transport any hydrocarbons in excess of the FMQ by other means.

63. These are not the only difficulties with INEOS' argument that Apache is under no contractual obligation to ship Shipper's Pipeline Liquids above the FMQ in Attachment F through the FPS. Another difficulty is created by clause 3.03(b):

    i) Clause 3.03(b)(ii) allows Apache to terminate the TPA if, after a force majeure event affecting Apache, it is reasonably anticipated that Apache will be unable to tender Shipper's Pipeline Liquids for a continuous period of more than twenty four months.

    ii) However, in the event of such a termination, clause 3.03(b)(ii) provides that if Apache "at any time thereafter" wishes to export Shipper's Pipeline Liquids from the Shipper's Fields, it "shall resume doing so pursuant to the terms of this Agreement subject to any technical amendments to this Agreement".

    iii) Apache is also required to seek to novate the TPA, including this term, to any third party to whom it assigns or transfers any interest in the Shipper's Fields in those circumstances.

    iv) There is nothing which limits these obligation to the period addressed by Attachment F (on the contrary, it is expressed to apply "at any time"). The parties must have contemplated that clause 3.303(b)(ii) might "revive" the Shipper's obligation at a point in time which was not covered by Attachment F in force at the date of termination.

64. INEOS argues that the implicit limitation for which it contends "is the only sensible way of reading clauses 2.01(a) and 5.01 together" because "Apache cannot be obliged to tender its production under clause 2.01 in circumstances in which clause 5.01 states that it cannot tender those liquids because they would exceed the applicable FMQ". INEOS suggests that it is possible to test that argument by considering the position where INEOS is unable to consent to a revision to Attachment F because there is "no Uncommitted Capacity in the FPS".

65. As to this argument:

    i) In relation to the period up to the end of 2020, the flaw in this argument is that clause 5.01 does not provide that Apache cannot tender its production, it merely regulates the period of time over which Apache's "total production" will be tendered because of the limit on the volume of product which INEOS is obliged to accept any particular Day. Absent the time-limit which INEOS' argument must prove rather than simply assume, the effect of the daily limit created by the FMQs and the Peak Entitlement is simply to increase the period of time over which the same volume of production will have to be transported.

    ii) In relation to the period after the end of 2020, INEOS' argument assumes that it has the unfettered right to allocate FPS capacity after the end of 2020 in such

a way as to leave no capacity at all for Apache. Once again, however, that is to assume in INEOS' favour that which it seeks to prove. To the extent that INEOS has a contractual commitment to carry Shipper's Pipeline Liquids under the TPA after December 2020, that will not be capacity which INEOS is permitted to sell elsewhere. As INEOS only raised this argument after the hearing, I heard no submissions on the question of whether it is open to INEOS to sell all of the FPS capacity after 2020 to other users and leave nothing for Apache. I have real doubts that it is. Clause 5.01 refers to Apache having a "Peak Entitlement", which is defined as "the maximum quantity of Shipper's Pipeline Liquids which the Shipper *will be entitled to specify* for the FMQ" (emphasis added). The language of entitlement, and the fact that the FMQ within that limit is a matter to be "specified" unilaterally by Apache rather than agreed by INEOS, would suggest that INEOS is not entitled to enter into contractual commitments with third parties which have the effect that that Apache was unable to nominate up to the Peak Entitlement. It is not necessary to determine for the purposes of this hearing whether that is effect of the TPA, or whether there is some narrower implicit limit on Apache's obligation to tender Shipper's Pipeline Liquids if all of the capacity of the TPA has been committed elsewhere. This issue is certainly not a reason to imply the wider limit to Apache's clause 2.01(a) obligation for which INEOS is forced to argue.

What were the parties' obligations and entitlements if Apache continued producing from the Shipper's Fields after the end of 2020?

66. In its supplemental submissions, INEOS accepted that the better view is that Apache was obliged to seek INEOS' approval to a revised Attachment F if it continues production from the Shipper's Fields after 2020. That was a realistic submission in circumstances in which:

    i) Clause 5.05(a) addressed what happens when "the Shipper *requires* to … amend Attachment F" (in contrast, for example, to the language of clause 5.06(a) which states "if at any time the Shipper *wishes*").

    ii) Clause 5.01 imposed an obligation on Apache for each Contract Year (which phrase, as I have noted, is not limited to any particular period) to notify its FMQ for each Quarter of that year, and an EMQ for all subsequent Contract Years during the anticipated duration of the TPA.

    iii) Each FMQ and EMQ notified by Apache must be Apache's "bona fide estimate of maximum daily production during the relevant Quarter".

67. Further, I find that Apache was not entitled to condition any request for an amendment to Attachment F to provide for production after the end of 2020 on INEOS' agreement to vary the TPA, e.g. by reducing the contractual tariff, amending the "Send or Pay" provisions to Apache's advantage or by enlarging Apache's entitlement to make alternative transport arrangements. There is simply nothing in the language of clause 5.05(a) which provides a basis for Apache conditioning its request in this way, and I am unable to accept Ms Tolaney QC's (counsel for INEOS) submission that Apache could, in appropriate circumstances, condition a request for

an amendment to Attachment F to a reduction in the tariff which INEOS could not unreasonably (in the relevant sense) reject.

68. For the reasons I have set out above, I have concluded that Apache's obligation to transport Shipper's Pipeline Liquids did not cease at the end of 2020 merely because the existing Attachment F did not address the period from the end of 2021 onwards, with the result that if Apache carried on producing Shipper's Pipeline Liquids, it remained obliged to transport them through the FPS, subject to the two very limited exceptions in the TPA.

69. INEOS also accepted that, even if no amended Attachment F was agreed, Apache would retain its entitlement to tender Additional and Spot Quantities under clause 5.06, subject to the throughput restrictions created by clause 11, and that the existing contractual tariff would continue to apply to such tenders, because clause 5.06(a) and (b) both provide that such tenders "shall be subject to all the relevant terms and conditions of" or "contained in" "this Agreement". However, that argument involves:

    i) some linguistic infelicity, because Additional and Spot Quantities are defined as figures "in excess of the FMQ determined pursuant to clause 5.01 for the period in question", which pre-supposes that there has been such a determination, rather than the scenario which INEOS' submission is addressing when there is no FMQ;

    ii) the curiosity that INEOS would continue to owe Apache an obligation under clause 4.2(a) of the TPA to maintain the FPS, even though Apache had no committed capacity on the FPS and (on INEOS' case) no obligation to use it; and

    iii) some commercial infelicity, because the tariff payable for Additional and Spot Quantities after 2020 would continue at the existing rate, if Attachment F was not amended, but increase if it was amended, although Apache's rights in relation to the transportation of such Quantities would not change, and its rights were not (even on INEOS' case) being enlarged in this respect.

    On this last issue, I should note that INEOS' opening submissions asserted an entitlement to charge at a rate higher than the contractual tariff for Spot Quantities for the period after 2020, referring to a figure of £1.20 as "the price which INEOS proposes to charge in the absence of any agreement to Attachment F, i.e. if it was accepting liquids on a spot basis". However, in its post-hearing submissions INEOS appeared to accept that, in such an eventuality, if INEOS agreed to carry Spot Quantities, it was obliged to do so at the contractual tariff by reason of the words "subject to all the relevant terms and conditions of this Agreement" in clause 5.06.

70. Further, even if INEOS does agree to the amendment of Attachment F to reflect the fact that Apache's production profile for the Shipper's Fields now extends to 2040, and Apache accepted the condition of an increase in tariff, that would not involve an unqualified contractual commitment by INEOS to continue to operate the FPS for that period in return for payment of the new tariff. The qualification of INEOS' maintenance obligation in clause 4.02 of the TPA would continue to operate, as would the right of termination under clause 18. In addition, INEOS would retain its right to elect for costs share.

The contractual status of the tariff in clause 7.01

71. Clause 7.01 sets out a base tariff for "the Services" which is to be escalated over time using the formula in clause 7.02. Clause 7.02 provides for escalation without limit as to time ("from the commencement of each Quarter for application of each Month of the Quarter"). Clause 7.03(b) addresses two contingencies in which the escalation provision might not work – where one of the indices by reference to which escalation is to be conducted ceases to be published or where the weightings of an index change over time – but there are no other provisions which allow for the formula to be revised or adjusted. In particular, there is no re-basing provision of the kind which is sometimes seen in long term supply contracts.

72. The figure generated by the formula in clauses 7.01 and 7.02 feeds into other express provisions of the TPA:

    i) Apache's "Send-or-pay" obligation under clause 7.04(a) involves a payment "calculated by multiplying the tariff specified in Clause 7.01" by the Tariff Shortfall Quantity

    ii) Clause 7.05 provides that "with effect from 1st October 2015", INEOS is entitled on 12 months' notice to require Apache to pay a charge calculated on the basis of Apache's share of INEOS' costs, with a 10% uplift, "in lieu of the tariff and fee referred to in clause 7.01 that would otherwise have applied". In that eventuality, Apache is entitled to terminate the TPA.

    iii) Clause 8.01 provides for INEOS to invoice Apache "in respect of the tariff payable pursuant to Clause 7.01".

73. These provisions assume that the clause 7.01 and 7.02 tariff remains payable unless and until INEOS exercises its right under clause 7.05 to change to a costs-share charging basis, and they are capable of operating as well after 2020 as before. The presence of the clause 7.05 option, together with the qualification of INEOS' maintenance obligation in clause 4.02, and the right of termination in clause 18, mean that it cannot be said that INEOS might be obliged to continuing operating the TPA after 2020 even if it was no longer economic to do so at the existing tariff. Nor does the fact – as I am asked to assume – that BPEOC originally calculated the tariff on the basis of production continuing to the end of 2020, assist INEOS, in circumstances in which the period of operation of the tariff was not so limited by the TPA, and when there is no suggestion that BP's calculations were shared with Apache in any event.

74. However, I accept that if the parties agree to a change in tariff as the price of an amendment to Attachment F, then these provisions can operate perfectly happily on the basis of the newly agreed tariff. Nonetheless, the provisions relating to the tariff in the TPA support the view that this was a central aspect of the parties' bargain which could only be revisited to a limited extent and in limited circumstances. In particular, it is noteworthy that a change by INEOS to costs sharing gives Apache a right of termination. By contrast, if INEOS is entitled to condition its consent to an amendment to Attachment F on a change in tariff, but Apache is unwilling to agree to such change, Apache has no right to terminate the TPA.

THE FIRST PRELIMINARY ISSUE

75. Given the conclusions I have reached as to the proper construction of the TPA, it is in my view clear that INEOS cannot require an increase in the tariff as a condition of agreeing to the amendment of Attachment F. On the proper construction of the TPA:

    i) For the reasons set out at [47]-[65], Apache is entitled and obliged to tender Shipper's Pipeline Liquids for transportation on the FPS at the contractual tariff for the duration of the TPA, which continues until it is terminated on one of the six bases the TPA provides.

    ii) For the reasons set out at [50]-[65], the terms of Attachment F do not limit that entitlement and obligation to the period up to 2020.

    iii) In those circumstances, it would be inconsistent with the terms and scheme of the TPA if INEOS was entitled to make its consent to the amendment of Attachment F conditional on Apache agreeing to a fundamental revision of the parties' bargain in the form of a new tariff.

76. Further, for the reasons set out at

    i) [60], INEOS' argument is inconsistent with the treatment in the TPA of production from previously undeveloped hydrocarbon accumulations;

    ii) [66]-[70] above, INEOS' argument sits uneasily with the contractual rights and obligations which INEOS accepts continue after 2020 even if no amendment to Attachment F is agreed.

    iii) [74], INEOS' argument also sits uneasily with the significant importance which the parties clearly attached to a change to the contractual tariff.

    iv) [67] and [70], INEOS' argument would give rise to considerable contractual asymmetry in the operation of the FPA. Indeed if I am right in my conclusion that Apache's obligation to tender its "total production of Shipper's Pipeline Liquids" was not limited to the period up to 2020 (absent a revised Attachment F), then it was not clear to me whether INEOS challenges the conclusion that the concomitant of that obligation was an entitlement to pay the existing contractual tariff. Clearly, it would render the TPA a particularly one-sided bargain if Apache had either to accept any rational conditions sought by INEOS as the price of amending Attachment F, or risk being unable to transport its production ashore.

77. Finally, I would note that even in respect of the period before 2020, INEOS' construction would have unreasonable and unexpected commercial consequences. If, for example, production of Shipper's Pipeline Liquids extended beyond 2020 only because a Force Majeure event affecting INEOS meant that the FPS could not be used for significant periods before 2020, INEOS would still be entitled to seek an increased tariff as a condition of consenting to the amendment of Attachment F, as it would in respect of changes to the production profile before 2020. While INEOS would no doubt argue that the contractual constraint of "reasonableness" would provide some protection for Apache in this scenario, it seems to me improbable that the parties intended that Apache should be exposed to that risk "with the protection only of a requirement of good faith and rationality" (which is what INEOS contends to be the

applicable test), or that the decision must be one which might be reached by a reasonable person in the circumstances.

78. In these circumstances, it is not necessary for me to consider what kinds of conditions INEOS might legitimately impose on its consent to such an amendment, and what commercial or other interests INEOS might legitimately seek to advance through the imposition of conditions. Nor is it necessary to address Mr Allen QC's argument that the purpose of INEOS' power to withhold consent is to "provide protection to INEOS in circumstances where it would be unable, for reasons other than Uncommitted Capacity, to fulfil its clause 2 obligations". Clause 5.05(a) encompasses a number of different types of request which may fall to be treated differently – an increase in Peak Entitlement, and amendments to Attachment F which might involve increases or reductions in FMQ, both before and after 2020 (although I note that INEOS' consent is only referred to as being necessary for an "increase"). INEOS might well have different legitimate commercial interests in respect of different requests. Further, INEOS might find itself facing requests from more than one user for additional capacity at the same time, which might itself provide a reasonable basis for not consent to such a request in full even if Uncommitted Capacity was available.

79. On the proper construction of the TPA, however, what INEOS cannot do is condition its consent on Apache giving up its contractual right to tender Shipper's Pipeline Liquids for carriage at the contractual tariff for so long as the TPA continues. That is sufficient to resolve the First Preliminary Issue.

THE SECOND PRELIMINARY ISSUE

80. Given my findings on the First Preliminary Issue, the Second Preliminary Issue does not arise, and I will deal with it briefly. It falls to be considered on the assumption that it was open to INEOS to make consent to the amendment to Attachment F conditional on the revision of the contractual tariff, and that factors of potential relevance to that decision are (a) the capital expenditure which it is to be assumed that INEOS is undertaking to ensure that the FPS remains operational through to 2040 and (b) the current price INEOS is charging other producers for transporting hydrocarbons on the FPS.

81. Apache's explanation as to the potential relevance of these matters was as follows:

> "It is anticipated that interrogation of the terms upon which INEOS acquired the FPS and its knowledge at this time will further evidence that INEOS' conduct in conditioning its consent to an increase in tariff is simply to increase profit, thus demonstrating the unreasonableness of its conduct".

82. I do not understand this explanation, nor how the amount INEOS paid for the FPS (whether, in "Three Bears" terms, it was too high, too low or just right) can be relevant to the rationality or objective reasonableness of INEOS' decision. If INEOS had overpaid, that would be collateral to its relationship with Apache under the TPA, and could not justify a decision to charge more for the same service. The converse is equally true. Nor can I see how knowledge on the part of INEOS in 2017 that Apache intended to continue producing from the Shipper's Fields after 2020 could be relevant. Apache appears to want to contend that the risk of production continuing

may have been "priced in" to the acquisition cost, but for reasons I have already given, the acquisition cost (and the basis on which it was arrived at) is irrelevant.

83. The suggestion that the judicial determination of whether INEOS' decision to impose a condition in 2019 involves a breach of the TPA requires a factual and expert assessment of the deal INEOS did in 2017 lacks reality. Further, the suggestion that the terms of the transfer from BPEOC to INEOS are capable of affecting the substantive rights of the parties to the TPA does not sit easily with the terms on which Apache, INEOS and BPEOC agreed to the novation of the TPA, which were intended to achieve a seamless transfer under which INEOS would stand in BPEOC's shoes going forward. Paragraph 5(a)(1) of the Novation Deed dated 31 October 2017 provided that INEOS would be bound by the TPA "as if [INEOS] had at all times been a party to the [TP

84. A] in place of [BPEOC]". There is, moreover, a certain arbitrariness in Apache's argument (which would appear to involve different outcomes dependent on whether INEOS had purchased the FPS or simply purchased the shares of BPEOC.

85. Whatever commercial interest Apache may have in acquiring knowledge of those issues, and whatever forensic play Apache might think it can make of that material in any merits hearing, it will not assist the Judge. Rather it is likely to be the source of hard-fought but ultimately irrelevant satellite issues.

CONCLUSION

86. For these reasons, my answers to the Preliminary Issues are as follows:

i) The First Preliminary Issue: On the basis of the agreed facts and the assumption the Court has been asked to make, INEOS is acting non-contractually by withholding consent under clause 5.05(a) of the Apache Forties TPA to an amendment to Attachment F unless Apache agrees to increase the base tariff payable

ii) The Second Preliminary Issue: The terms (including as to price) on which INEOS acquired the FPS from BPEOC, and/or INEOS' knowledge at the time it agreed to purchase the FPS from BPEOC are not relevant to the assessment of whether INEOS has unreasonably refused consent under clause 5.05(a).

IN THE HIGH COURT OF JUSTICE Claim No. CL-2019-000763

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

BETWEEN:

APACHE NORTH SEA LIMITED

Claimant

and

INEOS FPS LIMITED

Defendant

TRANSPORTATION AND PROCESSING AGREEMENT DATED 11 JANUARY 2003

SELECTED CLAUSES

Clause 1.01

Contract Year means a period beginning at 0600 hours on 1 October in any Year and ending at 0600 hours on 1 October in the next succeeding Year.

Estimated Maximum Quantity or **EMQ** means the Shipper's estimate of the maximum quantity of Shipper's Pipeline Liquids which it wishes to be entitled to deliver to the Transfer Point on any given Day during the relevant period (Contract Year), expressed in Barrels per Day.

Firm Maximum Quantity or **FMQ** means the Shipper's specification of the maximum quantity of Shipper's Pipeline Liquids which it wishes to be entitled to deliver to the Transfer Point on any given Day during the relevant period Contract Year, expressed in Barrels per Day.

Forties Field means the hydrocarbon accumulation generally known as Forties Field underlying Blocks 21/09, 21/10 and 22/06 of the United Kingdom Continental Shelf.

Forties Pipeline means those parts of the Forties System comprising:

(a) the thirty six inch (36") nominal diameter submarine pipeline from Forties Platform FC via the Unity Platform to the landfall at the Cruden Bay terminal together with its export riser and associated pig-launching facilities situated on Forties Platform FC;

(b) the Cruden Bay terminal containing, inter alia, relief facilities for the protection of the onshore pipeline, booster pumps and pig-receiving and pig launching facilities;

(c) the onshore pipeline (including the pump stations) from the Cruden Bay terminal to the oil stabilisation, gas recovery and treatment plant located at the Kerse of Kinneil adjacent to the refinery at Grangemouth owned by BP Oil Grangemouth Refinery Limited together with the associated pig-receiving facilities; and

(d) any facilities, owned, rented, leased or otherwise operated or controlled by BP, in addition to those set out above, which are necessary for the transportation of Pipeline Liquids from Forties Platform FC to the aforesaid oil stabilisation, gas recovery and treatment plant located at the Kerse of Kinneil.

Forties System means the facilities existing from time to time owned, rented, leased or otherwise operated or controlled by BP, necessary to transport and process Pipeline Liquids and necessary to handle and deliver Forties Blend and Raw Gas and/or Gas Products. The relevant facilities currently comprise those facilities described in Attachment A, Part 1.

Peak Entitlement means the maximum quantity of Shipper's Pipeline Liquids which the Shipper will be entitled to specify for the FMQ.

Production Profile means that relationship between production and time as expressed in the form of a table showing flow rates per Day and the period over which such rates apply.

Shipper's Field(s) means any hydrocarbon accumulation located within Licence P.057 Block 21/9, Licence P.246 Block 21/10 and Licence P.084 Block 22/6a in which and to the extent that the Shipper has an ownership interest.

A plan showing the Shipper's Field(s) at the date of this Agreement is annexed to this Agreement as Attachment A Part II.

Shipper's Pipeline Liquids means Pipeline Liquids in which the Shipper has a beneficial interest and which:

i) are derived from the Shipper's Field(s); and

ii) subject to the terms of this Agreement, the Shipper is entitled to have transported and processed under this Agreement.

Shipper's System means the production, processing and pipeline facilities and all other facilities associated therewith existing from time to time and necessary to produce Pipeline Liquids from the Shipper's Field(s) and to deliver the same at the Transfer Point. Such facilities shall include but not be limited to the Shipper's Platform.

Uncommitted Capacity means such capacity (if any) in any part of the Forties System which is not required for the transportation and handling of the total of Pipeline Liquids to be delivered pursuant to contractual commitments entered into by BP (including, without limitation, this Agreement).

Year means a calendar year ending on 31 December.

Clause 2.01

2.01 Subject to the terms and conditions herein contained:

(a) The Shipper undertakes to tender for delivery at the Transfer Point its total production of Shipper's Pipeline Liquids and undertakes to accept delivery of, or procure the acceptance of delivery of, its entitlement to Forties Blend and Raw Gas at the appropriate Redelivery Points.

(b) BP undertakes to provide the Services by accepting all Shipper's Pipeline Liquids properly tendered for delivery hereunder by the Shipper at the Transfer Point, to transport such Shipper's Pipeline Liquids in conjunction with other Forties System Users' Pipeline Liquids through the Forties Pipeline and to process such Shipper's Pipeline Liquids at the Kerse of Kinneil and to handle within the Forties System the resultant Forties Blend and Raw Gas and to deliver the Forties Blend and Raw Gas at the appropriate Redelivery Points.

(c) BP and the Shipper shall exercise their respective rights and discharge their respective obligations hereunder to the standard of a Reasonable and Prudent Operator.

Clauses 3.01, 3.02 and 3.03

3.01 **Effective date**

This Agreement shall be effective on the Completion Date.

3.02 **Commencement Date**

Subject to BP receiving the notices required under Clause 5, the date on which BP shall commence the Services and the date of commencement of delivery of Shipper's Pipeline Liquids at the Transfer Point shall be the Completion Date or, such other date as the Parties may agree. Such date or such date as the Parties shall agree shall be the "Commencement Date".

3.03 **Termination**

(a) This Agreement shall continue in full force and effect until termination upon the earlier of the following occurrences:

(i) following reasonable notice upon the permanent cessation of production of hydrocarbons and run-down from the Shipper's Field(s);

(ii) expiry of any one hundred and fifty (150) Days notice served on the Shipper pursuant to Clause 8.03(e) in the event that the Shipper has failed to pay all amounts due in accordance with the said Clause 8.03(e);

(iii) the date on which charges become payable by the Shipper to BP in accordance with a notice served by BP on the Shipper pursuant to Clause 7.05(a) in the event that the Shipper has served notice on BP pursuant to Clause 7.05(b);

(iv) the expiry date of notices served in accordance with either Clause 18.01 or Clause 18.03.

(b) Notwithstanding the provisions of Clauses 3.03(a)(i), (ii), (iii) and (iv), either Party shall have the right to terminate this Agreement by giving ninety (90) Days' notice to the other:

(i) If, whether following a Force Majeure event declared by BP in accordance with Clause 20 or otherwise as a consequence of damage to or destruction or breakdown of the Forties System or any other facilities or infrastructure, it is reasonably anticipated that BP will be unable to accept, transport and process Shipper's Pipeline Liquids properly tendered for delivery for a continuous period of more than twenty four (24) Months; or

(ii) if, following a Force Majeure event declared by the Shipper in accordance with Clause 20, it is reasonably anticipated that as a result of such event, the Shipper will be unable to tender Shipper's Pipeline Liquids for a continuous period of more than twenty four (24) Months.

Provided always that if the Shipper so terminates this Agreement for the reasons given in Clause 3.03(b)(ii) there shall be a surviving obligation that if at any time thereafter it wishes to export Shipper's Pipeline Liquids from the Shipper's Field(s), then it shall resume doing so pursuant to the terms of this Agreement subject to any necessary technical amendments to this Agreement including but not limited to any revised Transfer Point. After such a termination of this Agreement there shall also be a

surviving obligation that if the Shipper should assign or transfer any beneficial interest owned by the Shipper in the Shipper's Field(s), then it shall novate this Agreement with such obligation to undertake the export of Shipper's Pipeline Liquids pursuant to the terms of this Agreement and BP shall not unreasonably withhold consent to such novation.

Clauses 4.01, 4.02, 4.03 and 4.05

4.01 **Services**

Subject to the terms of this Agreement, BP undertakes:

(a) to accept Shipper's Pipeline Liquids tendered by the Shipper at the Transfer Point and to transport such Shipper's Pipeline Liquids (which may be in conjunction with the Pipeline Liquids of other Forties System Users) through the Forties Pipeline to the Kerse of Kinneil;

(b) to process at the Kerse of Kinneil such Shipper's Pipeline Liquids to produce Forties Blend and Raw Gas and to make fit for disposal into the Firth of Forth any water separated from Shipper's Pipeline Liquids;

(c) to store temporarily such Forties Blend in the Dalmeny tank farm; to deliver the said Forties Blend free on board tankships to be provided (or procured to be provided) by any member or members of the Shipper at the Redelivery Point (Forties Blend), or, following agreement between the relevant Parties, to deliver the said Forties Blend free into pipeline at the Kerse of Kinneil approved meters, such meters currently being located at the following flow recording and totalising quantity meters ("FRQs") as specified by BP at the Kerse of Kinneil: FRQ 505, FRQ 506, FRQ 507, FRQ 508, FRQ 509, FRQ 510 and FRQ 511; and

(d) to deliver such Raw Gas to the Shipper at the delivery points for Raw Gas which are currently located at the following flow elements ("FEs") as specified by BP at the Kerse of Kinneil: FE304, FE305, FE313, FE318, FE404, FE405, FE413 and FE418.

The services specified in this Clause 4.01 (a) — (e) shall be referred to as "the Services". In the event that the Shipper requires gas processing services in respect of Shipper's Pipeline Liquids, BP and the Shipper shall meet and in good faith negotiate the terms and conditions upon which such gas processing service would be provided. Any terms and conditions offered to the Shipper by BP in respect of such gas processing services shall be no less favourable than those terms and conditions contained within the new field transportation and processing agreement either published at www.fortiespipeline.com or, if not so published, otherwise generally offered as at the time the Shipper makes its request to BP for the provision of the gas processing services.

4.02 **Provision of the Forties System**

For the purposes of this Agreement, BP shall provide, maintain, repair and operate throughout the continuation of this Agreement those parts of the Forties System necessary to fulfil its obligations hereunder, provided that if at any time and for any reason BP is unable to fulfil its obligations hereunder and in order to resume its performance thereof it would have to rebuild, repair, re-configure, rectify or reinstate any part of the Forties System, it shall be

under no obligation to rebuild, repair, reconfigure, rectify or reinstate such part or to resume such performance if to do so would, in the reasonable opinion of BP, be uneconomic to BP.

4.03 **Other Pipeline liquids**

BP shall retain absolute discretion in respect of the acceptance or otherwise, and the conditions of any such acceptance into the Forties System, of Pipeline Liquids other than Shipper's Pipeline Liquids. Acceptance of Pipeline Liquids other than Shipper's Pipeline Liquids shall be without prejudice to the Shipper's rights under this Agreement.

4.05 **Temporary Alternative Arrangements**

To the extent BP fails for reasons of Force Majeure to accept Shipper's Pipeline Liquids into the Forties System for any reason not caused by the Shipper then, notwithstanding Clause 2, the Shipper may, after giving written notice to BP, make temporary alternative arrangements for the disposal of those Shipper's Pipeline Liquids. The Shipper shall use reasonable endeavours to ensure that any such temporary arrangements can be terminated promptly without undue cost or liability following receipt of notification from BP that it is able to resume acceptance of Shipper's Pipeline Liquids. As soon as BP is able to reasonably predict the date on which it expects to be able to resume acceptance of Shipper's Pipeline Liquids it will notify the Shipper of that date. On receipt of such notice the Shipper shall immediately take all necessary steps to terminate its alternative temporary arrangements in accordance with the terms and conditions of such alternative arrangements, provided that in no event shall the Shipper be obliged to incur termination costs or liabilities in connection with any such termination. The Shipper shall immediately on termination of such arrangements recommence delivery of Shipper's Pipeline Liquids under this Agreement

Clauses 5.01, 5.02, 5.03, 5.05, 5.06, 5.07

5.01 **Firm Maximum Quantity**

Subject to the provisions of this Agreement, the maximum quantity of Shipper's Pipeline Liquids that may be tendered for delivery of any Day at the Transfer Point will be the FMQ applicable during the Contract Year in question. Such FMQ shall not exceed a Peak Entitlement of seventy-five thousand (75,000) Barrels per Day. The expected Production Profile for the Shipper's Pipeline Liquids is set out in Attachment F.

On the Completion Date the Shipper shall notify BP of the FMQ for the remainder of the Quarter in which the Commencement Date occurs and each Quarter thereafter in the Contract Year in which the Commencement Date falls and for each Quarter of the following Contract Year (for purposes of the first Contract Year the "Subsequent Contract Year"). At the time of giving such notice the Shipper shall also notify BP of its estimated maximum quantity for each Quarter of all subsequent Contract Years. Thereafter, the FMQ applicable during each Quarter will be determined in accordance with notices given by the Shipper on or before 30th September in each Year. The notices will specify an FMQ for each Quarter of the Contract Year commencing on the 1st October after service of the notice (the "Next Contract Year"), an FMQ for each Quarter of the next following Contract Year (the "Subsequent Contract Year") and an EMQ (estimated maximum quantity) for each Quarter of all subsequent Contract Years during the anticipated duration of this Agreement. Each notice shall comply with the following requirements:

(a) the FMQ for each Quarter of the Next Contract Year must be the same as was nominated for the corresponding Quarter of the Subsequent Contract Year in the immediately preceding notice; and

(b) the FMQ for each Quarter of the Subsequent Contract Year shall:

(i) not exceed the maximum specified in respect of that Quarter in Attachment F in force at that time;

(ii) not be less than eighty per cent (80%) of the EMQ last notified in respect of that Quarter;

(iii) not exceed one hundred and ten per cent (110%) of the last EMQ notified in respect of that Quarter,

(c) subject to the limitations in Clause 5.01(a) to (b), each FMQ and EMQ notified shall be the Shipper's bona fide best estimate of maximum daily production during the relevant Quarter.

5.02 **Estimated Average Daily Production**

(a) For the remainder of the Contract Year on and from the Commencement Date the Shipper's estimated average daily production of Shipper's Pipeline Liquids (on a dry basis) and the completion of Shipper's Pipeline Liquids for each month of that Contract Year shall be as notified by the Shipper at Completion. Thereafter at the same time as notice of the FMQ is given in Clause 5.01(a), the Shipper shall advise BP of the estimated average daily production of Shipper's Pipeline Liquids (on a dry basis) and composition of Shipper's Pipeline Liquids for each Month of the forthcoming Contract Year that it expects to deliver at the Transfer Point. Thereafter, the Shipper shall inform BP of any change to any quantity or quality of the Shipper's Pipeline Liquids prior to the first Day of each Quarter.

(b) If, during the Contract Year in question, the Shipper foresees deviation from the profile in (a) above of more than twenty percent (20%), the Shipper shall notify BP of such an expected deviation.

5.03 **Monthly nominations information**

Not later than the twentieth (20th) Day of each Month, the Shipper shall provide to BP the following:

(a) its best estimate of the daily quantities (including any Additional Quantities) of Shipper's Pipeline Liquids which the Shipper wishes to deliver at the Transfer Point and the composition thereof for the following Month; and

(b) its best estimate of the daily quantities (including any Additional Quantities) of Shipper's Pipeline Liquids which the Shipper wishes to deliver at the Transfer Point and the composition thereof for the forthcoming three (3) Months following the Month referred to in Clause 5.03(a).

5.05 **Increase to Peak Entitlement and FMQ**

(a) If the Shipper requires either to increase the Peak Entitlement specified in Clause 5.01 or amend Attachment F then subject to there being Uncommitted Capacity in the Forties System, BP shall not unreasonably withhold its consent to such increase.

(b) If the Shipper requires within a Contract Year, to increase the FMQ to a new FMQ not exceeding the current Peak Entitlement, then provided always that the Shipper has served a notice at least 30 days prior to the commencement of the Quarter in respect of which the increase is being requested and subject to there being Uncommitted Capacity in the Forties System, BP shall not unreasonably withhold its consent to such increase.

(c) If within a Contract Year the Shipper requires to decrease the FMQ for a Quarter then provided:

(i) the Shipper has served a notice at least 30 days prior to the commencement of, the Quarter in respect of which the request is being made; and

(ii) such decrease is no more than 20% of the FMQ for the Quarter in respect of which the request is being made that has been previously notified by the Shipper pursuant to Clause 5.01.

BP shall not unreasonably withhold its consent to such decrease.

(d) If in any Contract Year, the Shipper wishes to deliver Shipper's Pipeline Liquids from a previously undeveloped hydrocarbon accumulation and the daily quantity of such Shipper's Pipeline Liquids for such an accumulation together with the existing Shipper's Pipeline Liquids for any Quarter would exceed the Production Profile for that Quarter given in Attachment F, then the following arrangements shall apply:

(i) Shipper shall seek a change to the Production Profile in Attachment F for such increased quantities in accordance with Clause 5.05(a);

(ii) and if there is insufficient Uncommitted Capacity in the Forties System for the whole of such Shipper's Pipeline Liquids from that accumulation and/or the specification by reference to Attachment C for such Shipper's Pipeline Liquids from that accumulation is not accepted by BP;

(iii) the Shipper shall be entitled to make alternative transportation arrangements for the Shipper's Pipeline Liquids for that accumulation or part thereof.

5.06 **Additional and Spot Quantities**

(a) If at any time the Shipper wishes to deliver at the Transfer Point quantities of Shipper's Pipeline Liquids in excess of the FMQ determined pursuant to Clause 5.01 for [the period in question] then, subject to Clause 11 (Throughput Restrictions), BP shall not unreasonably withhold consent to a request by the Shipper for the delivery of such additional quantities ("Additional Quantities"). Requests for Additional

Quantities shall be made in accordance with the procedure set out in Clause 5.03 and shall be subject to all the relevant terms and conditions of this Agreement.

(b) If at any time the Shipper wishes to deliver on a day at the Transfer Point quantities of Shipper's Pipeline Liquids in excess of the FMQ and any Additional Quantity, BP may at its absolute discretion, consent to a request by the Shipper for the delivery of such incremental quantities ("Spot Quantities") provided always that BP shall be entitled at its absolute discretion to withdraw its consent at any time prior to the delivery of the Spot Quantities in question. In the event that Spot Quantities are delivered pursuant to the terms of this Clause 5.06(b) the same shall be accepted subject to all relevant terms and conditions contained in this Agreement.

5.07 **Information**

The Shipper shall provide all relevant data and information as reasonably required from time to time hereunder in a timely manner upon the request of BP to the extent such data and information is reasonably required to enable BP to provide the Services hereunder.

Clause 7.01, 7.02, 7.04, 7.05

7.01 **Transportation Tariff**

For the Services the Shipper shall pay to BP a tariff (T_r) at the rate of sixty pence sterling (£0.60) per Barrel of Shipper's Pipeline Liquids delivered in each Month at the Transfer Point in accordance with this Agreement.

7.02 **Escalation**

The tariff and the fee specified in Clause 7.01 shall be adjusted effective from the commencement of each Quarter for application during each Month of the Quarter in question by application of the following formula:

$$T = (T_o) x \frac{P_2}{P_1}$$

where:

T is the tariff in pounds sterling applicable for each Month of the Quarter in question per Barrel of Shipper's Pipeline Liquids;

P1 is the "Index numbers of producer prices - Price Index Number of Output: home sales - Output of manufactured products" as contained in Table Number 18.7 of the Central Statistical Office Monthly Digest of Statistics (the "Producer Price Index"), avenged for the Fourth Quarter 2002;

P2 is the Producer Price Index, averaged for the Quarter preceding the Quarter in question.

7.04 **Send-or-pay**

(a) With effect from the Commencement Date and with respect to each Contract Year of this Agreement thereafter until such time (if any) as the Shipper is required to pay a charge pursuant to Clause 7.05, the Shipper shall be obliged to pay for, whether or not sent, a minimum of sixty five per cent (65%) of the sum of the daily FMQs applicable during such Contract Year pursuant to Clause 5.01, as may be adjusted from time to time pursuant to the terms of this Agreement (herein referred to as the "Tariff Minimum Quantity"), unless the Shipper is able to demonstrate that the reason for not sending said quantity of Shipper's Pipeline Liquids is caused by reservoir failure not foreseeable by a Reasonable and Prudent Operator when submitting notice pursuant to Clause 5.01.

For avoidance of doubt in the last Contract Year, the Tariff Minimum Quantity shall be 65% of the sum of the daily FMQs applicable during such Contract Year pursuant to Clause 5.01 as may be adjusted from time to time pursuant to the terms of this Agreement.

(b) In the event of a throughput restriction or a reduction in capacity in the Forties System or any part thereof or any other circumstances, which is not attributable to any act or default of the Shipper, causing a reduction in or suspension of the provision of the Services to the Shipper, the Shipper shall be obliged to pay for, whether or not sent, a minimum of sixty five per cent (65%) of that quantity of Shipper's Pipeline Liquids for the Contract Year in question which BP is in such circumstances obliged, able and willing to accept and process having regard to Clauses 11.01, 11.02 and 20 and the Tariff Minimum Quantity shall be reduced accordingly.

(c) If the quantity of Shipper's Pipeline Liquids actually delivered in any Contract Year is less than the Tariff Minimum Quantity for such Contract Year (as may have been reduced pursuant to Clause 7.04 (b)) then the difference between the Tariff Minimum Quantity for such Contract Year (as may have been reduced pursuant to Clause 7.04 (b)) and the quantity actually delivered during such Contract Year shall be calculated and known as the "Tariff Shortfall Quantity".

(d) If volumes of Shipper's Pipeline Liquids actually delivered in any Contract Year is less than the Tariff Minimum Quantity, then, in addition to the tariff payable pursuant to Clause 7.01 in respect of the quantity of Shipper's Pipeline Liquids delivered during the Contract Year in question, the Shipper shall pay BP an amount calculated by multiplying the tariff specified in Clause 7.01 applicable for the Fourth Quarter of the Contract Year in question by the Tariff Shortfall Quantity. The additional amount payable shall be termed a "Tariff Shortfall Payment".

7.05 **BP's operating cost option**

(a) With effect from 1st October 2015, or such later date as may be advised in writing by BP to the Shipper, BP shall have the right, upon giving not less than twelve (12) months prior notice in writing to the Shipper, to require the Shipper to pay to BP, in lieu of the tariff and fee referred to in Clause 7.01 that would otherwise have applied, a charge calculated in accordance with Attachment G. The exercise of this option does not imply any obligation on the part of BP to incur capital expenditure in relation to the Forties System.

(b) On receipt of a notice from BP pursuant to Clause 7.05(a) the Shipper shall be entitled to terminate this Agreement. The Shipper may so terminate this Agreement by serving a notice on BP not less than ninety (90) days prior to the date on which BP's notice under Clause 7.05(a) comes into effect and any such Shipper's notice shall take effect on the date specified in such notice, provided that if such date is later than the date set in BP's notice under Clause 7.05(a) (and the operating cost charge for Forties System Users then applies) the Shipper shall continue to receive Services pursuant to this Agreement until the date specified for termination in its notice on payment to BP of the operating costs as calculated in accordance with Attachment G.

7.06 **Free barrels**

(a) A Free Barrel accrues to the Shipper in respect of any Barrel which:

(i) has been nominated under Clause 5.03, up to a maximum of the FMQ for the relevant Month; and

(ii) the Shipper was ready willing and able to deliver, in accordance with this Agreement; and

(iii) was not accepted by BP as a consequence of its failure to act as a Reasonable and Prudent Operator; and

(iv) has not previously been deducted under this Clause 7.06.

Clause 8.01

8.01 **Invoicing and payment of tariffs**

(a) Until charges calculated in accordance with Attachment G apply, then promptly following the last Day of each Month BP shall invoice the Shipper in respect of the tariff payable pursuant to Clause 7.01 (including any adjustments pursuant to Clause 8.02) and other operating charges which may arise pursuant to this Agreement in respect of the quantity of Shipper's Pipeline Liquids delivered at the Transfer Point in the Month in question.

(b) Promptly following the last day of each Contract Year BP shall, as appropriate, invoice Shipper in respect of any Tariff Shortfall Payments.

(c) In the event that charges calculated in accordance with Attachment G apply, then promptly following the last day in each Quarter in which the Shipper is required to pay a charge pursuant to Clause 7.05 and Attachment G, BP shall invoice the Shipper for such charge calculated in accordance with said Clause 7.05 and Attachment G (including any adjustments pursuant to Clause 8.02).

(d) Within ten (10) Working Days following the receipt of each invoice the Shipper shall pay to BP the amounts of the invoices (net of credit notes). Such payment shall be made in pounds sterling by telegraphic transfer by the Shipper to BP's account number 00118540 with The Royal Bank of Scotland plc, 30 Bothwell Street, Glasgow G2 6PB (Sort Code 83-37-00), or such other account as may be notified by BP to the Shipper from time to time, quoting the invoice number against which payment is made.

Clause 9.04

9.04 **Flow rates**

(a) Save as otherwise previously agreed in writing by BP the FMQ, any Additional Quantity, and any Spot Quantity shall represent an absolute number of Barrels of Shipper's Pipeline Liquids which the Shipper is entitled to deliver on a Day at the Transfer Point and the Shipper shall deliver Shipper's Pipeline Liquids at the Transfer Point so far as is reasonably practicable as a Reasonable and Prudent Operator at uniform rates of delivery.

(b) Save as previously agreed by BP in writing the instantaneous flow rate of Shipper's Pipeline Liquids at the Transfer Point shall not at any time exceed one hundred and ten per cent (110%) of the latest flow rate specified to BP.

(c) Save as previously agreed by BP in writing the instantaneous flow rate of Shipper's Pipeline Liquids at the Transfer Point shall not vary by more than ten per cent (10%) over a continuous period of twenty four (24) hours, from the latest flow rates specified to BP.

Clause 11.01

11.01 **Reduction of throughput entitlement**

(a) Without prejudice to the provisions of Clause 6.03(a) and (b) and 11.02(a) if at any time the capacity of the Forties System is below the Total User Requirements at the time in question, BP shall, to the extent necessitated by such reduced capacity, reduce for the period of such reduced capacity the entitlement of the Shipper to deliver Shipper's Pipeline Liquids into the Forties System according to the following principles:

(i) Firstly, where the reduction in capacity exceeds the total entitlement to deliver Spot Quantities of all Users (including the Shipper's Spot Quantities), then the entitlement of all Users (including the Shipper) to deliver Spot Quantities shall be suspended. Where the reduction in capacity does not exceed the total entitlement as aforesaid the entitlement of the Shipper to deliver Spot Quantities shall be reduced on a percentage basis by the amount necessary to achieve the required reduction in capacity (the same percentage reduction being applied to all Users). The Shipper will receive its full FMQ entitlement during such period.

(ii) Secondly, where the reduction in capacity exceeds the total entitlement to deliver both Spot Quantities and Additional Quantities of all Users (including the Shipper's Spot Quantities and Additional Quantities), then the entitlement of all Users (including the Shipper) to deliver Additional Quantities shall be suspended. Where the reduction in capacity does not exceed the total entitlement as aforesaid the entitlement of the Shipper to deliver Additional Quantities shall be reduced on a percentage basis by the amount necessary to achieve the required reduction in capacity (the same percentage reduction being applied to all Users). The Shipper will receive its full FMQ entitlement during such period.

(iii) Thirdly, to the extent that after the reductions, if any, effected under Clauses 11.01(a)(i) and (ii) the capacity of the Forties System is still below the remaining Total User Requirements as reduced, the entitlement of the Shipper to deliver Shipper's Pipeline Liquids shall be reduced after taking account of the rights of Shell U.K. Limited ("Shell") and Esso Exploration and Production UK Limited ("Esso") existing prior to this Agreement. Such reduction shall be calculated in accordance with the following formula:

$$\frac{(A - B)}{(D - B)} \times C$$

Where in Barrels of Pipeline Liquids per Day:

A is the available capacity in the Forties System during a throughput restriction.

B is the capacity required in the Forties System to provide Shell and Esso their combined entitlement to Forties Blend allocated in respect of Pipeline Liquids from the Forties Field in the period concerned.

C is the Shipper's entitlement to deliver Shipper's Pipeline Liquids under Clause 5.01.

D is the Total User Nomination in the Forties System during the period concerned after making reductions referred to in Clauses 11.01(a)(i) and 11.01(a)(ii).

Clause 18 Economic Life of Forties System

18.01 Notice by BP

BP shall, upon giving at least twenty four (24) Months' prior written notice to Shipper, have the right on or after 1 January 2020 to abandon or remove all or part of the Forties System necessary for BP to fulfil its obligations under this Agreement, and to terminate this Agreement accordingly.

18.02 Good faith discussions

If BP gives notice pursuant to Clause 18.01 the Parties shall meet to discuss in good faith alternative means of enabling the Shipper to safeguard its interests, including the possibility of the Shipper, either alone or with others, assuming ownership and/or operatorship of all or part of the Forties System on reasonable terms and conditions.

18.03 Shipper's right to terminate

If BP gives notice pursuant to Clause 18.01 then the Shipper may, by giving BP not less than twelve (12) Months' prior notice in writing, terminate this Agreement.

ATTACHMENT F

PRODUCTION PROFILE OF SHIPPERS PIPELINE LIQUIDS

[Data as supplied by the Shippers (DATE)]

Year	**Quarter**	**Volume (MSm^3)**	**Volume (mbd)[1]**	**Booking**
2003	1Q			FMQ
	2Q			FMQ
	3Q			FMQ
	4Q			FMQ
2004	1Q			FMQ
	2Q			FMQ
	3Q			FMQ
	4Q			FMQ
2005	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2006	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2007	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2008	1Q			EMQ

[1] : Estimated Average Daily Flows of Shippers Pipeline Liquids averaged over the Quarter in question

	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2009	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2010	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2011	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2012	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2013	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2014	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2015	1Q			EMQ
	2Q			EMQ

	3Q			EMQ
	4Q			EMQ
2016	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2017	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2018	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2019	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ
2020	1Q			EMQ
	2Q			EMQ
	3Q			EMQ
	4Q			EMQ